# NORTH CAROLINA REPORTS

## VOLUME 319

SUPREME COURT OF NORTH CAROLINA

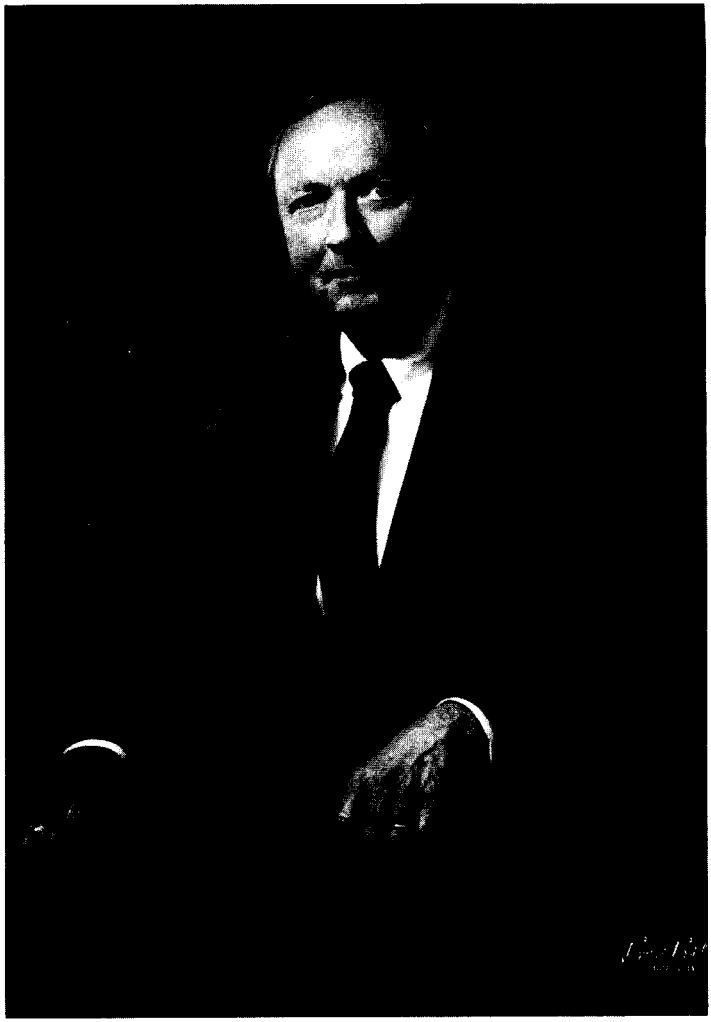
3 FEBRUARY 1987

2 JUNE 1987

RALEIGH
1988

CITE THIS VOLUME
319 N.C.

# IN MEMORIAM



EARL WRAY VAUGHN
ASSOCIATE JUSTICE
2 JANUARY 1985-31 JULY 1985

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# THE SUPREME COURT
# OF
# NORTH CAROLINA

*Chief Justice*

JAMES G. EXUM, JR.

*Associate Justices*

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BURLEY B. MITCHELL, JR.
HARRY C. MARTIN
HENRY E. FRYE
JOHN WEBB
WILLIS P. WHICHARD

*Retired Chief Justices*

WILLIAM H. BOBBITT
SUSIE SHARP
JOSEPH BRANCH

*Retired Justices*

I. BEVERLY LAKE
J. FRANK HUSKINS
DAVID M. BRITT
J. WILLIAM COPELAND*

*Clerk*

J. GREGORY WALLACE

*Librarian*

FRANCES H. HALL

---

ADMINISTRATIVE OFFICE OF THE COURTS

*Director*

FRANKLIN E. FREEMAN, JR.

*Assistant Director*

DALLAS A. CAMERON, JR.

---

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

H. JAMES HUTCHESON

---

*Deceased 3 February 1988.

# TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

## SUPERIOR COURT DIVISION

*First Division*

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| 1 | J. HERBERT SMALL | Elizabeth City |
| | THOMAS S. WATTS | Elizabeth City |
| 2 | WILLIAM C. GRIFFIN | Williamston |
| 3 | DAVID E. REID, JR. | Greenville |
| | HERBERT O. PHILLIPS III | Morehead City |
| 4 | HENRY L. STEVENS III | Kenansville |
| | JAMES R. STRICKLAND | Jacksonville |
| 5 | L. BRADFORD TILLERY | Wilmington |
| | NAPOLEON B. BAREFOOT | Wilmington |
| 6 | RICHARD B. ALLSBROOK | Roanoke Rapids |
| 7 | FRANKLIN R. BROWN | Tarboro |
| | CHARLES B. WINBERRY, JR. | Rocky Mount |
| 8 | JAMES D. LLEWELLYN | Kinston |
| | PAUL MICHAEL WRIGHT | Goldsboro |

*Second Division*

| | | |
|---|---|---|
| 9 | ROBERT H. HOBGOOD | Louisburg |
| | HENRY W. HIGHT, JR. | Henderson |
| 10 | EDWIN S. PRESTON, JR. | Raleigh |
| | ROBERT L. FARMER | Raleigh |
| | HENRY V. BARNETTE, JR. | Raleigh |
| | DONALD W. STEPHENS | Raleigh |
| 11 | WILEY F. BOWEN | Dunn |
| 12 | DARIUS B. HERRING, JR. | Fayetteville |
| | COY E. BREWER, JR. | Fayetteville |
| | E. LYNN JOHNSON | Fayetteville |
| 13 | GILES R. CLARK | Elizabethtown |
| 14 | THOMAS H. LEE | Durham |
| | ANTHONY M. BRANNON | Bahama |
| | J. MILTON READ, JR. | Durham |
| 15A | J. B. ALLEN, JR. | Burlington |
| 15B | F. GORDON BATTLE | Chapel Hill |
| 16 | B. CRAIG ELLIS | Laurinburg |

*Third Division*

| | | |
|---|---|---|
| 17A | MELZER A. MORGAN, JR. | Wentworth |
| 17B | JAMES M. LONG | Pilot Mountain |
| 18 | W. DOUGLAS ALBRIGHT | Greensboro |
| | THOMAS W. ROSS | Greensboro |
| | JOSEPH R. JOHN | Greensboro |
| | RALPH WALKER[1] | Greensboro |
| 19A | THOMAS W. SEAY, JR. | Spencer |
| | JAMES C. DAVIS | Concord |
| 19B | RUSSELL G. WALKER, JR. | Asheboro |
| 20 | F. FETZER MILLS | Wadesboro |
| | WILLIAM H. HELMS | Wingate |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| 21 | WILLIAM Z. WOOD | Winston-Salem |
| | JUDSON D. DERAMUS, JR. | Winston-Salem |
| | WILLIAM H. FREEMAN | Winston-Salem |
| 22 | ROBERT A. COLLIER, JR. | Statesville |
| | PRESTON CORNELIUS | Mooresville |
| 23 | JULIUS A. ROUSSEAU, JR. | North Wilkesboro |
| | *Fourth Division* | |
| 24 | CHARLES C. LAMM, JR. | Boone |
| 25 | FORREST A. FERRELL | Hickory |
| | CLAUDE S. SITTON | Morganton |
| 26 | FRANK W. SNEPP, JR. | Charlotte |
| | KENNETH A. GRIFFIN | Charlotte |
| | ROBERT M. BURROUGHS | Charlotte |
| | CHASE BOONE SAUNDERS | Charlotte |
| | W. TERRY SHERRILL | Charlotte |
| 27A | ROBERT W. KIRBY | Cherryville |
| | ROBERT E. GAINES | Gastonia |
| 27B | JOHN MULL GARDNER | Shelby |
| 28 | ROBERT D. LEWIS | Asheville |
| | C. WALTER ALLEN | Asheville |
| 29 | HOLLIS M. OWENS, JR. | Rutherfordton |
| 30 | JAMES U. DOWNS | Franklin |
| | JANET MARLENE HYATT | Waynesville |

## SPECIAL JUDGES

| | |
|---|---|
| JAMES ARTHUR BEATY, JR. | Winston-Salem |
| JOHN B. LEWIS, JR. | Farmville |
| LAMAR GUDGER | Asheville |
| I. BEVERLY LAKE, JR. | Raleigh |
| MARVIN K. GRAY | Charlotte |
| BRUCE BRIGGS | Mars Hill |
| SAMUEL T. CURRIN | Raleigh |
| RICHARD BONER[2] | Charlotte |
| CARLTON FELLERS[3] | Raleigh |
| JACK B. CRAWLEY, JR.[4] | Raleigh |

## EMERGENCY JUDGES

| | |
|---|---|
| HENRY A. MCKINNON, JR. | Lumberton |
| SAMUEL E. BRITT | Lumberton |
| JAMES H. POU BAILEY | Raleigh |
| JOHN R. FRIDAY | Lincolnton |
| D. MARSH MCLELLAND | Graham |
| EDWARD K. WASHINGTON | High Point |

1. Appointed 21 September 1987 to replace Edward K. Washington who retired.
2. Appointed 17 August 1987.
3. Appointed 1 December 1987.
4. Appointed 29 January 1988 to replace Donald L. Smith who went on the Court of Appeals bench.

# DISTRICT COURT DIVISION

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| 1 | JOHN T. CHAFFIN (Chief) | Elizabeth City |
| | GRAFTON G. BEAMON | Elizabeth City |
| | J. RICHARD PARKER | Manteo |
| 2 | HALLETT S. WARD (Chief) | Washington |
| | JAMES W. HARDISON | Williamston |
| | SAMUEL C. GRIMES | Washington |
| 3 | E. BURT AYCOCK, JR. (Chief) | Greenville |
| | JAMES E. RAGAN III | Oriental |
| | JAMES E. MARTIN | Bethel |
| | H. HORTON ROUNTREE | Greenville |
| | WILLIE LEE LUMPKIN III | Morehead City |
| | JAMES RANDAL HUNTER | New Bern |
| 4 | KENNETH W. TURNER (Chief) | Rose Hill |
| | STEPHEN M. WILLIAMSON | Kenansville |
| | WILLIAM M. CAMERON, JR. | Jacksonville |
| | WAYNE G. KIMBLE, JR. | Jacksonville |
| | LEONARD W. THAGARD[1] | Clinton |
| 5 | GILBERT H. BURNETT (Chief) | Wilmington |
| | CHARLES E. RICE | Wrightsville Beach |
| | JACQUELINE MORRIS-GOODSON | Wilmington |
| | ELTON G. TUCKER | Wilmington |
| 6 | NICHOLAS LONG (Chief) | Roanoke Rapids |
| | ROBERT E. WILLIFORD | Lewiston |
| | HAROLD P. MCCOY, JR. | Scotland Neck |
| 7 | GEORGE M. BRITT (Chief) | Tarboro |
| | ALLEN W. HARRELL | Wilson |
| | ALBERT S. THOMAS, JR. | Wilson |
| | QUINTON T. SUMNER | Rocky Mount |
| 8 | JOHN PATRICK EXUM (Chief) | Kinston |
| | ARNOLD O. JONES | Goldsboro |
| | KENNETH R. ELLIS | Fremont |
| | RODNEY R. GOODMAN, JR. | Kinston |
| | JOSEPH E. SETZER, JR. | Goldsboro |
| 9 | CLAUDE W. ALLEN, JR. (Chief) | Oxford |
| | BEN U. ALLEN | Henderson |
| | CHARLES W. WILKINSON | Oxford |
| | J. LARRY SENTER | Franklinton |
| 10 | GEORGE F. BASON (Chief) | Raleigh |
| | STAFFORD G. BULLOCK | Raleigh |
| | GEORGE R. GREENE | Raleigh |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| | RUSSELL G. SHERRILL III | Raleigh |
| | WILLIAM A. CREECH | Raleigh |
| | L. W. PAYNE | Raleigh |
| | JOYCE A. HAMILTON | Raleigh |
| | FRED M. MORELOCK | Raleigh |
| | JERRY W. LEONARD | Raleigh |
| 11 | ELTON C. PRIDGEN (Chief) | Smithfield |
| | WILLIAM A. CHRISTIAN | Sanford |
| | EDWARD H. MCCORMICK | Lillington |
| | O. HENRY WILLIS | Dunn |
| 12 | SOL G. CHERRY (Chief) | Fayetteville |
| | LACY S. HAIR | Fayetteville |
| | ANNA ELIZABETH KEEVER | Fayetteville |
| | WARREN L. PATE | Raeford |
| | PATRICIA ANN TIMMONS-GOODSON | Fayetteville |
| | JOHN HAIR | Fayetteville |
| 13 | WILLIAM C. GORE, JR. (Chief) | Whiteville |
| | JERRY A. JOLLY | Tabor City |
| | D. JACK HOOKS, JR. | Whiteville |
| | DAVID G. WALL | Elizabethtown |
| 14 | DAVID Q. LABARRE (Chief) | Durham |
| | ORLANDO F. HUDSON, JR. | Durham |
| | RICHARD CHANEY | Durham |
| | KENNETH C. TITUS | Durham |
| | CAROLYN D. JOHNSON | Durham |
| 15A | WILLIAM S. HARRIS, JR. (Chief) | Graham |
| | JAMES KENT WASHBURN | Burlington |
| | SPENCER B. ENNIS | Burlington |
| 15B | STANLEY PEELE (Chief) | Chapel Hill |
| | PATRICIA HUNT | Chapel Hill |
| | LOWERY M. BETTS | Pittsboro |
| 16 | JOHN S. GARDNER (Chief) | Lumberton |
| | CHARLES G. MCLEAN | Lumberton |
| | HERBERT LEE RICHARDSON | Lumberton |
| | ADELAIDE G. BEHAN | Lumberton |
| 17A | PETER M. MCHUGH (Chief) | Reidsville |
| | ROBERT R. BLACKWELL | Reidsville |
| | PHILIP W. ALLEN | Yanceyville |
| 17B | JERRY CASH MARTIN (Chief) | Mount Airy |
| | CLARENCE W. CARTER | King |
| 18 | PAUL THOMAS WILLIAMS (Chief) | Greensboro |
| | WILLIAM L. DAISY | Greensboro |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| | EDMUND LOWE | High Point |
| | ROBERT E. BENCINI | High Point |
| | SHERRY FOWLER ALLOWAY | Greensboro |
| | J. BRUCE MORTON | Greensboro |
| | LAWRENCE C. MCSWAIN | Greensboro |
| | WILLIAM A. VADEM | Greensboro |
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| | ROBERT M. DAVIS, SR. | Salisbury |
| 19B | WILLIAM M. NEELY (Chief) | Asheboro |
| | RICHARD M. TOOMES | Asheboro |
| 20 | DONALD R. HUFFMAN (Chief) | Wadesboro |
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| | ROLAND HARRIS HAYES | Winston-Salem |
| | WILLIAM B. REINGOLD | Winston-Salem |
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| | SAMUEL ALLEN CATHEY | Statesville |
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| | KIMBERLY T. HARBINSON | Taylorsville |
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| | MICHAEL E. HELMS | Wilkesboro |
| 24 | ROBERT HOWARD LACEY (Chief) | Newland |
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| 25 | L. OLIVER NOBLE, JR. (Chief) | Hickory |
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| | RONALD E. BOGLE | Hickory |
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| | JONATHAN L. JONES | Hickory |
| 26 | JAMES E. LANNING (Chief) | Charlotte |
| | L. STANLEY BROWN | Charlotte |

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
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| | DAPHENE L. CANTRELL | Charlotte |
| | WILLIAM H. SCARBOROUGH | Charlotte |
| | T. PATRICK MATUS II | Charlotte |
| | RESA L. HARRIS | Charlotte |
| | ROBERT P. JOHNSTON | Charlotte |
| | MARILYN R. BISSELL | Charlotte |
| | RICHARD ALEXANDER ELKINS | Charlotte |
| | SHIRLEY L. FULTON | Charlotte |
| 27A | LAWRENCE B. LANGSON (Chief) | Gastonia |
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| | TIMOTHY L. PATTI | Gastonia |
| | HARLEY B. GASTON, JR. | Belmont |
| | CATHERINE A. STEVENS | Gastonia |
| 27B | GEORGE HAMRICK (Chief) | Shelby |
| | JAMES THOMAS BOWEN III | Lincolnton |
| | JOHN KEATON FONVIELLE | Shelby |
| 28 | EARL JUSTICE FOWLER, JR. (Chief) | Arden |
| | PETER L. RODA | Asheville |
| | ROBERT L. HARRELL | Asheville |
| | GARY STEPHEN CASH | Fletcher |
| 29 | ROBERT T. GASH (Chief) | Brevard |
| | ZORO J. GUICE, JR. | Hendersonville |
| | THOMAS N. HIX | Hendersonville |
| | LOTO J. GREENLEE | Marion |
| 30 | JOHN J. SNOW, JR. (Chief) | Murphy |
| | DANNY E. DAVIS | Waynesville |
| | STEVEN J. BRYANT | Bryson City |

1. Appointed 6 November 1987 to replace James Nello Martin who resigned.

# ATTORNEY GENERAL OF NORTH CAROLINA

*Attorney General*

## LACY H. THORNBURG

*Administrative Deputy Attorney General*

JOHN D. SIMMONS III

*Deputy Attorney General for Policy and Planning*

ALAN D. BRIGGS

*Deputy Attorney General for Training and Standards*

PHILLIP J. LYONS

*Chief Deputy Attorney General*

ANDREW A. VANORE, JR.

*Senior Deputy Attorneys General*

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WILLIAM W. MELVIN
WILLIAM F. O'CONNELL
EUGENE A. SMITH

*Special Deputy Attorneys General*

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*Assistant Attorneys General*

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JAMES A. WELLONS
THOMAS B. WOOD
DEBBIE K. WRIGHT
SARAH C. YOUNG
THOMAS J. ZIKO
THOMAS D. ZWEIGART

# DISTRICT ATTORNEYS

| DISTRICT | DISTRICT ATTORNEY | ADDRESS |
|---|---|---|
| 1 | H. P. WILLIAMS | Elizabeth City |
| 2 | MITCHELL D. NORTON | Williamston |
| 3A | THOMAS D. HAIGWOOD | Greenville |
| 3B | W. DAVID MCFADYEN, JR. | New Bern |
| 4 | WILLIAM H. ANDREWS | Jacksonville |
| 5 | JERRY LEE SPIVEY | Wilmington |
| 6 | DAVID BEARD | Murfreesboro |
| 7 | HOWARD S. BONEY, JR. | Tarboro |
| 8 | DONALD JACOBS | Goldsboro |
| 9 | DAVID WATERS | Oxford |
| 10 | COLON WILLOUGHBY | Raleigh |
| 11 | JOHN W. TWISDALE | Smithfield |
| 12 | EDWARD W. GRANNIS, JR. | Fayetteville |
| 13 | MICHAEL F. EASLEY | Whiteville |
| 14 | RONALD L. STEPHENS | Durham |
| 15A | STEVE A. BALOG | Graham |
| 15B | CARL R. FOX | Carrboro |
| 16 | JOE FREEMAN BRITT | Lumberton |
| 17A | THURMAN B. HAMPTON | Wentworth |
| 17B | H. DEAN BOWMAN | Dobson |
| 18 | HORACE M. KIMEL, JR. | Greensboro |
| 19A | JAMES E. ROBERTS | Kannapolis |
| 19B | GARLAND N. YATES | Asheboro |
| 20 | CARROLL R. LOWDER | Monroe |
| 21 | WILLIAM WARREN SPARROW | Winston-Salem |
| 22 | H. W. ZIMMERMAN, JR. | Lexington |
| 23 | MICHAEL A. ASHBURN | Wilkesboro |
| 24 | JAMES T. RUSHER | Boone |
| 25 | ROBERT E. THOMAS | Newton |
| 26 | PETER S. GILCHRIST III | Charlotte |
| 27A | CALVIN B. HAMRICK | Gastonia |
| 27B | WILLIAM CARLOS YOUNG | Shelby |
| 28 | ROBERT W. FISHER | Asheville |
| 29 | ALAN C. LEONARD | Rutherfordton |
| 30 | ROY H. PATTON, JR. | Waynesville |

# PUBLIC DEFENDERS

| DISTRICT | PUBLIC DEFENDER | ADDRESS |
|---|---|---|
| 3 | ROBERT L. SHOFFNER, JR. | Greenville |
| 12 | MARY ANN TALLY | Fayetteville |
| 15B | J. KIRK OSBORN | Chapel Hill |
| 18 | WALLACE C. HARRELSON | Greensboro |
| 26 | ISABEL S. DAY | Charlotte |
| 27 | ROWELL C. CLONINGER, JR. | Gastonia |
| 28 | J. ROBERT HUFSTADER | Asheville |

# CASES REPORTED

## 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



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# LICENSED ATTORNEYS

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

On December 3, 1987, the following individual was admitted:

JOHN MOORHEAD CLOUD ..... Norfolk, Virginia, applied from the State of Virginia

Given over my hand and Seal of the Board of Law Examiners this the 4th day of December, 1987.

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

---

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

JULIE ANN ABELL ..... Carrboro
ARTHUR JOEL BERK ..... Raleigh
RICHARD L. CROUSE ..... Pfafftown
JEFFREY ANTHONY DEMATTHEW ..... Wilson
JAMES COLUMCILLE DEVER III ..... San Diego, California
DWIGHT MICHAEL DOSKEY ..... New Orleans, Louisiana
KIMBERLYE KATHERINE FAYSSOUX ..... Charlotte
CRISTINA MARIA FERNANDEZ ..... Durham
LYNN FONTANA ..... Pittsboro
STEVEN ELLORY FOSKETT ..... Arlington, Virginia
ROBERT R. GELBLUM ..... Raleigh
MARTHA STACEY HAWVER ..... San Francisco, California
SARA JAMES MATHIS ..... Charlotte
DEAN ARDEN RIDDLE ..... Atlanta, Georgia
TIMOTHY S. RITCHIE ..... Chapel Hill
PATRICK STEPHEN SHIEL ..... Vinton, Virginia
PHILIP RICHARD WILKINSON ..... Zebulon

Given over my hand and Seal of the Board of Law Examiners this the 4th day of January, 1988.

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

# LICENSED ATTORNEYS

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

On January 21, 1988, the following individuals were admitted:

DOUGLAS KENT BARTH ..... Greenville, applied from the State of Ohio
JAMES MARIUS BELL ..... Greensboro, applied from the State of Virginia
BRUCE W. BERGER ..... Raleigh, applied from the State of West Virginia
WILLIAM ALEXANDER DAVIS, II . Chapel Hill, applied from the District of Columbia and the State of Colorado
ROBERT WALTER KILROY ..... Holly Ridge, applied from the State of Indiana
RAYMOND JOHN RYAN
Skillman, New Jersey, applied from the State of Pennsylvania

Given over my hand and Seal of the Board of Law Examiners this the 25th day of January, 1988.

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

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

On February 24, 1988, the following individuals were admitted:

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RICK CORNWELL ..... High Point, applied from the State of Oklahoma
SANTO JOSEPH COSTA ..... Research Triangle Park, applied from the State of Ohio
JOHN CHRISTIAN LOWE
Charlottesville, Virginia, applied from the State of Virginia
DONALD PAUL MCCARTHY
Fayetteville, New York, applied from the State of New York
FRANK JOSEPH WIKENHEISER .. Nags Head, applied from the State of North Dakota

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

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Given over my hand and Seal of the Board of Law Examiners this the 11th day of April, 1988.

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

CASES

ARGUED AND DETERMINED IN THE

# SUPREME COURT

OF

## NORTH CAROLINA

AT

## RALEIGH

STATE OF NORTH CAROLINA v. FREDDIE LEE STOKES

No. 553A83

(Filed 3 February 1987)

**1. Courts § 15; Infants § 11— trial of juvenile as adult—constitutionality of statute not presented**

The contention of the seventeen-year-old defendant that the statute permitting persons sixteen or more years old to be prosecuted as adults, N.C.G.S. 7A-517(20), creates unconstitutional classifications has no bearing on defendant's prosecution for first degree murder because defendant was not tried in superior court pursuant to the classifications contained in N.C.G.S. 7A-517(20) but was tried as an adult pursuant to N.C.G.S. 7A-608, which authorizes the juvenile court in ordinary felonies and requires it in capital felonies, upon a finding of probable cause, to transfer juveniles who were fourteen years of age or older at the time of the offense to superior court for trial as adults.

**2. Criminal Law §§ 76.3, 135.6— failure to object to out-of-court statement—tactical decision—waiver**

Defendant's failure to object at trial to the State's introduction of his out-of-court statement during the *Enmund* issues phase of a capital sentencing proceeding waived his right to complain of its admission on appeal where defendant's statement was the only evidence supporting submission of *Enmund* issues, and defendant thus made a tactical decision to let the evidence come in without objection.

**3. Criminal Law § 135.8— first degree murder—especially heinous aggravating circumstance—sufficient evidence**

Submission of the "especially heinous" aggravating circumstance in defendant's first degree murder trial was supported by evidence of the nature and extent of the fatal wounds inflicted and the victim's lingering death. The question of the sufficiency of evidence to support submission of this issue was controlled by the decision in a prior appeal arising out of the same incident but involving one of defendant's accomplices who pled guilty to second degree

murder that such evidence was sufficient to support submission of the "especially heinous" aggravating circumstance. N.C.G.S. 15A-2000(e)(9).

**4. Criminal Law § 135.4— capital sentencing proceeding—Enmund issue—burden of proof—sufficiency of evidence**

The State's burden of proof on an *Enmund* issue in a capital sentencing proceeding is proof beyond a reasonable doubt. The test for the sufficiency of the evidence on such an issue is the same as that ordinarily applied in criminal cases.

**5. Criminal Law § 135.4— capital sentencing proceeding—Enmund issues—delivery of fatal blows**

It is not necessary under *Enmund v. Florida*, 458 U.S. 782 (1982), that a capital defendant in order to be executed be the only person who delivered fatal blows to the victim; rather, it is enough if the capital defendant is one of two or more who delivered fatal blows.

**6. Criminal Law § 135.4— capital sentencing proceeding—Enmund issues—delivery of fatal blows—sufficient evidence**

The evidence in the phase of a capital sentencing hearing directed to *Enmund* issues was sufficient to permit the jury to find beyond a reasonable doubt that defendant himself delivered fatal blows to the victim where a State's witness testified that defendant, armed with a stick, and an accomplice, armed with "some kind of object," accosted the victim at 6:30 p.m. on a ramp just outside the door to his warehouse for the purpose of robbing him; a struggle ensued in which defendant was "bent over"; at approximately 8:30 p.m. the victim was discovered, semi-conscious, lying on the ramp where the attack occurred; he had gashes on his head and his skull had been crushed; and the victim died some fourteen hours after the attack from head injuries.

**7. Criminal Law § 135.10— death sentence disproportionate**

A sentence of death imposed on defendant for first degree felony murder was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, where the State's evidence tended to show that both defendant and an accomplice committed the same crime in the same manner; the accomplice received a sentence of life imprisonment in a separate trial; defendant may be less deserving of death than the accomplice in view of mitigating circumstances in his case; juries in this state almost always recommend life imprisonment when the defendant's conviction in a robbery-murder case rests solely on a felony murder theory; defendant's crime was less aggravated than those involved in the four robbery-murder cases in which juries have recommended the death penalty following a conviction based solely on a felony murder theory; and defendant's crime was similar to and no worse than the one involved in a case in which the Supreme Court found the death penalty to be disproportionate. Therefore, defendant's sentence of death is vacated and a sentence of life imprisonment is imposed. N.C.G.S. 15A-2000(d)(2).

Justice MITCHELL dissenting in part.

Justice WEBB joins in this dissenting opinion.

**State v. Stokes**

APPEAL by defendant from a death sentence imposed at the 24 October 1983 Session of NEW HANOVER Superior Court, *Judge Stevens* presiding.

*Lacy H. Thornburg, Attorney General, by Joan H. Byers, Special Deputy Attorney General, for the state.*

*Arnold Smith for defendant appellant.*

EXUM, Chief Justice.

This appeal is from a new sentencing hearing ordered by this Court in *State v. Stokes*, 308 N.C. 634, 304 S.E. 2d 184 (1983), at which a death sentence was imposed. Defendant contends: (1) The court lacked jurisdiction over him; (2) there was error in admitting his out-of-court statement; (3) the evidence was insufficient to support the "especially heinous" aggravating circumstance and submission of an *Enmund* issue[1] to the jury; and (4) his death sentence was excessive or disproportionate when considered against sentences imposed in similar cases. We find no error in the proceeding. We agree that the death sentence is excessive and disproportionate. The death sentence is, therefore, set aside and a sentence of life imprisonment is imposed.

I.

On 28 December 1981 between 6 and 6:30 p.m., four young men, Ricky Benbow, Lorenzo Thomas, James Murray, and defendant here, Freddie Stokes, all in their late teens or early twenties, conspired to and did rob Kauno Lehto at his Wilmington Bonded Warehouse.[2] In the course of the robbery Lehto was beaten severely on and about the head. The blows fractured his skull and caused hemorrhaging into his brain from which Lehto died some fourteen hours after the attack.

In January 1982 Thomas gave a statement to Wayne Norris, a Wilmington police investigator, implicating himself and his

1. *Enmund* issues, described in text *infra* pp. 4-6, stem from *Enmund v. Florida*, 458 U.S. 782, 73 L.Ed. 2d 1140 (1982), discussed in text *infra* p. 5.

2. Some of these background facts and those which follow are taken from earlier appeals of cases arising out of this incident: *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984); *State v. Benbow*, 309 N.C. 538, 308 S.E. 2d 647 (1984); *State v. Stokes*, 308 N.C. 634, 304 S.E. 2d 184.

three accomplices in the crimes committed against Lehto. Information provided by Thomas resulted in the arrests of Benbow, Murray and Stokes. Ultimately Thomas pled guilty to second degree murder and was sentenced to fifteen years' imprisonment. Benbow pled guilty to second degree murder and was sentenced initially to life imprisonment but on appeal won a new sentencing hearing. At his new sentencing hearing Benbow, on 1 May 1984, was sentenced to twenty-five years' imprisonment.[3]

Both Murray and Stokes entered pleas of not guilty; at separate trials both were convicted by juries of first degree felony murder, armed robbery and felonious larceny. In both cases judgment was arrested on the armed robbery conviction; defendants were sentenced to ten years' imprisonment on the larceny conviction, and sentencing hearings were conducted on the first degree murder conviction. In Murray's case the jury recommended that he be sentenced to life imprisonment[4] and judgment was entered accordingly. This Court found no error in Murray's trial. *State v. Murray*, 310 N.C. 541, 543, 313 S.E. 2d 523, 526 (1984).[5]

A.

As for Stokes, the defendant here, the jury at his first trial recommended as punishment for the murder a sentence of death, and judgment was entered accordingly. *State v. Stokes*, 308 N.C. at 641, 304 S.E. 2d at 187. This Court found no error in the guilt phase of Stokes' trial but, finding error in the sentencing phase, ordered that a new sentencing hearing be conducted. *Id.* at 658, 304 S.E. 2d at 199. At the new sentencing hearing, from which the present appeal is taken, the jury again recommended a sentence of death, which was imposed.

On Stokes' first appeal, he contended, and this Court agreed, that he was entitled to have *Enmund* issues submitted to the jury before the jury considered the issues mandated by our capital sentencing statute, N.C.G.S. § 15A-2000. In *Enmund* the United

3. *State v. Benbow*, 82CRS17355, New Hanover Superior Court.

4. See Issues and Recommendations as to Punishment, file No. 82CRS10109, New Hanover Superior Court.

5. The Court did remand the larceny case against Murray for a new sentencing hearing. *State v. Murray*, 310 N.C. at 554, 313 S.E. 2d at 532.

States Supreme Court considered a Florida death sentence imposed on Enmund, who had participated with two others in the burglary-murder of an elderly couple. The two others had actually entered the couple's home where they murdered the victim. Enmund drove the getaway car. Enmund was convicted of felony murder as an aider and abettor, or principal in the second degree. Because there was no proof "that Enmund killed or attempted to kill, . . . [or] intended or contemplated that life would be taken . . .," the Supreme Court concluded Enmund's death sentence was excessive under the Eighth and Fourteenth Amendments. *Enmund v. Florida*, 458 U.S. 782, 801, 73 L.Ed. 2d 1140, 1154 (1982).

At Stokes' first trial the state's evidence, briefly summarized, was as follows: Lorenzo Thomas testified that Ricky Benbow, in the presence of James Murray and defendant, told Thomas that Benbow, Murray and defendant were going to Lehto's warehouse to rob Lehto; Benbow asked Thomas to be a lookout and Thomas agreed. Thomas later observed Murray and defendant struggling with the victim on a ramp leading to one of the warehouse's doors. Benbow was at the bottom of the ramp. Murray, Benbow and defendant left the scene in Lehto's car with defendant driving. The state also offered defendant's out-of-court statement. According to this statement defendant acted as lookout while Benbow and Thomas went to the warehouse. There Thomas struck Lehto, and Thomas and Benbow robbed Lehto of Lehto's car keys and money.

Defendant, himself, testified that he had no part in the crimes at all and offered evidence of an alibi.

The trial court instructed the jury that Stokes could be found guilty of first degree murder on the theory that he actually struck the fatal blows or on the theory that, as a lookout for other accomplices, he was an aider and abettor. The jury returned a general verdict of guilty without specifying upon which of these theories it relied.

On Stokes' first appeal, this Court concluded that defendant was entitled to a new sentencing hearing at which special issues required by *Enmund* would be submitted and answered by the jury. The Court noted that, unlike *Enmund*, there was enough evidence from which a jury could find that Stokes himself in-

flicted the fatal blows; therefore Stokes was not entitled, as Enmund was, to have his death sentence vacated as a matter of law. Stokes' out-of-court statement, however, offered by the state, was some evidence to the contrary, tending to show defendant at most acted as a lookout for other accomplices. This created an evidentiary conflict on the question of the extent of Stokes' participation in the murder—a conflict which, under *Enmund*, must be resolved by the jury favorably to the state before Stokes could be sentenced to death. The Court ordered a new sentencing hearing at which the following issues would be submitted to and answered by the jury as the Court directed:

> 1. Did defendant deliver the fatal blows which caused the victim's death?
>
> 2. If not, did defendant, while acting as an aider and abettor, attempt to kill, intend to kill, or contemplate that life would be taken during the commission of the felony?
>
> Of course, defendant and the State will be permitted to offer competent evidence pertinent to the resolution of these issues.
>
> If the jury should answer either of the above-stated questions 'yes,' then the jury would proceed to hear competent evidence concerning the aggravating and mitigating circumstances and return its recommendation as to whether defendant's punishment should be imprisonment for life or the death sentence. However, if the jury should answer both issues 'no,' it would return a recommendation of life imprisonment.

*State v. Stokes*, 308 N.C. at 651-52, 304 S.E. 2d at 195.

On Stokes' first appeal this Court also concluded there was error in failing to submit the following statutory mitigating circumstances, timely requested by defendant, because there was evidence from which a jury could reasonably find their existence:[6] (1) Defendant was under the influence of a mental or emotional disturbance, (f)(2); (2) defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, (f)(6); and (3) defendant's par-

6. Statutory references will be to subsections of N.C.G.S. § 15A-2000.

ticipation in the capital felony was relatively minor, (f)(4). The Court also concluded the following nonstatutory mitigating circumstances, timely requested by defendant, should be submitted at defendant's new sentencing hearing if there was evidence to support them because a jury could reasonably find them to have mitigating value: (1) Defendant in his formative years was subjected to cruelty and abuse by his parents; (2) defendant in his formative years was subjected to mental abuse by his parents. *State v. Stokes*, 308 N.C. at 654-57, 304 S.E. 2d at 198.

B.

Defendant's new sentencing hearing, from which the instant appeal is taken, was, according to our direction, conducted in two phases. The first phase was directed to *Enmund* issues. In this phase the state offered essentially the same evidence it had offered in the guilt phase of defendant's first trial. The state's key witness was, again, Lorenzo Thomas, who testified as follows: On the day of the crime Ricky Benbow approached him and said, "I'd like for you [Thomas] to be a lookout man while we go up to the Wilmington Bonded Warehouse and take some money from the old man." James Murray and defendant were with Benbow. Thomas never replied but he did join the other three, all of whom were prior acquaintances. Defendant "had a stick in his hand, and Murray, he had something up his arm, but I really couldn't see what it was, but to me, it looked like some kind of object." The stick in defendant's hand was 16 to 18 inches long.[7] Thomas walked with the others to the Wilmington Bonded Warehouse where he was to "[b]e the lookout man." At the warehouse Thomas observed Benbow at the foot of the ramp and Murray and Stokes on either side of a bay door to which the ramp led. Thomas then walked around the area for about five minutes. He returned to a position where he could observe the ramp. He saw Benbow "still standing at the foot of the ramp, . . . Murray and . . . Stokes was [sic] bent over; looked like some type of struggle to me . . . . I couldn't say what was going on because I wasn't there; I was on the other side of

7. Thomas had difficulty describing the stick's diameter. At one point he testified it was "[l]ike a piece of stick from off a tree," but not like a "tree limb." He said it was "a little old stick like." Later he said it was approximately the size of "or a little larger than, a pencil in diameter." Still later he said the stick was "two and a half" in diameter, but he would not say whether he meant inches or some other unit of measure.

the street." Stokes was holding his stick, but "[w]hat he done with it, I don't know." Murray had his stick "underneath his arm; you could hardly see his." Thomas then left the area. "The last time I saw [Stokes] is when I saw him bent over on that ramp." Three to five minutes later Thomas observed Stokes driving the victim's car with Benbow in the front seat and Murray in the back. Still later Thomas met Benbow, Murray, and Stokes. Stokes gave Thomas a bag of marijuana "[f]or being a lookout man."

The state also offered, without objection, defendant's out-of-court statement. According to this statement, Stokes, Benbow and Thomas went to the warehouse. Thomas "had a stick in his hand." When they got to the warehouse, Stokes "broke away from . . . Benbow and . . . Thomas and went to an area . . . directly across the street from the" warehouse to serve as a lookout. Benbow and Thomas went up the ramp to the bay door. "When the old man came out of the door . . . Thomas struck the old man." Thomas "again struck the old man, and the old man fell to the concrete." Benbow and Thomas went "through the old man's pockets." Stokes observed "blood coming from the old man's mouth; he was spitting out blood." Thomas later had a wallet from which Stokes got $150. Stokes also got a set of car keys from Thomas, "unlocked the car that was parked in the parking lot and left by himself."

Defendant offered no evidence at the *Enmund* issue phase of the new sentencing hearing.

After arguments and instruction the following issue was submitted to and answered by the jury affirmatively:[8]

> Did the defendant, Freddie Lee Stokes, deliver the fatal blows which caused the death of Kauno Lehto?

The sentencing hearing then proceeded to the phase where the jury was asked to consider statutory issues pursuant to

8. The following issue was also submitted:

> "Did the defendant, Freddie Lee Stokes, while acting as an aider or abettor either attempt to kill, intend to kill, or contemplate that life would be taken during the commission of the felony, (Robbery with a dangerous weapon)?"
>
> Following the court's instruction and having answered the first issue "yes," the jury did not consider this issue.

N.C.G.S. § 15A-2000. During this phase of the new sentencing hearing the state relied entirely on evidence it had produced during the *Enmund* issue phase. Defendant offered evidence which tended to show as follows: Defendant grew up with his mother and three siblings in a subsidized housing project for low-income families. Defendant is mildly, mentally retarded and was enrolled in a "special education" curriculum in the elementary grades. Defendant was placed on juvenile probation at age nine for breaking into an automobile and stealing tapes and for stealing cookies from a grocery store. Later he violated his probation by striking a teacher and was sent to Samarkand Manor, a juvenile rehabilitation center, in February 1976. He was granted a conditional one-year release from Samarkand in October 1976, which he successfully completed. Thereafter, defendant, at age fourteen, was involved in other breakings into schools and stealing school window air conditioners. He was sent back to Samarkand on a two-year commitment in 1979 and was unconditionally discharged in August 1981 at age sixteen.

Defendant at age eleven at Samarkand in 1976 was treated by Dr. Rolf Henry Fisscher, a staff psychiatrist. Dr. Fisscher treated defendant with various medications to control defendant's outbursts of temper and aggressive behavior towards other students and teachers. He diagnosed defendant as being borderline mentally retarded with a "full scale I.Q. of 70."

Defendant also offered certain reports from physicians at Dorothea Dix Hospital where, after the present charges were brought, defendant, then age eighteen, was sent to have determined his competency to stand trial. These reports reveal the following information about defendant. Testing showed defendant had an I.Q. of 63 and read at grade level 2.9. "There were hints of aggressive tendencies." Defendant "attended to his personal needs appropriately and adjusted fairly well to the ward. Occasionally he has been noisy or intimidating or aggressive, but he has seemed able to control his behavior." Defendant was ultimately diagnosed as having an "antisocial personality disorder."

Only defendant's mother and an older sister took an interest in defendant during the time he was under the supervision of a juvenile court from 1974 to 1981. Defendant's father lived in Brunswick County and is disabled. He was never married to de-

fendant's mother. He never communicated with defendant's family court counselor during the years in question; but he was present in the courtroom during most of defendant's new sentencing proceeding. When defendant was eight or nine years old there was "a whole lot of drinking in [his] family." His mother "drank a whole lot," and his older sister, "who pretty much raised" defendant, tried to hide his mother's drinking from defendant and the other siblings. Defendant got little supervision from his mother, and the family did not attend church or Sunday school.

After arguments and instructions, statutory issues pursuant to N.C.G.S. § 15A-2000 were submitted to and answered by the jury. Only one aggravating circumstance, that the murder was "especially heinous, atrocious, or cruel," (e)(9),[9] was submitted to the jury and answered favorably to the state. Twelve mitigating circumstances were submitted. The jury, without specifying which ones, found "one or more" of the following statutory and nonstatutory mitigating circumstances to exist:

STATUTORY MITIGATING CIRCUMSTANCES

(1) Defendant has no significant history of prior criminal activity. (f)(1).

(2) The murder was committed while defendant was under the influence of a mental or emotional disturbance. (f)(2).

(3) The capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. (f)(6).

(4) Defendant's age, seventeen, at the time of the crime. (f)(7).

NONSTATUTORY MITIGATING FACTORS

(1) Defendant's mother's habitual use of alcohol during his formative years.

(2) Defendant's own abuse of drugs and alcohol.

(3) Defendant's subjection to mental abuse by his parents during his formative years.

9. All statutory references will be to subsections of N.C.G.S. § 15A-2000.

(4) Defendant's lack of religious and moral training during his formative years.

(5) Defendant's love and affection for his mother and siblings.

(6) Original purpose of criminal enterprise was to commit a robbery and not a murder.

(7) Defendant is an illegitimate child and has never experienced a relationship with his natural father.

(8) Any aspect of defendant's character, record, or reputation or any other circumstance deemed by the jury to have mitigating value.

The jury then determined: (1) The mitigating circumstance(s) found was (were) insufficient to outweigh the aggravating circumstance found, (b)(2), and (2) the aggravating circumstance was sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance(s) found, (b)(1); *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983).

The jury recommended that defendant be sentenced to death and Judge Stevens entered judgment accordingly.

II.

**[1]** Defendant was seventeen years old when the criminal acts in this case occurred. His first argument is that the superior court lacked jurisdiction to try him. N.C.G.S. § 7A-517(20), relating to juveniles, permits persons sixteen or more years old to be prosecuted as adults. Defendant argues this creates a classification which, in defendant's words, is so "arbitrary, fundamentally unfair," and "discriminatory" as to violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Equal Protection and Law of the Land Clauses of Article I, section 19 of the North Carolina Constitution.

N.C.G.S. § 7A-517(20) defines a juvenile as "any person who has not reached his eighteenth birthday and is not married, emancipated, or a member of the armed services of the United States." This section then provides that, "For the purposes of subdivisions (12) and (28) of this section, a juvenile is any person who has not

reached his sixteenth birthday and is not married, emancipated, or a member of the armed forces." Subdivision (12) of the section defines a "delinquent juvenile" as "Any juvenile less than 16 years of age who has committed a criminal offense under State law or under an ordinance of local government, including violation of the motor vehicle laws." Subdivision (28) of the section defines an "undisciplined juvenile" as "A juvenile less than 16 years of age who is unlawfully absent from school; or who is regularly disobedient to his parent, guardian, or custodian and beyond their disciplinary control; or who is regularly found in places where it is unlawful for a juvenile to be; or who has run away from home." N.C.G.S. § 7A-524 provides that "[a]ny juvenile who is under the jurisdiction of the court and commits a criminal offense after his sixteenth birthday is subject to prosecution as an adult." Finally, N.C.G.S. § 7A-608 provides:

> The court after notice, hearing, and a finding of probable cause may transfer jurisdiction over a juvenile 14 years of age or older to superior court if the juvenile was 14 years of age or older at the time he allegedly committed an offense which would be a felony if committed by an adult. If the alleged felony constitutes a capital offense and the judge finds probable cause, the judge shall transfer the case to the superior court for trial as in the case of adults.

Defendant's argument is directed solely to the classifications contained in N.C.G.S. § 7A-517(20). He says there is no rational basis for making a distinction, in terms of criminal responsibility for the same offense, between fifteen year olds and sixteen year olds.

Defendant's argument has no bearing on this case. Defendant was not tried in superior court pursuant to the classifications contained in N.C.G.S. § 7A-517(20). He was tried in superior court as an adult pursuant to N.C.G.S. § 7A-608. This section authorizes the juvenile court in ordinary felonies and requires it in capital felonies, upon a finding of probable cause, to transfer juveniles who were "fourteen years of age or over" at the time of the offense to superior court for trial as adults. Defendant makes no challenge to the classification contained in N.C.G.S. § 7A-608.

Assignment of error No. 1, giving rise to defendant's constitutional argument with regard to classifications in juvenile

statutes having no bearing on the instant case is, therefore, overruled.

III.

**[2]** Defendant's next contention, based on his assignment of error No. 2, is that the trial court erred in admitting into evidence defendant's out-of-court statement in the *Enmund* issue phase of the case. Defendant relies solely on *State v. Fincher*, 309 N.C. 1, 305 S.E. 2d 685 (1983). In *Fincher* we held a person defined as a juvenile by N.C.G.S. § 7A-517(20) was entitled before questioning to be advised of his rights pursuant to N.C.G.S. § 7A-595(a), which provides:

> (a) Any juvenile in custody must be advised prior to questioning:
>
> (1) That he has a right to remain silent; and
>
> (2) That any statement he does make can be and may be used against him; and
>
> (3) That he has a right to have a parent, guardian or custodian present during questioning; and
>
> (4) That he has a right to consult with an attorney and that one will be appointed for him if he is not represented and wants representation.

Fincher at the time his inculpatory statement was taken was seventeen. Fincher objected at trial to the admission of his statement. Evidence at voir dire demonstrated affirmatively that Fincher was not advised of his right to have a "parent, guardian or custodian present during questioning." The trial court concluded that defendant was not entitled to be advised pursuant to N.C.G.S. § 7A-595(a)(3) because he was being tried as an adult, not a juvenile. On Fincher's appeal this Court disagreed. We concluded Fincher was entitled to be advised pursuant to N.C.G.S. § 7A-595(a). For failure of the investigators to advise Fincher of his right to have a "parent, guardian or custodian present during questioning," as the statute required, this Court held Fincher's statement should not have been admitted against him. Because, however, of the overwhelming evidence of Fincher's guilt, other than his statement, the Court also concluded its admission did not amount to reversible error.

In the instant case, although *Fincher* was decided some two and a half months before defendant's second sentencing hearing, defendant did not object to the admission of his statement. No voir dire was conducted, and the question whether defendant was advised of his rights under N.C.G.S. § 7A-595(a) was never addressed at trial. Neither was it addressed at Stokes' first trial conducted before the *Fincher* decision.

Where a defendant fails at trial to object to the admission of evidence, he may not, in the absence of plain error, rely on its admission as error on appeal. *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983). Indeed, a defendant may not raise on appeal a ground, not raised at trial, for challenging the admissibility of a confession even though at trial admissibility was challenged on other grounds. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177 (1983).

This Court has been slow to apply the waiver rule in capital cases. *But see id.* There is authority for the Court in capital cases to examine the record on its own motion for reversible error whether excepted to at trial or assigned as error on appeal. *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975); *State v. Fowler*, 270 N.C. 468, 155 S.E. 2d 83 (1967); *State v. McCoy*, 236 N.C. 121, 71 S.E. 2d 921 (1952). But the Court has also said in considering questions arising from the admission of evidence:

> A defendant, however, in a capital case who fails to make even a general objection at trial when doing so could have saved the trial from error runs a high risk of waiving his right to complain on appeal where the incident complained of is not patently erroneous, or if erroneous, not patently prejudicial.

*State v. Strickland*, 290 N.C. 169, 182, 225 S.E. 2d 531, 541 (1976); *see also State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335.

Here we have no hesitancy in holding that defendant's failure to object at trial to the state's introduction of his out-of-court statement waives his right to complain of its admission on appeal. According to defendant's statement, he was standing across the street serving as a lookout when his accomplice Thomas actually struck the victim. Defendant said he observed blood coming from the victim's mouth. Defendant argues the statement was hurtful

to him because it enabled the state to discredit it entirely before the jury on the ground defendant's observation of the blood would have been physically impossible given the distance from the point of the beating to the place where defendant claimed to have observed it. The state argued defendant could have known of the blood only if he was participating in the attack; therefore the jury should consider his statement as being evidence that he did participate. Because the state was able to make this argument about the statement, defendant says the statement prejudiced him in the jury's eyes and helped cause the jury to find against him on the *Enmund* issue. He argues we should not apply the waiver rule and consider the merits of the admissibility issue.

We disagree. On defendant's first appeal he argued that *Enmund* issues should have been submitted to the jury at the sentencing phase of the proceeding. In agreeing with this argument, this Court relied on defendant's out-of-court statement as providing the sole evidentiary basis for the submission of *Enmund* issues. At defendant's new sentencing hearing this statement, again, was the only evidence supporting submission of *Enmund* issues. Without it, *Enmund* issues need not have been submitted because all of the other evidence in the case tended to show defendant himself inflicted the fatal blows. Thus there are aspects of this statement which enabled the state to argue against its credibility and to defendant's detriment, but the statement's substance provides the only evidentiary basis for defendant's principal defense against imposition of the death penalty. Under these circumstances it is imperative that defendant decide at trial whether he wants the statement admitted or not. It is a tactical decision that can only be made by defendant, not the court. A defendant may not, for tactical reasons, fail to object at trial to evidence he hopes will help him and later on appeal assign admission of that evidence as error when in light of the jury's verdict the evidence was not helpful, or was even hurtful, to defendant. The waiver rule was designed precisely to prevent this kind of second-guessing of the probable impact of evidence on the jury by parties who lose at the trial level. Defendant made his tactical decision to let the evidence come in at trial without objection. He may not now be heard to complain.

IV.

**[3]** Next defendant argues there was no evidence to support submission of the "especially heinous" aggravating circumstance described by N.C.G.S. § 15A-2000(e)(9). We disagree.

*State v. Benbow*, 309 N.C. 538, 308 S.E. 2d 647 (1983), controls this question contrary to defendant's contention. *Benbow* was an appeal arising out of the same incident as is now before us but involving one of defendant's accomplices who pled guilty to second degree murder. In *Benbow* we held the nature and extent of the fatal blows inflicted upon the victim, Lehto, and Lehto's having "lingered and remained in a semiconscious state for over twelve hours," supported the trial court's finding in aggravation under the Fair Sentencing Act, N.C.G.S. § 15A-1340.4(a)(1)f, that the crime was "especially heinous, atrocious, or cruel." The only difference in the cases is that Benbow was sentenced under the Fair Sentencing Act upon a plea of guilty to second degree murder and Stokes was sentenced under the capital sentencing statute upon a verdict of guilty to first degree, felony murder.

It will not always be appropriate to compare sentences under the two different statutes to decide in a given case whether the evidence supports a finding of the "especially heinous" circumstance. *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983). For example, it might not be appropriate to compare a felonious assault case in which the especially heinous circumstance was supported by the evidence to determine whether the circumstance was likewise supported in a first degree murder case even though, except for the death of the victim, the cases are factually similar. "Rather, the focus should be on whether the facts of the case disclose excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present" in the very offense under consideration. *Id.* at 414, 306 S.E. 2d at 786 (emphasis in original omitted).

Here, however, we see nothing which distinguishes *Benbow* on the question of whether the "especially heinous" circumstance was supported by the evidence. If it was supported in *Benbow* by evidence of the nature of the fatal wounds inflicted and the victim's lingering death, it must likewise be supported by the same evidence in the instant case. The facts upon which the circumstance rests in both cases are identical and the differences be-

tween second degree murder and first degree felony murder are not material on the issue. Defendant concedes as much in his brief but suggests that the Court "reconsider its decision" in *Benbow* on this point. We think the issue was properly decided in *Benbow* and that *Benbow* controls it here; consequently we conclude the evidence supports the jury's finding of the existence of the especially heinous circumstance.

V.

At the close of evidence in the *Enmund* issue phase of the case, defendant moved for the imposition of a sentence of life imprisonment on the ground the evidence was insufficient to permit a jury to answer the *Enmund* issues favorably to the state. The motion was denied, and defendant assigns error to the ruling.

Defendant's argument is that the evidence was not enough to permit a jury to find beyond a reasonable doubt that defendant himself delivered the fatal blows to the victim. In essence, defendant contends he was entitled to a directed verdict in his favor on this issue. We disagree.

**[4]** For the purpose of measuring the sufficiency of evidence on an *Enmund* issue in a capital sentencing proceeding, we think the issue should be treated like other issues the jury must answer under our capital sentencing statute, N.C.G.S. § 15A-2000. Under this statute the jury must, in order to recommend a death sentence, answer certain issues favorably to the state. The state's burden of proof on these issues is beyond a reasonable doubt. *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308; *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981). Therefore, the state's burden of proof on an *Enmund* issue must be, as the trial court here properly instructed, beyond a reasonable doubt. Since the state's burden of proof on an *Enmund* issue is the same as that in any other criminal case, the test for the sufficiency of the evidence on such an issue should likewise be the same as is ordinarily applied in criminal cases.

That test 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). Defendant's evidence which clarifies the state's evidence or rebuts inferences favorable to the state may be considered favorably to defendant if it does not contradict and is not inconsistent with the state's evidence. *State v. Bates*, 309 N.C. 528, 308 S.E. 2d 528 (1983); *State v. Bruton*, 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 fact to be proved, even if the suspicion is strong. *State v. Malloy*, 309 N.C. 176, 305 S.E. 2d 718 (1983).

**[5, 6]** Applying this test to the evidence before us, we hold the evidence was sufficient to permit the jury to find beyond a reasonable doubt that Stokes himself delivered fatal blows to the victim. We note that it is not necessary under *Enmund* that a capital defendant in order to be executed be the only person who delivered fatal blows to the victim. It is enough if the capital defendant is one of two or more who delivered fatal blows. Here state's witness Thomas testified that Stokes armed with a stick and Murray armed with "some kind of object" accosted the victim, Lehto, for the purpose of robbing him on a ramp just outside the door to his warehouse. A struggle ensued during which Stokes was "bent over." Lehto, although seventy years old, was described as a "physically very active man." The struggle occurred at approximately 6:30 p.m. At approximately 8:30 p.m. Lehto was discovered, semiconscious, lying on the ramp where the attack occurred. He had gashes on his head and his skull had been crushed. He died some fourteen hours after the attack from head injuries. Clearly this evidence, taken in the light most favorable to the state, is enough for a rational jury to find beyond a reasonable doubt: Stokes and Murray in an effort to rob Lehto accosted him at his warehouse. Lehto put up a struggle. Stokes and Murray hit Lehto about the head to subdue him, Stokes with the stick and Murray with some other object they each had, respectively, carried to the scene. These blows to the head caused Lehto's death.

The trial judge, therefore, correctly denied defendant's motion for a directed verdict on the *Enmund* issue.

VI.

[7] Having found no error relating to conduct of the new sentencing hearing, we now consider whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2). We conclude that it is.

The Court has said:

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

*State v. Lawson*, 310 N.C. 632, 648, 314 S.E. 2d 493, 503 (1984), *cert. denied*, --- U.S. ---, 86 L.Ed. 2d 267 (1985). The pool of available cases from which those roughly similar with regard to the crime and defendant may be drawn for comparison purposes has been defined as

> *all cases* arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time.

*State v. Williams*, 308 N.C. at 79, 301 S.E. 2d at 355. The pool, however, includes only those cases which this Court has found to

be free of error in both phases of the trial. *State v. Jackson*, 309 N.C. 26, 45, 305 S.E. 2d 703, 717 (1983).

Proportionality review is intended to serve "as a check against the capricious or random imposition of the death penalty." *State v. Hutchins*, 303 N.C. 321, 357, 279 S.E. 2d 788, 810 (1981). By requiring this Court to compare penalties imposed in similar cases, the legislature has provided us with a mechanism for addressing and, insofar as we are able, eliminating disparities in capital sentencing that might occur because of, for example, improper racial, sexual, socioeconomic, or regional discrimination. *Cf. State v. Williams*, 304 N.C. 394, 410, 284 S.E. 2d 437, 448 (1981), *cert. denied*, 456 U.S. 932, 72 L.Ed. 2d 450 (1982) (one objective of state's capital sentencing statute is to eliminate effects of racial discrimination). Although comparative proportionality review is not always required by the federal Constitution, *Pulley v. Harris*, 465 U.S. 37, 79 L.Ed. 2d 29 (1984), it promotes consistency in capital sentencing.

In every proportionality review, this Court's emphasis is on an "independent consideration of the individual defendant and the nature of the crime or crimes which he has committed." *State v. Pinch*, 306 N.C. 1, 36, 292 S.E. 2d 203, 229, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *rehearing denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983).

Here, the most similar case for comparison in terms of the crime committed is *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984), which arose out of the same incident as is now before us. Murray, like defendant Stokes, entered a plea of not guilty. The jury found him guilty, among other things, of first degree murder, and after the required hearing recommended that Murray be sentenced to life imprisonment. Judgment was entered accordingly.

The State's evidence in *Murray* tended to show, as it does here, that both Murray and Stokes struck the blows which resulted in the victim's death. Both carried sticks to the scene of the crime; both went up on the ramp leading to the warehouse door; both were seen engaged in a struggle with the victim. *Id.* at 544, 313 S.E. 2d at 526. The *Enmund* issue was answered against both

Murray[10] and Stokes. Thus, as to the crime committed, Murray and Stokes are equally culpable. Both committed the same crime in the same manner.

As for the defendants themselves, Stokes does not appear to be more deserving of death than Murray. Stokes was only seventeen years old when he murdered Kauno Lehto; Murray was considerably older.[11] There also is evidence that Stokes suffered from impaired capacity to appreciate the criminality of his conduct, and that he was under the influence of a mental or emotional disturbance at the time of the murder. Moreover, because the jury found the existence of "one or more" mitigating circumstances without specifying which ones, we must assume the existence of each mitigating factor the trial judge submitted and the evidence supported, including those involving age, mental or emotional disturbance, and impaired capacity. *State v. Lawson*, 310 N.C. at 648, 314 S.E. 2d at 503. None of these mitigating factors applied to Murray, who in addition had a worse criminal record than Stokes.[12]

The State, during oral argument, tried valiantly to distinguish this case from *Murray*. Counsel suggested, for example, that Stokes was the ringleader, and that he may have beaten the victim more savagely than did Murray.

There is simply no evidence in the record to support either contention. Lorenzo Thomas, the only eyewitness to testify at Stokes' trial, indicated that Stokes and Murray took equal parts in the beating of Kauno Lehto. Evidence of who was the ringleader is virtually nonexistent. Thomas testified that after the crime was completed Stokes gave him a bag of marijuana for act-

10. See Issues and Recommendations as to Punishment, File No. 82CRS10109, New Hanover Superior Court.

11. The evidence shows that in December 1981, when the crime was committed, Murray was in his twenties, "closer to 23 than . . . 20." Thomas was "approximately 23 [or] over 20." Benbow was "17 or 18."

12. Murray had been convicted of several violent assaults. One of these was felonious and resulted in a two-year prison sentence. *State v. Murray*, 310 N.C. 541, 549-50, 313 S.E. 2d 523, 529-30. The jury found as an aggravating factor that Murray had previously been convicted of a felony involving the use of violence to a person. Stokes, on the other hand, had a record consisting primarily of property offenses and one assault committed as a juvenile.

ing as a lookout. On the other hand, Thomas said it was Ricky Benbow who asked him to stand watch in the first place. Other facts culled from the testimony in this case are similarly inconclusive.

Justice Mitchell, in his dissent, argues that Stokes drove Lehto's car away from the crime scene, thereby removing the victim's last hope of obtaining help. The evidence on this point, though contradictory, tends to show that Murray and Benbow rode away with Stokes. Defendant, in his largely exculpatory pretrial statement, claimed to have driven away alone. Thomas, however, put Murray and Benbow in the car with Stokes. At Benbow's sentencing hearing the state *stipulated* that Stokes, Murray, and Benbow drove away together. *State v. Benbow*, 309 N.C. 538, 541, 308 S.E. 2d 647, 649 (1983). Murray, at his trial, was convicted of the felonious larceny of Lehto's car. *State v. Murray*, 310 N.C. at 547-49, 313 S.E. 2d at 528-29. Surely Stokes is not more deserving of death than Murray simply because he was behind the wheel of the car in which they both made their escape.

The dissent also makes much of Stokes' crime being found by the jury to have been "especially heinous, atrocious, or cruel."[13] The dissenters acknowledge, however, that juries do not consistently recommend the death sentence in cases involving especially heinous first degree murders. In fact, a review of the proportionality pool indicates that they have recommended life imprisonment more often than death in such cases.[14]

13. The jury in *Murray* did not answer the "especially heinous" issue, even though it was submitted. The jury did find, as aggravating circumstances, that Murray had previously been convicted of a felony involving the use of violence to the person, and that his murder of Lehto was committed for pecuniary gain. See Issues and Recommendations, *supra* note 10.

14. Juries have recommended life imprisonment despite finding the murder to be especially heinous in 20 cases involving 24 defendants. *State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986); *State v. Sidden*, 315 N.C. 539, 340 S.E. 2d 340 (1986) (two defendants); *State v. Ledford*, 315 N.C. 599, 340 S.E. 2d 309 (1986); *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985) (three defendants); *State v. Spangler*, 314 N.C. 374, 333 S.E. 2d 722 (1985); *State v. Harold*, 312 N.C. 787, 325 S.E. 2d 219 (1985); *State v. Bare*, 309 N.C. 122, 305 S.E. 2d 513 (1983); *State v. Fincher*, 309 N.C. 1, 305 S.E. 2d 685 (1983); *State v. Hill*, 308 N.C. 382, 302 S.E. 2d 202 (1983); *State v. Barnett*, 307 N.C. 608, 300 S.E. 2d 340 (1983); *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982); *State v. Temple*, 302 N.C. 1, 273 S.E. 2d 273 (1981); *State v. Clark*, 301 N.C. 176, 270 S.E. 2d 425 (1980); *State v. King*, 301 N.C. 186, 270 S.E. 2d

The dissenters nevertheless seem to be arguing that the death penalty cannot be disproportionate in a case where the jury has found a murder to be especially heinous, atrocious, or cruel. *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983), indicates otherwise. In that case, defendant's premeditated and deliberate murder of a drinking companion was found by the jury to have been especially heinous, atrocious, or cruel; this Court nevertheless overturned the death sentence on proportionality grounds after reviewing the mitigating circumstances surrounding defendant's crime. *Id.* at 692-95, 309 S.E. 2d at 181-83. Chief Justice Branch, writing for a unanimous Court, noted that "[i]n conducting our proportionality review, we will consider the totality of the

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98 (1980); *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980); *State v. Ferdinando*, 298 N.C. 737, 260 S.E. 2d 423 (1979); *State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979), *overruled on other grounds, State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981); *State v. Taylor*, 298 N.C. 405, 259 S.E. 2d 502 (1979); *State v. Crews*, 296 N.C. 607, 252 S.E. 2d 745 (1979) (two defendants).

In at least two cases where the murder was found to be especially heinous, the jury could not agree on a sentencing recommendation and life imprisonment was imposed. *State v. Jenkins*, 311 N.C. 194, 317 S.E. 2d 345 (1984); *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980).

Juries have recommended the death penalty after finding the murder to be especially heinous in 16 cases involving 17 defendants. *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673 (1986); *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808 (1985), *cert. denied*, --- U.S. ---, 90 L.Ed. 2d 733 (1986); *State v. Huffstetler*, 312 N.C. 92, 322 S.E. 2d 110 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985); *State v. Boyd*, 311 N.C. 408, 319 S.E. 2d 189 (1984), *cert. denied*, 471 U.S. 1030, 85 L.Ed. 2d 324 (1985); *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197, *cert. denied*, 469 U.S. 963, 83 L.Ed. 2d 299 (1984); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983); *State v. Craig and Anthony*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 464 U.S. 908, 78 L.Ed. 2d 247 (1983); *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *rehearing denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983); *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *rehearing denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983); *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982); *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038, 72 L.Ed. 2d 155 (1982); *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. denied*, 454 U.S. 933, 70 L.Ed. 2d 240, *rehearing denied*, 454 U.S. 1117, 70 L.Ed. 2d 655 (1981); *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025, 68 L.Ed. 2d 220, *rehearing denied*, 451 U.S. 1012, 68 L.Ed. 2d 865 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, *rehearing denied*, 448 U.S. 918, 65 L.Ed. 2d 1181 (1980).

circumstances presented in each individual case and the presence or absence of a particular factor will not necessarily be controlling." *Id.* at 694 n. 1, 309 S.E. 2d at 183 n. 1. If we were to make *any* aggravating circumstance conclusive as to proportionality, we would thwart the comparative review mandate of G.S. § 15A-2000 (d)(2). Indeed, a thorough comparative proportionality review is particularly important when, as here, the "especially heinous" aggravating circumstance is the only one found by the jury. As the most ambiguous of the statutory aggravating factors, it is the most susceptible to inconsistent application. *See* Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases —The Standardless Standard*, 64 N.C. L. Rev. 941 (1986).

Stokes was convicted of first degree murder on a felony murder theory. There is little, if any, evidence of a premeditated killing. In robbery murder cases where conviction rests solely on a felony murder theory, juries in this state almost invariably have recommended life imprisonment rather than death. *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985); *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985); *State v. Wilson*, 311 N.C. 117, 316 S.E. 2d 46 (1984); *State v. Bauguss*, 310 N.C. 259, 311 S.E. 2d 248, *cert. denied*, 469 U.S. 838, 83 L.Ed. 2d 76 (1984); *State v. Hill*, 308 N.C. 382, 302 S.E. 2d 202 (1983); *State v. Barnett*, 307 N.C. 608, 300 S.E. 2d 340 (1983); *State v. Booker*, 306 N.C. 302, 293 S.E. 2d 78 (1982); *State v. Miller*, 302 N.C. 572, 276 S.E. 2d 417 (1981); *State v. Smith*, 301 N.C. 695, 272 S.E. 2d 852 (1981); *State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980); *State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979), *overruled on other grounds, State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981). In four of these cases the jury found that the murder was especially heinous, atrocious, or cruel. *Hayes*, *Hill*, *Barnett*, and *Atkinson*.

Juries have recommended death in only four armed robbery cases where defendant was convicted of first degree murder solely on a theory of felony murder. *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); *State v. Oliver and Moore*, 309 N.C. 326, 307 S.E. 2d 304 (1983); *State v. Craig and Anthony*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 464 U.S. 908, 78 L.Ed. 2d 247 (1983); *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *rehearing denied*, 459 U.S. 1189, 74

L.Ed. 2d 1031 (1983). All of these killings were considerably more aggravated than the one now before us.

In *Gardner* defendant was convicted of two first degree felony murders committed during the course of an armed robbery. The Court characterized the killings as "part of a violent course of conduct, . . . coldblooded, calculated, and senseless." *State v. Gardner*, 311 N.C. at 514, 319 S.E. 2d at 607. The jury found as an aggravating circumstance that the murder was part of a course of conduct that included the commission of a crime of violence against another person. The jury refused to find that defendant's capacity to appreciate the criminality of his conduct was impaired, and was not asked to consider whether defendant was laboring under any mental or emotional disturbance. As noted earlier, we must assume that Stokes suffered from both infirmities.

In *Oliver and Moore* there were again two first degree murders, this time committed during the armed robbery of a convenience store. Defendant Oliver's death sentence for the murder of a customer, Dayton Hodge, while Hodge, in the presence of his seven-year-old grandson, was putting gas in his truck, was affirmed on appeal. The jury found as aggravating circumstances that this murder was committed for pecuniary gain. The jury found no mitigating circumstances.

*Williams* involved two murders and two armed robberies committed during the same course of conduct. The jury found the course of conduct including violence to another person as an aggravating factor. There was no evidence that defendant in *Williams* suffered from an impaired capacity to appreciate the criminality of his conduct or from any emotional or mental disturbance.

Finally, *Craig and Anthony* involved a murder which the jury found not only to be especially heinous, but also to be part of a course of conduct in which crimes of violence were committed against other persons. There was no suggestion that defendants were laboring under an impaired capacity or a mental or emotional disturbance. The murder victim in *Craig and Anthony* was first stabbed by Craig as she begged him not to kill her. Craig handed the knife to an accomplice who stabbed the victim repeatedly in the abdomen. Defendant Anthony then took the knife and

stabbed the victim until death ensued. In all, the victim was stabbed thirty-seven times.

Prior to today, this Court has overturned death sentences on proportionality grounds five times. *State v. Rogers*, 316 N.C. 203, 341 S.E. 2d 713 (1986); *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983). Our decision in *Young* is particularly instructive here. Defendant in that case asked two friends, Jackson and Presnell, to accompany him to the home of J. O. Cooke for the purpose of killing Cooke and stealing his money. En route, defendant Young

> suggested that Jackson hold Cooke, defendant stab him, and Presnell "finish" him. When the men arrived at Cooke's house, Jackson knocked on the door and told Cooke that they wanted to buy liquor. Cooke let the men inside and went into the kitchen to get the liquor. When he returned with the vodka, defendant suddenly reached into his pants, pulled out a knife and stabbed Cooke twice in the chest. Cooke said "What are you doing?" and fell to the floor. Cooke was able to take the knife from his own chest, at which point defendant told Presnell to "finish him." Presnell stabbed the victim five or six times in the back.

*State v. Young*, 312 N.C. at 672, 325 S.E. 2d at 184.

The Court unanimously found Young's death sentence to be disproportionate when compared to the punishments assessed in similar cases. Among other things, the Court said that it was "convinced that defendant Young did not commit a crime as egregious as those committed by the defendants in *Gardner*, . . . *Oliver and Moore*, *Craig and Anthony*, and *Williams*." *Id.* at 691, 325 S.E. 2d at 194. Certainly the crime commited by Stokes was no more egregious than the pre-planned, cold-blooded killing involved in *Young*.

Three of the other four cases in which the death penalty was found disproportionate—*Rogers*, *Hill*, and *Bondurant*—involved first degree murder convictions based on a theory of premeditation and deliberation. The evidence in this case shows that Stokes and his accomplices planned to rob Lehto, not to kill him. The

state sought and obtained the conviction of Stokes on a felony murder theory. While this fact alone is not conclusive, our comparison of this case with others in the pool indicates that Stokes' crime does not rise to the level of those for which we have approved sentences of death. Rather, it falls within the class of crimes for which juries generally have recommended life imprisonment.

To summarize: Defendant Stokes is no more deserving of death than his accomplice James Murray, who committed the same crime in the same manner; indeed he may be less deserving of death in view of the mitigating circumstances involved in this case. In addition, juries in this state almost always recommend life imprisonment when defendant's conviction in a robbery murder case rests solely on a felony murder theory. Defendant's crime in the case at bar was less aggravated than those involved in *Gardner, Oliver and Moore, Williams*, and *Craig and Anthony*, the four robbery murder cases in which juries have recommended the death penalty following a conviction based solely on a felony murder theory. Finally, Stokes' crime was similar to—and no worse than—the one involved in *Young*, a case in which this Court found the death penalty to be disproportionate.

For the foregoing reasons we conclude as a matter of law that the death sentence in this case is disproportionate within the meaning of N.C.G.S. § 15A-2000(d)(2). This Court therefore must, and we hereby do, vacate defendant's sentence of death and order instead that defendant be sentenced to imprisonment in the state's prison for the remainder of his natural life. Defendant is entitled to credit on his sentence for all days spent in confinement before the date of this judgment. The Clerk of Superior Court of New Hanover County shall issue a commitment accordingly.

Death sentence vacated.

Sentence of life imprisonment imposed.

Justice MITCHELL dissenting in part.

I respectfully dissent from that part of the decision of the majority vacating the sentence of death and sentencing the de-

fendant to imprisonment for life. Otherwise, I concur in the result reached by the majority.

In this case, the jury found as an aggravating circumstance that the murder committed by the defendant was an especially heinous, atrocious or cruel murder in the first degree. We have previously discussed the phrase "especially heinous, atrocious, or cruel" used in N.C.G.S. § 15A-2000(e)(9) as follows:

> Although every murder may be characterized as heinous, atrocious, and cruel, this aggravating factor is not to be applied in every first-degree murder case. The legislature specifically provided that this aggravating circumstance may be found only in cases in which the first-degree murder committed was *especially* heinous, *especially* atrocious, or *especially* cruel. N.C.G.S. § 15A-2000(e)(9). Therefore, a finding that this aggravating circumstance exists is permissible when the level of brutality involved exceeds that normally present in first-degree murder, *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), or when the first-degree murder in question was conscienceless, pitiless, or unnecessarily torturous to the victim. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983). We have also stated that this factor is appropriate when the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder. *State v. Stanley*, 310 N.C. 332, 312 S.E. 2d 393 (1984).
>
> In *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983), we identified two types of murder as included in the category of murders which would warrant the submission of the especially heinous, atrocious, or cruel aggravating circumstance to the jury. One type involves killings which are physically agonizing for the victim or which were in some other way dehumanizing. The other type consists of those killings which are less violent, but involve the infliction of psychological torture, placing the victim in agony in his last moments, aware of, but helpless to prevent, impending death.
>
> In determining whether the evidence is sufficient to support a finding of essential facts which would support a determination that a murder was 'especially heinous, atrocious, or

> cruel,' the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984); *State v. Stanley*, 310 N.C. 332, 312 S.E. 2d 393 (1984).

*State v. Brown*, 315 N.C. 40, 65-66, 337 S.E. 2d 808, 826-27 (1985). Having so defined this aggravating factor, the majority's view that the jury properly determined that the murder here was an *especially* heinous, atrocious or cruel murder in the first degree but also that the death sentence recommended by the jury was disproportionate seems to me to be almost inherently self-contradictory. The result simply defies reason and common sense.

If we are to have a death penalty—and our legislature has dictated that we shall—it would seem to me that the one situation in which it would certainly be applied would be a case involving an *especially* heinous, atrocious or cruel *murder in the first degree*. If the death penalty is not to be applied in such cases, when if ever may it be applied properly?

When exercising the statutory duty of proportionality review imposed uniquely upon this Court, we must bear in mind that:

> In comparing 'similar cases' for purposes of proportionality review, we use as a pool for comparison purposes *all cases* arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time.

*State v. Williams*, 308 N.C. 47, 79, 301 S.E. 2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177 (1983). The pool, however, includes only those cases which this Court has found to be free of error in both phases of the trial. *State v. Jackson*, 309 N.C. 26, 45, 305 S.E. 2d 703, 717 (1983).

A review of all cases forming the pool available for our proportionality review makes it clear that juries have recommended death sentences frequently in cases involving especially heinous, atrocious or cruel murders in the first degree. *E.g., State v. Glad-*

*den*, 315 N.C. 348, 340 S.E. 2d 673 (1986); *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808 (1985); *State v. Huffstetler*, 312 N.C. 92, 322 S.E. 2d 110 (1984); *State v. Boyd*, 311 N.C. 408, 319 S.E. 2d 189 (1984); *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197 (1984); *State v. Craig and Anthony*, 308 N.C. 446, 302 S.E. 2d 740 (1983); *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308 (1983); *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335 (1983); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569 (1982); *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264 (1982); *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981); *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979). The majority points out that in other cases juries have recommended life imprisonment despite having found that the first degree murder in question was especially heinous, atrocious or cruel. North Carolina juries simply have not "consistently" recommended either life or death sentences in such cases. *Cf. State v. Lawson*, 310 N.C. 632, 648, 314 S.E. 2d 493, 503 (1984) (discussing principles to be considered when juries have "consistently" been returning life sentences or death sentences in a particular type of case).

The fact that *some juries* act in a self-contradictory manner by recommending a life sentence in such cases, however, is of little relevance to the proper performance of proportionality review by *this Court*. The very reason for proportionality review by *this Court* is to reduce the number of inconsistent or inherently self-contradictory results in capital cases, not to introduce or compound such errors as the majority does here.

The majority's reliance upon *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983) is equally unpersuasive. We recognized there that the presence or absence of a particular factor is not necessarily controlling during our proportionality review. We specifically emphasized, however, that the fact situation before us in *Bondurant* was unique because: "In no other capital case among those in our proportionality pool did the defendant [as did Bondurant] express concern for the victim's life or remorse for his action by attempting to secure immediate medical attention for the deceased." *Id.* at 694, 309 S.E. 2d at 182-83. The evidence in the present case represents the opposite end of the spectrum, however, since it tends to show that the defendant Stokes took steps to insure that the victim would not receive any type of assistance.

Even if the "similar cases" used for purposes of proportionality review are limited—as the majority has tended to do—to those cases in which the first degree murder conviction arose from an armed robbery and rested solely upon a felony murder theory, I would conclude that the death penalty recommended by the jury here was not disproportionate. As the majority points out, this Court has affirmed the death penalty in at least four such cases. *State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591, *cert. denied*, 469 U.S. 1230, 84 L.Ed. 2d 369 (1985); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983); *State v. Craig and Anthony*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 464 U.S. 908, 78 L.Ed. 2d 247 (1983); *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982). However, I do not agree with the statement of the majority that those four killings "were considerably more aggravated than the one now before us."

Here, unlike the situation in any of those four cases, the murder committed by the defendant is included in both types defined as "especially heinous, atrocious, or cruel" in *Brown*. 315 N.C. 40, 65-66, 337 S.E. 2d 808, 826-27. The murder committed in this case by Stokes was one of the first type described in *Brown* because it was extraordinarily "physically agonizing for the victim" and extraordinarily "dehumanizing." *Id.* It was one of the second type described in *Brown* because it resulted in "placing the victim in agony in his last moments, aware of, but helpless to prevent, impending death." *Id.*

After considering the evidence before it, the jury properly could have found—and during proportionality review, this Court must assume it did find—the following facts *inter alia*: Stokes and Murray beat the seventy-year-old victim Kuano A. Lehto on the head until a portion of his brain was visible and blood was gushing from his mouth. The victim was in excellent physical condition for his age, however, and he continued to attempt to arise from the pool of blood on the warehouse ramp. After Stokes took his share of the victim's money, Stokes *and Stokes alone* took the keys to the victim's car. He then drove it to another street where he left it abandoned. The evidence is contradictory as to whether Murray and Benbow rode in the car, but the uncontradicted evidence was that *only Stokes* actually *took* the car away and personally denied the victim its use.

By his action Stokes insured that his elderly victim's last hope of extricating himself from the horror he faced was removed. Even if Lehto was able to rise after Stokes finally left him to die alone, his only means of going for help had been taken from him by Stokes. The victim was left alone awaiting his impending death without hope. This obviously was extraordinarily "agonizing for the victim" and extraordinarily "dehumanizing." *State v. Brown*, 315 N.C. at 65-66, 337 S.E. 2d at 826-27. It is equally obvious that Stokes' action in removing the victim's last hope had the effect of "placing the victim in agony in his last moments [here hours], aware of but helpless to prevent, impending death." *Id.*

None of the four armed robbery first degree murder cases in which this Court has affirmed the death penalty involved a victim left helpless to linger and die alone in a remote place in such a dehumanizing and torturous manner. In each of those cases in which we found the death penalty proper—*Gardner, Oliver, Craig and Anthony,* and *Williams*—the victims were killed quickly, cleanly and with little psychological torture by comparison to the way in which Stokes left Lehto to die after removing his last chance for survival. In all of those cases except *Craig and Anthony,* the victims were shot and died almost instantly. Even in *Craig and Anthony,* the victim's suffering was not as prolonged as in this case. Although the victim there begged her two assailants not to kill her and was stabbed by them thirty-seven times, her period of terror and suffering was blessedly brief when compared to that inflicted upon this victim by *Stokes* when he left the dying victim attempting to rise from a pool of blood and removed the victim's car.

Even if the pool of *all* "similar cases" is abandoned completely *and improperly* and comparison is made only to the case against Murray, who with Stokes beat Lehto, I do not accept the view that the death penalty against Stokes must be found disproportionate. After the two men had beaten Lehto until his brain was visible and blood was gushing from his mouth as he lay prostrate before them attempting to rise, Murray did nothing further to add to the dehumanizing and psychologically torturous nature of his death. The jury clearly could properly have believed on the evidence before it, however, that *Stokes* took the victim's keys and drove his car away, thereby removing his last hope for sur-

vival and leaving him to die a lingering and painful death alone. Stokes did not take the car for hope of gain. Instead, *Stokes* simply moved it to another street some distance from where the victim lay injured and left it abandoned. This additional torture of the victim by *Stokes* was entirely sufficient to provide a principled and rational basis for the jury in his case to recommend death, even though the jury in Murray's case recommended that Murray be sentenced to life imprisonment. The majority has usurped the function of the jury in this regard and is simply wrong when it decides that Stokes and his accomplice Murray "committed the same crime in the same manner . . . ."

This case perhaps demonstrates that proportionality review results to a considerable extent in the substitution of this Court's view of the most desirable sentence to impose for that of the jury. *See generally, e.g.*, Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. Rev. 941 (1986). The majority in the present case states, for example, that: "There is little, if any, evidence of a premeditated killing." The jury, upon finding that Stokes took a club to the scene of the crime and literally beat the victim's brains out before robbing him, apparently felt that there was more than a little evidence of a premeditated killing. Under our system giving this Court the duty to conduct proportionality review, the view of the majority of this Court prevails over that of the jury as to what the evidence actually establishes in this regard.

Given the statutory provisions enacted for capital sentencing in North Carolina, the type of "proportionality review" conducted here by this Court is not required by the Constitution of the United States. *Pulley v. Harris*, 465 U.S. 37, 79 L.Ed. 2d 29 (1984). The inconsistency introduced into capital sentencing by this Court's proportionality review is exemplified by this and similar cases. This situation should lead our General Assembly to consider removing the heavy burden of proportionality review which it has chosen to place upon this Court solely by statute. The General Assembly is free to do so. *Id.*

Two juries now have recommended that the defendant Stokes receive a sentence of death. Accordingly, two Superior Court Judges, in compliance with the law of North Carolina and

their oaths of office, have sentenced him to death. Contrary to the view of the majority, I conclude that the sentence of death was entered properly in the present case and was proportionate.

For the foregoing reasons, I respectfully dissent from that part of the decision of the majority vacating the sentence of death and sentencing the defendant to imprisonment for life.

Justice WEBB joins in this dissenting opinion.

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STATE OF NORTH CAROLINA v. CURTIS EDWARD ETHERIDGE

No. 141A86

(Filed 3 February 1987)

1. **Criminal Law § 82.2— child abuse—no physician-patient privilege**

The trial court in a prosecution for rape, taking indecent liberties with a child, and incest properly admitted the testimony of a public health nurse that defendant had disclosed to her sexual contact with his children while seeking treatment for a sexually transmitted disease after he had been charged. The physician-patient privilege created by N.C.G.S. 8-53 is not available in cases involving child abuse; moreover, these exceptions to the physician-patient privilege apply without regard to whether the medical information was obtained before or after the accused was officially charged with a crime. N.C.G.S. 8-53.1, N.C.G.S. 7A-551.

2. **Criminal Law § 55.1— venereal disease report—disclosed during voir dire rather than in camera—no error**

There was no error in a prosecution for rape, taking indecent liberties with a child, and incest from the admission of defendant's disclosure to a public health nurse of sexual contact with his children while seeking treatment for a sexually transmitted disease where the information related by the nurse was not disclosed *in camera*, but at a *voir dire* in open court. Defendant was fully aware of the delicate contents of the nurse's report and his failure to apprise the judge of any objection to proceeding with the *voir dire* in open court constituted a waiver of the objection. N.C.G.S. 130A-163.

3. **Criminal Law § 75.13— statements to public health nurse—Miranda warnings not required**

In a prosecution for sexual offenses against his children, the lack of *Miranda* warnings and defendant's Fifth Amendment privilege against self-incrimination did not require the exclusion of statements concerning sexual contact with his children made to a public health nurse while seeking treatment for a sexually transmitted disease. Defendant raised no constitutional claim at trial; there was no indication that the nurse acted as an agent of the State, the

police, or the prosecution; defendant himself requested that he be taken to the health department and the accommodation of his request was not related to the criminal investigation; defendant was allowed a private interview with the nurse; defendant was asked only routine questions from a standard form used for patients complaining of sexually transmitted diseases; defendant was not under any compulsion to answer the questions; and there was no evidence of subtle coercion in the exchange.

**4. Rape and Allied Offenses § 5— second degree sexual offense—constructive force—general fear rationale**

The holding of *State v. Alston*, 310 N.C. 399, regarding the absence of force in a sexual offense, is limited to factually similar situations, and the application of the *Alston* "general fear" rationale to sexual activity between a parent and minor children in *State v. Lester*, 70 N.C. App. 757, *aff'd per curiam*, 313 N.C. 595, is expressly overruled.

**5. Rape and Allied Offenses § 5— second degree sexual offense—evidence of force—sufficient**

In a prosecution for a second degree sexual offense committed by defendant against his son, the State presented sufficient evidence from which the jury could reasonably infer that defendant used his position of power to force his son's participation in sexual acts where defendant had begun abusing his son when the boy was eight years old, so that the child was conditioned to succumb to defendant's advances, and the incidents of abuse all occurred while the boy lived as an unemancipated minor in defendant's household, subject to defendant's parental authority and threats of disciplinary action. Although defendant in the incident charged said no more than "do it anyway" when his son initially refused to disrobe, the child's knowledge of his father's power may alone induce fear sufficient to overcome his will to resist and the State presented sufficient evidence from which the jury could reasonably infer that defendant used his position of power to force his son's participation in sexual acts.

**6. Rape and Allied Offenses § 19— indecent liberties with a child—evidence sufficient**

The State presented sufficient evidence of five counts of taking indecent liberties with a child where each count coincided with an episode of intercourse, and in each instance defendant ordered his victim to lie down, then exposed his penis before proceeding with intercourse. Penetration of the victim, while perhaps defendant's ultimate goal, was not the only event in the sequence which could be found to have been performed for his gratification. N.C.G.S. § 14-202.1(a)(1).

**7. Constitutional Law § 34; Criminal Law § 26.5— statutory rape—indecent liberties with a child—incest—same transaction—no double jeopardy**

Neither convictions of statutory rape, taking indecent liberties with a child, and incest arising from the same transaction, nor convictions of crime against nature, taking indecent liberties with a child, and second degree sexual offense arising from the same transaction with a different child, violated de-

fendant's rights against double jeopardy because they were all separate and distinct crimes, none of which was a lesser-included offense of the other.

Justice WEBB dissenting.

APPEAL by defendant from judgments of *Small, J.*, filed at the 2 December 1985 session of Superior Court, PERQUIMANS County. Heard in the Supreme Court 10 December 1986.

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

*Malcolm Ray Hunter, Jr., Appellate Defender, by Geoffrey C. Mangum, Assistant Appellate Defender, for the defendant.*

MARTIN, Justice.

On charges involving his daughter,[1] defendant was convicted of four counts of rape in the first degree, four counts of taking indecent liberties with a child, and four counts of incest. On additional charges involving his son, defendant was convicted of single counts of crime against nature, taking indecent liberties with a child, and sexual offense in the second degree. Defendant appealed from consolidated judgments imposing two life sentences for the crimes against his daughter and a twelve-year sentence for the crimes against his son, all sentences to run consecutively. For the reasons set forth below, we deem defendant's assignments of error to be uniformly meritless and hold that he received a fair trial, free of prejudicial error.

Briefly summarized, the state's evidence tended to show that defendant began engaging in sexual activity with his daughter and son when they were six and eight years old, respectively. The most recent incidents, from which the criminal charges at issue arose, consisted of the following acts: On 10 April 1985 defendant drove his daughter, then aged twelve, to an isolated area in Perquimans County known as Bear Swamp. Defendant stopped his truck about halfway into the swamp and told the child to open the door of the truck, remove her clothes, and lie down on the seat. She complied with these demands. Defendant then unzipped his

1. In keeping with the practice established by this Court in recent cases, the names of the two minor victims have been deleted throughout this opinion to spare them further embarrassment.

pants and had vaginal intercourse with her. Afterward defendant warned her not to tell anyone admonishing that "we'll both get in trouble." Other episodes of intercourse, perpetrated in an essentially identical manner, occurred in Bear Swamp on 21 December 1984 and 5 January 1985 and in the child's room at home on 15 February 1985.

The state's evidence further tended to show that on 28 April 1985 defendant was at home alone with his son, then aged thirteen. Defendant told the boy to go upstairs and, having followed him to his room, directed him to remove his clothes. At first the child refused. However, when told to "[d]o it anyway," he obeyed defendant's order. Defendant then took off his own pants and had anal intercourse with his son. He threatened to hurt the boy if anyone found out what had transpired between them.

A friend to whom the boy later confided details of the incident informed the Department of Social Services (DSS), and defendant's children were removed from the home. This friend and Debbie Spence of the DSS testified as to what the children had told them about defendant's abuse. These statements were consistent with the children's testimony at trial. Public health nurse Louise Ervin provided additional corroboration, testifying that she had interviewed defendant at Perquimans Health Department on 21 May 1985 because he was concerned about symptoms of a sexually transmittable disease. Defendant stated to Ms. Ervin that he had had sexual contact with his son and daughter.

Defendant did not testify on his own behalf but presented evidence tending to show that his daughter vaguely remembered telling her mother when she was six years old that defendant had touched her breasts. Otherwise she had never complained of sexual abuse to friends or family members until DSS workers began asking questions about her father in May of 1985. Defendant's son learned about sexual abuse from a film at school and knew defendant would get into trouble if accused of molesting his children. He admitted that defendant had previously threatened to send him to training school because of disciplinary problems at home. Both children had gone over their testimony with the prosecutor, a police officer, and Debbie Spence a number of times prior to trial. Medical examinations of the children on 4 May 1985

revealed no bruising or tearing of the tissues or other physical evidence of sexual abuse.

**[1]** Defendant presents four assignments of error for our consideration. He first attacks the competency of nurse Louise Ervin's testimony insofar as it disclosed defendant's admission of sexual contact with his children. Ms. Ervin testified as follows:

> Q. Mrs. Ervin, at the time that you—after you asked the defendant what, if anything, you could do for him, did you later in your discussion with him ask him the question who he had had sexual contacts with?
>
> MR. HALSTEAD: Objection. Leading.
>
> THE COURT: Overruled.
>
> Q. You may answer the question.
>
> A. Yes, I did.
>
> Q. And when you asked him the question, who he had had sexual contacts with, what did he tell you?
>
> A. He said he had had contacts with his wife, his son, his daughter, and a girl in Edenton.
>
> Q. His wife, his son, his daughter, and a girl in Edenton?
>
> A. Uh-huh.
>
> Q. And whenever you—when he told you that, did you ask him or specify to him again, or did you ask the question of him again or specify what you meant to him?
>
> A. Yes, I did.
>
> Q. And in what way did you do that?
>
> A. I told Mr. Etheridge that this was sexual contact we were talking about.
>
> Q. All right. And whenever you did that, did he make some—make an additional response and say something else to you?
>
> A. He repeated what he had said.
>
> Q. And what exactly did he repeat?

A. He said that he had had contact with his wife, his son, his daughter, and a girl in Edenton.

At trial defendant sought to invoke the protections of the physician-patient privilege under N.C.G.S. § 8-53 to bar the admission of this testimony. That statute provides, in part:

§ 8-53. Communications between physician and patient.

No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, and no such information shall be considered public records under G.S. 132-1.

Defendant correctly notes that this privilege applies to communications with a nurse acting under the direction of a physician. *State v. Efird*, 309 N.C. 802, 309 S.E. 2d 228 (1983). Defendant insists that the prosecutor's statement during voir dire that "a licensed public health nurse working under the supervision of the Health Department would certainly come under the physician/patient privilege from my understanding of it," is sufficient to bring Ms. Ervin's testimony within the purview of the statute. However, we find it wholly unnecessary to resolve the issue of whether Ms. Ervin in this instance acted under the direction of a physician. Any privilege of confidentiality to which defendant might possibly have been entitled by section 8-53 was nullified by N.C.G.S. §§ 8-53.1 and 7A-551 under the facts of this case.

Section 8-53.1 qualifies section 8-53 as follows:

§ 8-53.1. Physician-patient privilege waived in child abuse.

Notwithstanding the provisions of G.S. 8-53, the physician-patient privilege shall not be ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the North Carolina Juvenile Code, Subchapter XI of Chapter 7A of the General Statutes of North Carolina.

Section 8-53.1 is to be read in pari materia with section 7A-551. *Efird*, 309 N.C. at 805, 309 S.E. 2d at 230. Section 7A-551 provides:

> § 7A-551. Privileges not grounds for excluding evidence.
>
> Neither the physician-patient privilege nor the husband-wife privilege shall be grounds for excluding evidence of abuse or neglect in any judicial proceeding (civil, criminal, or juvenile) in which a juvenile's abuse or neglect is in issue nor in any judicial proceeding resulting from a report submitted under this Article, both as said privileges relate to the competency of the witness and to the exclusion of confidential communications.

We agree with this Court's succinct assessment of the implications of N.C.G.S. §§ 8-53.1 and 7A-551 as stated in *Efird*: "In essence, the physician-patient privilege, created by N.C. Gen. Stat. § 8-53, is not available in cases involving child abuse." 309 N.C. at 805, 309 S.E. 2d at 230. Defendant attempts to distinguish his situation from that in *Efird* in order to avoid application of this general rule. In *Efird*, the perpetrator had been treated for a sexually transmitted disease some months before he was actually implicated in the rape of his young stepdaughter. Here, on the other hand, defendant only sought treatment *after* he had been charged with sexual crimes and taken into custody. Defendant urges, based upon this discrepancy in timing, that his case should not be controlled by the provisions of sections 8-53.1 and 7A-551. Defendant premises this argument upon the notion that one of the primary objectives of the section 8-53 privilege is to encourage free disclosure of medical information which can curb the spread of communicable disease. To remove the privilege after an accused has already been charged, defendant claims, undermines this policy and endangers public health by deterring accused persons with sexually transmitted diseases from naming their sexual contacts. Defendant contends that such an effect was not contemplated by the legislature when it enacted sections 8-53.1 and 7A-551.

We find nothing in our examination of the statutes to support defendant's view. The language of each is all-inclusive. Section 8-53.1 allows evidence of abuse "in *any* judicial proceeding *related to a report* pursuant to the North Carolina Juvenile Code," while

section 7A-551 allows such evidence "in *any* judicial proceeding . . . in which a juvenile's *abuse or neglect is in issue.*" (Emphases added.) Clearly this case involves abuse of juveniles and arose from a report to the DSS, which fits the description of "a report pursuant to the North Carolina Juvenile Code." *See* N.C.G.S. § 7A-543 (1986). We believe the legislature, in balancing the need for confidential medical treatment against the need to protect child victims, opted to provide the broadest possible exceptions to the physician-patient privilege. The statutes plainly facilitate the prosecution of child abusers, without regard to whether the medical information was obtained before or after the accused was officially charged with a crime.

**[2]** Defendant argues alternatively that Ms. Ervin's testimony should have been barred under N.C.G.S. § 130A-163, which provides:

> § 130A-163. Confidentiality of venereal disease information and records.
>
> Except as necessary to enforce the provisions of this Part and its rules concerning the control and treatment of venereal disease, all personally identifiable information or records held by the Department, local health departments or licensed physicians relating to known or suspected cases of venereal disease shall be confidential and shall not be public records. However, all suspected cases of abused juveniles shall be reported in accordance with Article 44 of Chapter 7A of the General Statutes and information or records held by the Department, local health departments or licensed physicians shall be admissible in any judicial proceeding in which a juvenile's abuse or neglect is in issue or in any judicial proceeding resulting from a report submitted under Article 44 of Chapter 7A of the General Statutes if the material is disclosed in camera.

Specifically, defendant complains that the information related by Ms. Ervin was not admissible because it was not disclosed in camera. Instead, the trial judge removed the jury and conducted a voir dire in open court without excluding the spectators then present.

We do not find it necessary to determine whether the trial judge's action complied with the statute because the record

discloses that although the state had provided defendant with a copy of Ms. Ervin's written health department report, he never requested a hearing in camera. We hold that defendant's failure to apprise the judge of any objection to proceeding with the voir dire in open court constituted a waiver of such objection. The general rule is that objections to or requests for particular procedures must be timely, allowing the trial judge an opportunity to take action thereon. *E.g., State v. Payne*, 312 N.C. 647, 325 S.E. 2d 205 (1985) (absent timely request for voir dire on admissibility of testimony, the trial court need not conduct one); *State v. Cox*, 303 N.C. 75, 277 S.E. 2d 376 (1981) (objection must be made to offered evidence as soon as the party objecting has the opportunity to discover its objectionable nature); *State v. Hopper*, 292 N.C. 580, 234 S.E. 2d 580 (1977) (an objection comes too late when it is lodged only after the jury has heard the entire contents of the objectionable testimony); *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied*, 423 U.S. 1091 (1976) (requests for further jury instructions are timely only if tendered before the jury retires; codified by N.C.R. App. P. 10(b)(2)).

Defendant was fully aware of the delicate contents of Ms. Ervin's report and should have allowed the court an opportunity to exclude spectators before the testimony began. As the trial judge noted in the record:

> The Court had not anticipated that testimony concerning information in the records, which may have been confidentially obtained by the Health Department from the defendant, were to be the subject matter to be elicited from the witness until the witness Ervin had revealed this information.
>
> At the time the witness revealed the confidential venereal disease information solicited by the witness Ervin from the defendant, neither the State nor the defendant had requested an in-camera hearing, and this information was revealed to all the persons then in the courtroom.

Defendant must not be permitted to take advantage of his own failure to request the in camera hearing, for, as this Court has long recognized,

> it would be detrimental to public justice to allow a prisoner to remain silent, awaiting the chances of an acquittal, and, if

> disappointed in the result, to fall back upon a reserved exception, the substance of which is kept from the knowledge of the Court, when, if known, it could have been provided against.

*State v. Gee*, 92 N.C. 756, 763 (1885).

**[3]** Finally, defendant contends that Ms. Ervin's testimony should have been excluded as obtained in violation of his fifth amendment privilege against self-incrimination because he was not given Miranda warnings prior to his interview at the health department. We note at the outset that defendant raised no constitutional claim at trial and therefore has waived this issue on appeal. *State v. Creason*, 313 N.C. 122, 326 S.E. 2d 24 (1985); *Stone v. Lynch*, 312 N.C. 739, 325 S.E. 2d 230 (1985); *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982). Even if we were to consider the merits of this argument, however, defendant would not prevail.

The Miranda ruling applies only to custodial interrogations. *State v. Sykes*, 285 N.C. 202, 203 S.E. 2d 849 (1974). Custodial interrogation refers to questioning initiated by law enforcement officers after the accused has been deprived of his freedom. *State v. Thomas*, 284 N.C. 212, 200 S.E. 2d 3 (1973). Because of this limitation on Miranda's reach, statements made to private individuals unconnected with law enforcement are admissible so long as they were made freely and voluntarily. *See State v. Spence*, 271 N.C. 23, 155 S.E. 2d 802 (1967), *remanded*, 392 U.S. 649, 20 L.Ed. 2d 1350, *rev'd on other grounds*, 274 N.C. 536, 164 S.E. 2d 593 (1968); *In re Simmons*, 24 N.C. App. 28, 210 S.E. 2d 84 (1974).

Our appellate court decisions are replete with examples of individuals who, though occupying some official capacity or ostensible position of authority, have been ruled unconnected to law enforcement for Miranda purposes. *See State v. Barnett*, 307 N.C. 608, 300 S.E. 2d 340 (1983) (magistrate not government agent where no evidence that police requested that he speak to defendant); *State v. Conard*, 55 N.C. App. 63, 284 S.E. 2d 557 (1981), *disc. rev. denied*, 305 N.C. 303, 290 S.E. 2d 704 (1982) (magistrate not a representative of the police); *State v. Perry*, 50 N.C. App. 540, 274 S.E. 2d 261, *disc. rev. denied*, 302 N.C. 632, 280 S.E. 2d 446 (1981) (bail bondsman not a law enforcement officer in spite of ability to make arrests); *In re Weaver*, 43 N.C. App. 222, 258 S.E. 2d 492 (1979) (DSS worker not acting on behalf of law enforcement of-

ficers); *State v. Johnson*, 29 N.C. App. 141, 223 S.E. 2d 400, *disc. rev. denied*, 290 N.C. 310, 225 S.E. 2d 831 (1976) (radio dispatcher employed by police department not acting as a law enforcement officer). Particularly illuminating are those cases holding that medical personnel and hospital workers did not function as agents of the police where the accused made incriminating statements on his own initiative, out of the presence of police, and in response to questions not supplied by police. *See, e.g., State v. Alston*, 295 N.C. 629, 247 S.E. 2d 898 (1978) (statement to hospital desk clerk admissible); *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975) (statements to nurse, doctor, and medical attendant admissible).

Here, as in those cases, we find no indication that Ms. Ervin acted as an agent of the state, the police, or the prosecution. Defendant himself requested that he be taken to the health department, and the accommodation of this request was not related to the criminal investigation. Although transported to the health department in the custody of a police officer, defendant was allowed a private interview with Ms. Ervin out of the officer's presence. He was asked only routine questions from a standard form used for patients complaining of sexually transmitted diseases. Defendant was not under any compulsion to answer the questions and the record reveals no evidence of subtle coercion in the exchange. Defendant's statements were freely and voluntarily given.

In sum, we hold that Ms. Ervin's testimony was not barred by the physician-patient privilege under N.C.G.S. § 8-53, the requirement of confidentiality of venereal disease records under N.C.G.S. § 130A-163, or the privilege against self-incrimination. For all the reasons stated above, we hold that the testimony was properly admitted.

**[4]** Defendant next contends that the trial court erroneously denied his motion to dismiss the charge of sexual offense in the second degree. He argues that the state failed to present the evidence of force necessary to sustain his conviction of the offense under N.C.G.S. § 14-27.5. In overruling this assignment of error, we take this opportunity to elaborate upon our recent limitation of the holding in *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984), and to disavow its misbegotten offspring. *State v. Lester*,

70 N.C. App. 757, 321 S.E. 2d 166 (1984), *aff'd per curiam*, 313 N.C. 595, 330 S.E. 2d 205 (1985).

For the act of anal intercourse with his son, defendant was convicted under section 14-27.5, which provides in pertinent part:

> § 14-27.5. Second-degree sexual offense.
>
> (a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:
>
> (1) By force and against the will of the other person;
>
> . . .

The phrase "by force and against the will of the other person" means the same as it did at common law when it was used to describe an element of rape. *State v. Locklear*, 304 N.C. 534, 284 S.E. 2d 500 (1981). The requisite force may be established either by actual, physical force or by constructive force in the form of fear, fright, or coercion. *State v. Hines*, 286 N.C. 377, 211 S.E. 2d 201 (1975). Constructive force is demonstrated by proof of threats or other actions by the defendant which compel the victim's submission to sexual acts. *See State v. Burns*, 287 N.C. 102, 214 S.E. 2d 56, *cert. denied*, 423 U.S. 933, 46 L.Ed. 2d 264 (1975) (threat of serious bodily injury sufficient to constitute constructive force). Threats need not be explicit so long as the totality of circumstances allows a reasonable inference that such compulsion was the unspoken purpose of the threat. *State v. Barnette*, 304 N.C. 447, 284 S.E. 2d 298 (1981).

Defendant argues that both actual and constructive force were conspicuously absent from the incident of anal intercourse as described by his son. He bases this contention on the reasoning in *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470, and *State v. Lester*, 70 N.C. App. 757, 321 S.E. 2d 166, *aff'd per curiam*, 313 N.C. 595, 330 S.E. 2d 205. We hold that *Lester* carried *Alston* far beyond its intended scope and that defendant's reliance on the two decisions is inappropriate under the facts of this case.

The facts giving rise to *Alston* were unusual ones. The prosecutrix, one Ms. Brown, had engaged in a consensual, though somewhat turbulent, sexual relationship with the defendant for six months prior to the alleged rape. The relationship involved some

violence by the defendant, who struck Ms. Brown when she refused him money, and some passivity by Ms. Brown, who on several occasions remained entirely motionless while the defendant undressed her and had intercourse with her. On the day of the alleged rape, the defendant waited outside the school which Ms. Brown attended. He grabbed her arm and told her she was going with him. As they walked away, he threatened to "fix" her face. The two then walked around the neighborhood and discussed their relationship, eventually arriving at the home of the defendant's friend. The defendant began to undress Ms. Brown and told her to lie down on the bed. She complied, whereupon he pushed her legs apart and had intercourse with her. She cried but attempted no physical resistance.

This Court, recognizing that Ms. Brown's prior consensual relationship with the defendant rendered any inquiry on the issue of force more difficult, determined that the acts complained of were committed against Ms. Brown's will but were not committed forcibly. We noted that the defendant's grabbing of Ms. Brown and his threat to "fix" her face, "although they may have induced fear, appeared to have been unrelated to the act of sexual intercourse between Brown and the defendant." We thereupon concluded that "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 476.

In *Lester*, the Court of Appeals applied the *Alston* "general fear" rationale to an intrafamilial sexual assault. The defendant in that case was convicted of two counts of raping his fifteen-year-old daughter. He had engaged in sexual intercourse with the child since she was eleven years old and had threatened to kill her if anyone learned of his actions. The defendant had also beaten the child's mother in her presence and had pointed a gun at his children. Before each of the two incidents charged, the defendant told his daughter to remove her clothes. Both times she initially refused but capitulated upon the second demand because her father seemed to be getting angry. The defendant then had intercourse with her. He neither used physical force nor threatened its use expressly, and the child made no attempt to resist. The Court of

Appeals held that, in light of *Alston*, "the victim's fear of defendant, however justified by his previous conduct" was insufficiently related to the intercourse to show that it had been forcible. This Court summarily affirmed.

We now disavow *Lester*'s misapplication of the *Alston* "general fear" rationale to a case of intrafamilial sexual abuse. As we noted in *State v. Strickland*, 318 N.C. 653, 351 S.E. 2d 281 (1987), the "general fear" theory should be applied only to those situations which are factually similar to *Alston*. Sexual activity between a parent and a minor child is not comparable to sexual activity between two adults with a history of consensual intercourse. The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose. We therefore expressly overrule *State v. Lester*, 70 N.C. App. 757, 321 S.E. 2d 166, *aff'd per curiam*, 313 N.C. 595, 330 S.E. 2d 205.

**[5]** Having overruled *Lester* and limited *Alston* to its peculiar facts, we return to our consideration of whether the evidence of force presented in the instant case was sufficient to withstand defendant's motion to dismiss. Upon a motion to dismiss in a criminal prosecution, the trial court must view the evidence in the light most favorable to the state, giving the state the benefit of every reasonable inference that might be drawn therefrom. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). The trial judge must decide if there is substantial evidence of each element of the offense charged. Substantial evidence means 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).

We hold that constructive force could be reasonably inferred from the circumstances surrounding the parent-child relationship in this case. Defendant began abusing his son when the boy was only eight years old. Like his sister, the child was conditioned to succumb to defendant's illicit advances at an age when he could not yet fully comprehend the implications of defendant's conduct. Not until he saw a film at school did the boy realize that defendant's behavior was considered improper and abusive. The incidents of abuse all occurred while the boy lived as an uneman-

cipated minor in defendant's household, subject to defendant's parental authority and threats of disciplinary action.

In the incident charged, defendant said no more than "[d]o it anyway" when his son initially refused to disrobe. It is nonetheless reasonable to conclude that these words carried a great deal more menace than is apparent on the surface, for a father's threat to impose punishment upon a child who refuses to obey his commands need not be stated in so many words. The child's knowledge of his father's power may alone induce fear sufficient to overcome his will to resist, and the child may acquiesce rather than risk his father's wrath. As one commentator observes, force can be understood in some contexts as the power one need not use. Estrich, *Rape*, 95 Yale L.J. 1087, 1115 (1986).

In such cases the parent wields authority as another assailant might wield a weapon. The authority itself intimidates; the implicit threat to exercise it coerces. Coercion, as stated above, is a form of constructive force. For this reason, we hold that the state presented sufficient evidence from which the jury could reasonably infer that defendant used his position of power to force his son's participation in sexual acts.

**[6]** Defendant next contends that the trial court erred in denying his motion to dismiss all charges of taking indecent liberties with his children. He claims that the state presented insufficient evidence to prove a violation of N.C.G.S. § 14-202.1, which defines the crime as follows:

> § 14-202.1. Taking indecent liberties with children.
>
> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

Defendant was convicted on five counts of indecent liberties under section 14-202.1(a)(1), each count coinciding with an episode of intercourse described by one of the children. In support of the charges, the state presented evidence that in each instance defendant ordered his victim to undress and lie down, then exposed his penis before proceeding with the act of intercourse.

We note first that it is not necessary that defendant touch his victim to commit an immoral, improper, or indecent liberty within the meaning of the statute. *State v. Turman*, 52 N.C. App. 376, 278 S.E. 2d 574 (1981). Thus it has been held that the photographing of a naked child in a sexually suggestive pose is an activity contemplated by the statute, *State v. Kistle*, 59 N.C. App. 724, 297 S.E. 2d 626 (1982), *disc. rev. denied*, 307 N.C. 471, 298 S.E. 2d 694 (1983), as is masturbation within a child's sight, *State v. Turman*, 52 N.C. App. 376, 278 S.E. 2d 574, and a defendant's act of exposing his penis and placing his hand upon it while in close proximity to a child, *State v. Hicks*, 79 N.C. App. 599, 339 S.E. 2d 806 (1986). These decisions demonstrate that a variety of acts may be considered indecent and may be performed to provide sexual gratification to the actor. Indeed, the legislature enacted section 14-202.1 to encompass more types of deviant behavior, giving children broader protection than available under other statutes proscribing sexual acts. *State v. Harward*, 264 N.C. 746, 142 S.E. 2d 691 (1965). We find that defendant's actions fall well within the broad category of indecent liberties.

However, defendant argues further that his conduct did not demonstrate any intent to arouse or gratify his sexual desire apart from his overall intent to commit rape or crime against nature. We disagree.

A sexual encounter encompasses a number of independent but related actions, any and all of which may be undertaken for the purpose of arousal. Here the penetration of the victim, while perhaps defendant's ultimate goal, was not the only event in the sequence which could be found to have been performed for his gratification. While we do not care to speculate upon all possible motivations involved in human sexual behavior, we hold that the jury could properly infer that defendant ordered his children to undress, demanded that they assume submissive, sexually suggestive positions, and brandished his penis before them in their

naked and helpless condition for the purpose of arousing or gratifying his sexual desire.

**[7]** In his final assignment of error, defendant contends that he received multiple punishments for the same acts, in violation of the double jeopardy clauses of the state and federal constitutions. For each episode of intercourse with his daughter, defendant was convicted of statutory rape, taking indecent liberties with a child, and incest. The episode of anal intercourse with his son yielded convictions of crime against nature, taking indecent liberties with a child, and sexual offense in the second degree.

Both the fifth amendment to the United States Constitution and article I, section 19 of the North Carolina Constitution prohibit multiple punishments for the *same* offense absent clear legislative intent to the contrary. *Missouri v. Hunter*, 459 U.S. 359, 74 L.Ed. 2d 535 (1983). That the offenses were consolidated for judgment does not put to rest double jeopardy issues, because the separate convictions may still give rise to adverse collateral consequences. *Ball v. United States*, 470 U.S. 856, 84 L.Ed. 2d 740 (1985); *see also State v. Summrell*, 282 N.C. 157, 192 S.E. 2d 569 (1972).

Where, as here, a single criminal transaction constitutes a violation of more than one criminal statute, the test to determine if the elements of the offenses are the same is whether each statute requires proof of a fact which the others do not. *Blockburger v. United States*, 284 U.S. 299, 76 L.Ed. 306 (1932); *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982). By definition, all the essential elements of a lesser included offense are also elements of the greater offense. Invariably then, a lesser included offense requires no proof beyond that required for the greater offense, and the two crimes are considered identical for double jeopardy purposes. *Brown v. Ohio*, 432 U.S. 161, 53 L.Ed. 2d 187 (1977); *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980). If neither crime constitutes a lesser included offense of the other, the convictions will fail to support a plea of double jeopardy. *See State v. Walden*, 306 N.C. 466, 293 S.E. 2d 780 (1982).

Defendant correctly concedes that our courts have already largely determined that the crimes charged in this case are not identical. *See State v. Warren*, 309 N.C. 224, 306 S.E. 2d 446 (1983) (crime against nature is not a lesser included offense of sex-

ual offense in the second degree); *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982) (indecent liberties is not a lesser included offense of statutory rape); *State v. Copeland*, 11 N.C. App. 516, 181 S.E. 2d 722, *cert. denied*, 279 N.C. 512, 183 S.E. 2d 688 (1971) (indecent liberties is not a lesser included offense of crime against nature). Clearly incest, which requires proof of a familial relationship, is not a lesser included offense of statutory rape; nor is indecent liberties, which requires proof of a sexual purpose, a lesser included offense of incest or sexual offense in the second degree. We hold that the convictions of statutory rape, taking indecent liberties with a child, and incest, all arising out of the same transaction, did not violate defendant's rights against double jeopardy. The three are legally separate and distinct crimes, none of which is a lesser included offense of another. By the same token, we hold that crime against nature, taking indecent liberties with a child, and sexual offense in the second degree are legally separate and distinct crimes and that convictions for all three crimes arising out of the same transaction did not place defendant in double jeopardy.

No error.

Justice WEBB dissenting.

I dissent from that portion of the majority opinion which holds that *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984), does not require that we hold there was insufficient evidence to find the defendant guilty of second degree sexual offense.

In *Alston* the evidence showed that the defendant had abused the prosecuting witness on past occasions and had, on the occasion in question, forced her to accompany him by twisting her arm. He also threatened to "fix her face." This Court said the evidence showed that the victim had a general fear of the defendant and that the sexual intercourse was against her will. This Court nevertheless said "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." *Id.* at 409, 312 S.E. 2d at 476. (Emphasis in original.) I do not see how we could have a clearer holding that, although a victim may be justifiably afraid of

a person and may testify that she only submitted because of a fear of what he might do if she did not submit, there still must be evidence of force or of a specific threat if she does not submit in order for the jury to find there was force. I do not believe this is consistent with reality but it is the way I believe *Alston* has to be read.

In this case the majority distinguishes *Alston* on the ground that the sex act in this case is between a father and his minor son. I agree that a father stands in a position of authority towards his son and that the son could have a legitimate fear of not doing the father's will. The difficulty for me with the majority's distinction is that the victim in *Alston* had an equal fear and yet this Court held there had to be a specific threat. That is the reason I believe the majority's distinction between this case and *Alston* is one without a difference.

For the reasons stated in this dissent I believe it is error to overrule *State v. Lester*, 70 N.C. App. 757, 321 S.E. 2d 166 (1984), *aff'd per curiam*, 313 N.C. 595, 330 S.E. 2d 205 (1985), without overruling *Alston*.

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JACKSON COUNTY BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY, EX REL. ANNETTE JACKSON v. JOHN WESLEY SWAYNEY

No. 461A85

(Filed 3 February 1987)

1. **Indians § 1— public assistance, future child support, and paternity—actions involving Cherokee Indians—no federal preemption**

Federal laws and regulations did not preempt the exercise of state court subject matter jurisdiction over actions to establish paternity, to collect a debt to the State for past AFDC payments, and to obtain future child support involving a mother, child and putative father who are all members of the Eastern Band of Cherokee Indians residing on the Indian reservation.

2. **Indians § 1— past public assistance and future child support—action against Cherokee Indian—jurisdiction of state court**

The exercise of state court jurisdiction over actions against a Cherokee Indian living on the Indian reservation to recover debts for the payment of past public assistance under the AFDC program and to secure payments for future child support mandated by the AFDC program does not unduly infringe

on the self-governance of the Eastern Band of Cherokee Indians, and state courts thus have subject matter jurisdiction over such actions.

3. **Indians § 1— paternity action involving Cherokee Indians—lack of jurisdiction in state court**

The exercise of state court jurisdiction over a paternity action when the mother, child and putative father are all members of the Eastern Band of Cherokee Indians living on the reservation unduly infringes on tribal self-governance, and the state courts thus lack subject matter jurisdiction of such an action.

Justices WEBB and WHICHARD did not participate in the consideration or decision of this case.

APPEAL by plaintiff from the decision of a divided panel of the Court of Appeals, 75 N.C. App. 629, 331 S.E. 2d 145 (1985), affirming an order granting defendant's motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure by *Snow, J.*, at the 16 July 1984 Civil Session of Superior Court, JACKSON County. Heard in the Supreme Court 18 December 1985.

*Lacy H. Thornburg, Attorney General, by Robert E. Cansler, Assistant Attorney General, for plaintiff-appellant.*

*Coward, Dillard, Cabler, Sossomon & Hicks, by Creighton W. Sossomon, for defendant-appellee.*

FRYE, Justice.

On 2 April 1982, plaintiff, by and through its Child Support Enforcement Agency, brought suit against defendant seeking to have him adjudicated the father of minor Kevin Jackson, to collect a debt owed to the State for past public assistance,[1] Aid to Families with Dependent Children (AFDC), paid for the minor's benefit, and to obtain an order requiring defendant to make future payments of support for the child. Annette Jackson, mother of Kevin Jackson, stated under oath that defendant is the biological father of her child. Defendant, Ms. Jackson, and Kevin are all members of the Eastern Band of Cherokee Indians residing on the Indian reservation. The office of the Jackson County Department of Social Services where Ms. Jackson applied for AFDC benefits

1. By accepting public assistance on behalf of a dependent child, the recipient is deemed to have made an assignment to the State or to the county from which such assistance was received and the State or county is subrogated to the right of the child or the person having custody to initiate a support action. N.C.G.S. § 110-137 (1978 & Cum. Supp. 1985).

and assigned her rights to support for her minor child is located within the exterior boundaries of the reservation.

Defendant filed a general answer to plaintiff's complaint but failed to raise any defenses under N.C.G.S. § 1A-1, Rule 12(b)(1) (lack of subject matter jurisdiction and (2) (lack of personal jurisdiction). Defendant filed a subsequent motion to dismiss pursuant to Rule 12(b)(1) and (2). This motion was granted by the trial court on 16 July 1984.

Plaintiff appealed to the Court of Appeals which affirmed the decision of the lower court as to dismissal on the Rule 12(b)(1) motion only. The Court of Appeals held that since defendant did not raise the 12(b)(2) motion before or with his answer, he was deemed to have waived his objection to the State's exercise of personal jurisdiction over him. On the issue of subject matter jurisdiction, the Court of Appeals found that federal law, 25 C.F.R. §§ 11.22 and 11.30, preempted State jurisdiction in this case. The court held that "after considering the well established rules of federal preemption, in conjunction with the two specific federal regulations . . . we hold that plaintiff must litigate this matter in the Court of Indian Offenses, and that our Courts of General Justice lack the necessary subject matter jurisdiction where the defendant is a member of the Eastern Band of Cherokee Indians who resides on the reservation." Plaintiff appeals the decision of the Court of Appeals pursuant to N.C.G.S. § 7A-30(2).

Plaintiff contends that the Court of Appeals erred in holding that the trial court lacked subject matter jurisdiction in this case where the defendant is a member of the Eastern Band of Cherokee Indians and resides on the Indian reservation because there are compelling reasons to require state jurisdiction in cases of this nature. Defendant argues that state jurisdiction in this case has been preempted by federal law, and therefore the matter is exclusively within the province of the Eastern Band's Court of Indian Offenses.[2]

I.

While the subject of Indian law is broad and "generalizations on this subject have become treacherous," *Mescalero Apache*

2. The Court of Indian Offenses for the Eastern Band of Cherokee Indians commenced operation on 28 July 1980.

*Tribe v. Jones*, 411 U.S. 145, 148, 36 L.Ed. 2d 114, 119 (1973), there are several basic principles which have been set forth by the United States Supreme Court in numerous decisions with respect to the boundaries between state regulatory authority and tribal self-government. In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 65 L.Ed. 2d 665 (1980), the Court stated:

> Long ago the Court departed from Mr. Chief Justice Marshall's view that 'the laws of [a state] can have no force' within reservation boundaries. At the same time we have recognized that the Indian tribes retain 'attributes of sovereignty over both their members and their territory.' As a result, there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members. The status of the tribes has been described as 'an anomalous one and of complex character,' for despite their partial assimilation into American culture, the tribes have retained 'a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as *a separate people, with the power of regulating their internal and social relations*, and thus far not brought under the laws of the Union or of the State within whose limits they reside.'
>
> Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3. This congressional authority and the 'semi-independent position' of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. *First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'* The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'back drop'

against which vague or ambiguous federal enactments must always be measured. (Citations omitted.) (Emphases added.)

II.

A.

**[1]** We consider first whether the exercise of state-court jurisdiction in this case is preempted by federal law. The United States Supreme Court has "rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144, 65 L.Ed. 2d 665, 673. Rather, the State's power over Indian tribes must be determined in light of the federal government's plenary power over all Indians. *Wildcatt v. Smith*, 69 N.C. App. 1, 6, 316 S.E. 2d 870, 873 (1984). State action may be barred upon a showing of congressional intent to "occupy the field" and prohibit parallel state action. *Id. See also In re Halloway*, No. 20519 (Utah Dec. 5, 1986) (Lexis, Utah library, Utah file).

Defendant cites no federal statutes but refers us instead to two federal regulations which he contends preempt the exercise of state court subject matter jurisdiction in the case *sub judice*.

25 C.F.R. § 11.22 *Jurisdiction* provides:

> The Court of Indian Offenses shall have jurisdiction of all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and of all other suits between members and non-members which are brought before the courts by stipulation of both parties. No judgment shall be given on any suit unless the defendant has actually received notice of such suit and ample opportunity to appear in court in his defense . . . .

25 C.F.R. § 11.22 (1986).

25 C.F.R. § 11.30 *Determination of paternity and support* provides:

> The Court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child. A judgment of the court establishing the identity of the father of the child

shall be conclusive of that fact in all subsequent determinations of inheritance by the Department of the Interior or by the Court of Indian Offenses.[3]

25 C.F.R. § 11.30 (1986).

Defendant contends that these two regulations establish the exclusive jurisdiction of the Court of Indian Offenses over all of the claims brought against him by the State. He emphasizes the parallel wording found in both regulations, that the Court of Indian Offenses "shall have jurisdiction of *all* suits . . . ." 25 C.F.R. §§ 11.22 and 11.30 (1986). He interprets this wording as depriving the State courts of subject matter jurisdiction in the instant case. The language of these regulations, defendant contends, clearly shows that the intent of Congress was to preempt the entire field of jurisdiction of state courts over Indian defendants in civil actions, once the Tribal Court system is mobilized.

We do not agree. These two regulations form part of the enabling legislation of the Court of Indian Offenses. We believe that these regulations merely enable the Court of Indian Offenses to exercise original jurisdiction over the various types of actions and categories of people described therein. We do not find that these enabling regulations, standing alone, are so pervasive as to "occupy the field" in this area and accordingly preempt the State from exercising any jurisdiction that it may already lawfully possess. Nor do we believe that the mere establishment of such a court necessarily deprives the State of all such jurisdiction. *Contra, Wildcatt v. Smith*, 69 N.C. App. 1, 316 S.E. 2d 870.

B.

As a general proposition, the states have only such power over the affairs of Indians living on a reservation as is granted by Congress. *See* Bridgers, *An Historical Analysis of the Legal Status of the North Carolina Cherokees*, 58 N.C.L. Rev. 1075, 1129 (1980). However, the Treaty of New Echota, 29 December 1835, United States—Cherokee Indians, 7 Stat. 478 (ceding all remain-

3. Federal regulations 25 C.F.R. §§ 11.22 and 11.30 were drafted under authority granted by Congress in 25 U.S.C. § 2 (1832) which provides that "the Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the president may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations."

ing Cherokee territory east of the Mississippi) gave the State of North Carolina jurisdiction over the individuals and families who remained in the State when the rest of the Cherokee were removed to Oklahoma. *Eastern Band of Cherokee Indians v. United States*, 117 U.S. 288, 29 L.Ed. 880 (1866) ("The Cherokee Trust Funds"). While subsequent federal action has clearly eroded the State's ability to exercise this jurisdiction, *see Eastern Band of Cherokee Indians v. Lynch*, 632 F. 2d 373, 377-78 (4th Cir. 1980) (cites several areas where federal law currently preempts state action), nothing presently before this Court convinces us that federal law preempts the exercise of subject matter jurisdiction by this State's courts in the instant case.[4] We therefore disagree with the Court of Appeals' conclusion that federal law preempts the exercise of subject matter jurisdiction by our State courts in this case.

C.

Having disposed of the doctrine of federal preemption as a barrier, we next consider whether the exercise of state court jurisdiction unduly infringes[5] on the self-governance of the Eastern Band of Cherokee Indians. The appropriate test is stated in *Williams v. Lee*, 358 U.S. 217, 220, 3 L.Ed. 2d 251, 254 (1959), which provides that:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of the reservation Indians to make their own laws and be ruled by them.

The *Williams* test is principally applicable in situations involving a non-Indian party.[6] *McClanahan v. Arizona State Tax*

4. Neither Public Law 280 (ceding to various states criminal and civil jurisdiction over named Indian tribes and providing a mechanism for other states to obtain jurisdiction over reservation Indians within their boundaries) nor Title IV of the 1968 Indian Civil Rights Act (repealing portions of Public Law 280 and substituting a different mechanism for the extension of state jurisdiction) divested states of jurisdiction properly assumed prior to the enactment of the statute. *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 81 L.Ed. 2d 113 (1984).

5. This has been commonly referred to as the infringement test. *See* S. Sherick, *State Jurisdiction Over Indians As A Subject of Federal Common Law: The Infringement-Preemption Test*, 21 Ariz. L. Rev. 85 (1979).

6. The instant case involves an Indian defendant and a non-Indian plaintiff (Jackson County). Ms. Jackson's right to child support was assigned to the county

*Commission*, 411 U.S. 164, 179, 36 L.Ed. 2d 129, 140 (1973). "In these situations, both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions." *Id.* This infringement test "was designed to resolve the conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." *Id.*

In *New Mexico ex rel. Dept. of Human Services v. Jojola*, 99 N.M. 500, 660 P. 2d 590, *cert. denied*, 464 U.S. 803, 78 L.Ed. 2d 69 (1984), the New Mexico Supreme Court held that the state court had subject matter jurisdiction over an action by the New Mexico Department of Human Services (DHS) to determine whether an Indian defendant was the natural father of a minor child and to require defendant to make monthly child support payments. The court, applying the *Williams* test, found no Acts of Congress governing jurisdiction in the case, and therefore proceeded to determine whether the state action infringed on the right of the reservation Indians to make their own laws and be ruled by them. Three criteria were found to bear on the question of state court jurisdiction: (1) whether the parties are Indians or non-Indians, (2) whether the cause of action arose within the Indian reservation, and (3) the nature of the interest to be protected. *Id.* at 502-3, 660 P. 2d at 592. The court in *Jojola* found that the action involved an Indian defendant and a non-Indian plaintiff (DHS), since the natural mother assigned her right to support to DHS when she accepted public assistance. The cause of action arose outside of the Indian reservation when "[the mother] filed and obtained public assistance and assigned her support rights to DHS." *Id.* at 503, 660 P. 2d at 593. The court then balanced the interest of the Indians (to govern themselves) against that of the State (the uniform enforcement of the AFDC program in New Mexico) and found no interference with the tribe's interest on the part of the state.

We consider the three criteria used by the New Mexico Supreme Court to be instructive on the issue of infringement. In this case, like *Jojola*, the plaintiff, Jackson County, is a non-Indian, and the defendant is an Indian. With respect to the second criterion, however, we are not persuaded by the New Mexico

when she accepted AFDC benefits. *See Settle v. Beasley*, 309 N.C. 616, 308 S.E. 2d 288 (1983).

court's reliance on the fact that the cause of action arose outside of the reservation when the mother filed and obtained public assistance and assigned her support rights to DHS. The foundation for the cause of action in both *Jojola* and the case *sub judice* is the determination of parentage; for unless defendant is the father of the child, there is no basis for requiring him to pay child support or reimburse the State for payments made by it. In any event, in the instant case, even the application for benefits was executed by the mother at the social services office on the reservation where the mother, the child and the defendant resided.

The final consideration requires a weighing of the relative interests affected by the exercise of state court jurisdiction. Plaintiff asserts as its interest the maintenance of the AFDC program in this State, while the interest asserted by the defendant is that of tribal self-governance. For purposes of considering the relative interests in this case, we find it necessary to consider separately the causes of action: (1) to determine the paternity of a child where the defendant is an Indian living on the reservation; and (2) to collect a debt owed to the State for past public assistance and to obtain a judgment for future child support.

**[2]** We first consider the jurisdiction of state courts over actions to collect debts owed to the State for public assistance. As a condition of participation in the AFDC program, the State must operate a Child Support Enforcement Program, 42 U.S.C. § 602(27), to secure support for the minor child from his natural parents or from any other person legally liable for the child's support. This program must be operated on a statewide basis in accordance with equitable standards for administration that are mandatory throughout the State. 45 C.F.R. 302.10(a). However, the Court of Indian Offenses is an entity created and regulated by the federal government. The State of North Carolina is therefore without power to require the tribal court to enforce debts owed to the State from persons legally liable for the child's support. The ultimate penalty for failure to comply with the required enforcement of the AFDC programs is loss of federal funding. The competing interest asserted by the defendant is that of tribal self-governance. However, we find before us nothing which suggests that the tribe's interest in self-governance would be significantly affected by the exercise of concurrent state and tribal court jurisdiction over actions to collect debts lawfully owed to the State.

We find, therefore, that the exercise of state court jurisdiction over causes of action to recover debts for payment of past public assistance does not unduly infringe on the interest of Indian self-governance.

The State's interest in exercising jurisdiction over causes of action for future child support is in essence the same state interest in exercising jurisdiction over actions for debts for payment of past public assistance—to secure payments by persons legally liable for a child's support as mandated by the AFDC program. Thus we find that the State's exercise of jurisdiction over actions for future child support mandated by the AFDC program likewise does not unduly infringe on tribal self-governance.

**[3]** A more difficult question arises when the state courts attempt to exercise jurisdiction over actions to determine paternity where the defendant is an Indian living on the reservation. The determination of the paternity of an Indian child is of special interest to tribal self-governance, the right of reservation Indians to make their own laws and be governed by them. Such determination strikes at the essence of the tribe's internal and social relations.[7] Thus, exclusive tribal court jurisdiction over the determination of paternity, where the defendant is an Indian living on the reservation, is especially important to tribal self-governance. The State's interest in having this matter litigated in its own courts is less compelling. We are aware that in cases referred to the Child Support Enforcement Program by the AFDC Program when paternity has not yet been established, the State, through its Child Support Enforcement Agency, must attempt to establish paternity by court order or legal process established under State law; or by acknowledgment if under the State law such acknowledgment has the same legal effect as court-ordered paternity. 45 C.F.R. 303.5. However, the State may resort to the Court of Indian Offenses to secure a judgment or order determining the paternity of the child, thus meeting this requirement.

7. 25 C.F.R. § 11.30 *Determination of Paternity and Support*, for example, provides that, "A judgment of the Court [of Indian Offenses] establishing the identity of the father of the child shall be conclusive of that fact in all subsequent determinations of *inheritance* by the Department of the Interior or by the Court of Indian Offenses." (Emphasis added.)

In *Fisher v. District Court*, 424 U.S. 382, 47 L.Ed. 2d 106 (1976), the United States Supreme Court, applying the infringement test, held that the exercise of state subject matter jurisdiction over a suit involving an adoption proceeding, where all of the parties were members of the Northern Cheyenne Tribe living on the reservation and the dispute arose on the reservation, interfered with the tribe's power of self-governance.[8] The Court stated:

> State-court jurisdiction plainly would interfere with powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court. It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves. As the present record illustrates, it would create a substantial risk of conflicting adjudications affecting the custody of the child and would cause a corresponding decline in the authority of the Tribal Court.

*Id.* at 387-88, 47 L.Ed. 2d at 112. Both the *Fisher* case and the case *sub judice* involve a civil proceeding requiring the determination of matters of great importance to the internal and social relations of tribal members. In *Fisher*, the cause of action required a determination of the respective rights of the Indian litigants regarding the legal parentage of an Indian child, while the cause of action here requires a determination of the biological parentage of an Indian child. As the Court found in *Fisher*, we find in the instant case that concurrent state and tribal jurisdiction over paternity would create a substantial risk of conflicting adjudication concerning respective rights of Indians living on the reservation and would undermine the authority of the tribal court. We hold, therefore, that the exercise of state court jurisdic-

8. We are not unmindful of the fact that a governmental agency is plaintiff in the instant case, whereas in *Fisher* both plaintiff and defendant were Indians. However, the cause of action in both cases requires determination of the respective rights between members of an Indian tribe residing on the reservation. In addition, the Court's reasoning in *Fisher* that a state, in asserting jurisdiction over cases between two Indians, must *at least* meet the same standards for exercising jurisdiction over cases between Indians and non-Indians indicates that the standard for establishing whether jurisdiction infringes on tribal self-governance in the case *sub judice* is not higher than the standard applied by the United States Supreme Court in *Fisher*.

tion over paternity actions where, as here, the mother, the child, and the putative father are all Indians living on the reservation unduly infringes on tribal self-governance.

For all of the reasons stated in this opinion, we conclude that our State courts lack subject matter jurisdiction to determine paternity in the instant case where the child, mother and defendant are members of the Eastern Band of Cherokee Indians residing on the reservation. Once paternity is established, our courts do have subject matter jurisdiction over causes of action brought by the State pursuant to requirements of the AFDC program to collect a debt owed to the State for past public assistance and to obtain a judgment for future child support. The decision of the Court of Appeals is therefore affirmed in part and reversed in part.

This cause is remanded to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion. Upon remand, if paternity is contested, the plaintiff may apply to the Superior Court, Jackson County, for a stay of proceedings in that court pending the filing and final disposition of an appropriate proceeding in the Court of Indian Offenses to determine the paternity of the child.

Affirmed in part, reversed in part and remanded.

Justices WEBB and WHICHARD did not participate in the consideration or decision of this case.

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NORTH CAROLINA NATIONAL BANK v. C. P. ROBINSON COMPANY, INC. AND C. P. ROBINSON, JR.

No. 269A86

(Filed 3 February 1987)

1. **Wills § 9.1; Execution § 1— execution on remainder interest under will—county of judgment or county of probate**

The trial court did not err by failing to transfer an action which sought to have a remainder interest under a will sold under execution from the county of judgment to the county of probate. The proceeding was in the nature of a creditor's supplemental proceeding under N.C.G.S. 1-307 which required that the action be filed in the county of judgment, and the trial judge was required

to find only that defendant possessed some interest under his father's will. Whether the interest was vested or contingent was immaterial and unnecessary to the order and the finding of a vested remainder interest under the will has no binding effect on any action brought to determine the nature of the interest purchased at the execution sale. N.C.G.S. 28A-3-1.

**2. Execution § 1— contingent future interests—subject to execution**

Contingent future interests are subject to execution by a judgment creditor of a remainderman; *Watson v. Dodd*, 68 N.C. 528, and *Bourne v. Farr*, 180 N.C. 135, are overruled to the extent that they are inconsistent with this holding. N.C.G.S. 39-6.3 (1983).

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

ON appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals reported at 80 N.C. App. 160, 341 S.E. 2d 362 (1986), vacating judgment of *Freeman, J.*, entered 28 September 1984, which subjected to execution and sale defendant Robinson's future interest in stock.

*Hutchins, Tyndall, Doughton & Moore, by George E. Doughton, Jr., and Kent L. Hamrick, for plaintiff-appellant.*

*Moore, Ragsdale, Liggett, Ray & Foley, P.A., by Jane Flowers Finch, for defendant-appellee C. P. Robinson, Jr.*

MEYER, Justice.

This appeal presents two principal questions for resolution: (1) whether a Forsyth County Superior Court may properly order a judgment of execution on a remainder interest created by a will that was probated in Anson County, and (2) whether a contingent remainder interest may be executed upon by a creditor of a remainderman. We answer both questions in the affirmative and therefore reverse the decision of the Court of Appeals.

On 9 June 1972, defendant C. P. Robinson, Jr., executed and delivered to the plaintiff, North Carolina National Bank (hereinafter "NCNB"), a promissory note whereby Robinson, as endorser for his company, promised to pay the lump sum of $100,000, with interest, on 8 August 1972. Defendant failed to pay the note, and on 14 November 1974 NCNB obtained a judgment in Forsyth County against defendant for $100,000, with interest at 7% per annum from 8 August 1972.

In 1975, an execution issued in Forsyth County against the defendant was returned unsatisfied.

In 1980, defendant's father, Charles Robinson, Sr., died and left a holographic will which was probated in the office of the Clerk of Superior Court of Anson County. The will contained the following bequest:

> I bequeath all other properties and the income therefrom to my beloved wife Hannah Washburn Robinson, during her lifetime. If she remarries, at her death my estate shall be left to my children, Betsy R. Lewis Jr. [sic] and Charles Phillips Robinson Jr.

In 1982, Hannah Robinson, describing herself as the life tenant of the property described in the bequest, petitioned the Anson County Superior Court to serve as trustee of the stock certificates and notes in the estate of her husband. The petition was granted on 14 September 1982.

In February 1984, NCNB served Robinson with a "Notice of Right to Have Exemptions Designated." The notice was filed in Forsyth County. On 8 May 1984, District Court Judge Gatto issued an order exempting certain of Robinson's property from execution.

On 5 July 1984, NCNB filed an execution in Superior Court, Forsyth County, and it was transmitted to Anson County for execution. The execution was returned unsatisfied by the sheriff's office of Anson County.

Having learned of the existence of the will of Charles Robinson, Sr., and of the alleged interest of Hannah Robinson in the property as life tenant and trustee, NCNB moved for a preliminary injunction restraining Robinson from transferring or otherwise disposing of his remainder interest under his father's will. NCNB also moved that Robinson's interest under the will be sold pursuant to N.C.G.S. § 1-362 and that a receiver be appointed pursuant to N.C.G.S. § 1-363.

On 30 July 1984, Judge Gatto issued a temporary restraining order in which Robinson was ordered to refrain from transferring or otherwise disposing of his interest in property under his father's will. In response to the issuance of the temporary restrain-

ing order, Robinson filed motions to transfer to the superior court division, to transfer to Anson County, to continue, and to dismiss for failure to join a necessary party. Robinson also moved to dissolve the temporary restraining order. Judge Gatto later extended the temporary restraining order issued on 30 July 1984.

On 16 August 1984, the Forsyth County Superior Court, Judge Albright presiding, granted Robinson's motion to transfer the case from the district court division to the superior court division. The court also extended the original temporary restraining order for ten days or until such time as the motion for a preliminary injunction could be heard.

In an order dated 28 September 1984 in Forsyth County Superior Court, Judge Freeman denied Robinson's motion to transfer the action to Anson County and to dismiss for failure to join necessary parties. In the same order, the court granted NCNB's motion for an order to prohibit the sale of Robinson's remainder interest and NCNB's motion that Robinson's remainder interest be sold under execution and the proceeds applied toward the satisfaction of NCNB's 1974 judgment. As part of his 28 September 1984 order, Judge Freeman found that defendant possessed a vested remainder interest in the will of his father. The court further found that this interest included defendant's one-half interest in intangible assets (stocks and notes) subject to the life estate of his mother, Hannah Robinson.

On 13 November 1984, pursuant to Judge Freeman's 28 September 1984 order, Robinson's remainder interest under his father's will was sold at a public sale at the Anson County courthouse. NCNB was the last and highest bidder, with a bid of $25,000.

The Court of Appeals, 80 N.C. App. 160, 341 S.E. 2d 362, vacated the judgment of the Forsyth County Superior Court. The majority held that the trial court erred in denying defendant's motion to transfer the action to Anson County. The majority also held that the "better policy" in such a case is to allow a construction of the will in the county of probate and then allow defendant to execute from the county of judgment, in this case Forsyth County.

Judge (now Justice) Webb dissented on the ground that there was no construction of the will in Forsyth County. The dissent

reasoned that, subsequent to the sale, NCNB may bring an action for declaratory judgment to determine the nature of the interest which it purchased at sale.

We reverse the Court of Appeals and hold that NCNB properly executed on its judgment. The Forsyth County Superior Court was empowered to order the sale of Robinson's remainder interest under his father's will.

I.

**[1]** We first address defendant's contention that the trial court erred in failing to transfer this matter to Anson County, the county in which the will was probated.

The majority of the Court of Appeals accepted defendant's contention that N.C.G.S. § 28A-3-1 requires that his interest under his father's will be determined in Anson County, the county where the will was probated.

N.C.G.S. § 28A-3-1 provides in pertinent part:

> The venue for the probate of a will and for all proceedings relating to the administration of the estate of a decedent shall be:
>
> (1) If [sic] the county in this State where the decedent had his domicile at the time of his death . . . .

N.C.G.S. § 28A-3-1(1) (1984).

The Court of Appeals held that because Robinson's father lived in Anson County and his will was probated there, the nature of defendant's interest under the will must be determined in Anson County before that interest may be ordered sold under execution. We disagree.

The purpose of probate is to establish that the will in question has been executed in a proper manner and that it constitutes the last will of the deceased. 1 N. Wiggins, *Wills and Administration of Estates in North Carolina 2d* § 112 (1983). Probate has been defined as the judicial process by which a court of competent jurisdiction in a duly constituted proceeding tests the validity of the instrument and determines whether it is the last will and testament. *In re Lamb*, 303 N.C. 452, 459, 279 S.E. 2d 781, 786 (1981).

Were NCNB attacking the validity of the will or seeking to determine its rights under the will, then the proceedings would be governed by N.C.G.S. § 28A-3-1 and Anson County would be the appropriate venue. However, NCNB's action in the present case is not a part of probate but rather a supplemental creditor proceeding instituted to enforce its 1974 judgment obtained in Forsyth County. The statute governing supplemental creditor proceedings *requires* that the action be filed in Forsyth County. That statute provides in pertinent part:

> Executions and other process for the enforcement of judgments can issue *only* from the court in which the judgment for the enforcement of the execution or other final process was rendered . . . .

N.C.G.S. § 1-307 (1983) (emphasis added).

In his 28 September 1984 order, Judge Freeman found as a fact that Robinson possessed a vested remainder interest under his father's will and ordered that it be executed upon to satisfy the 1974 judgment. On appeal, Robinson argues that Judge Freeman's order amounted to an interpretation of the will for which the proper venue is the place of probate, Anson County. Because we find that the proceeding is in the nature of a creditor's supplemental proceeding under N.C.G.S. § 1-307, the trial judge did not err in denying Robinson's motion to transfer to Anson County, where the will was probated.

In order to issue an execution on defendant's interest under his father's will, Judge Freeman was required to find only that defendant possessed *some* interest under his father's will. Whether the interest was vested or contingent was immaterial and thus unnecessary to the order. Because the finding was unnecessary to the order, it has no binding effect on any action which might be brought to determine the nature of the interest purchased at the execution sale. Because we find that interpretation of the will was unnecessary to the order, the question of whether a will may be construed in a nonprobate action brought in a county different from that in which the will was offered for probate is not before us, and we decline to resolve it. *See* 4 W. Bowe & D. Parker, *Page on the Law of Wills* § 31.5 n. 16 (rev. ed. 1961 & Cum. Supp. 1986). Of course, in situations such as that

presented in the case at bar, nothing prohibits an interpretation of a will in the county of probate prior to judicial sale.

II.

**[2]** The second issue we address is whether a contingent future interest is subject to execution by a judgment creditor of a remainderman.

In part I of our opinion, we held that the interpretation of the will was unnecessary to Judge Freeman's order of execution. Therefore, we need not determine whether he properly found that Robinson possessed a "vested" remainder interest under the will.

Defendant argues that if his interest were contingent rather than vested, it would not be subject to execution by his creditors. In order to address defendant's argument, we assume, *without deciding*, that Robinson possessed a contingent future interest.

The English common law long recognized that contingent remainders in land were not transferable *inter vivos*. As Professor Simes stated in his treatise:

> The rules as to the alienability of future interests in personalty followed the same lines as those with respect to realty. In 1845, by statute, in England all varieties of contingent future interests in land were made alienable.

4 L. Simes & A. Smith, *The Law of Future Interests* § 1853, at 159-60 (2d ed. 1956 & Supp. 1985) (footnotes omitted).

In the United States, most jurisdictions now allow for the free transferability of future interests. Some statutes specifically state that contingent future interests are alienable. *See* 4 L. Simes & A. Smith, *The Law of Future Interests* § 1854, at 160-61 (2d ed. 1956 & Supp. 1985).

North Carolina's statute allowing for free alienability of future interests provides:

> (a) The conveyance, by deed or will, of an existing future interest shall not be ineffective on the sole ground that the interest so conveyed is future or *contingent*. All future interests in real or *personal property*, including all reversions, executory interests, vested and *contingent remainders*,

rights of entry both before and after breach of condition and possibilities of reverter *may be conveyed by the owner thereof, by an otherwise legally effective conveyance, inter vivos* or testamentary, subject, however, to all conditions and limitations to which such future interest is subject.

(b) The power to convey as provided in subsection (a), can be exercised *by any form of conveyance, inter vivos* or testamentary, which is otherwise legally effective in this State at the date of such conveyance to transfer a present estate of the same duration in the property.

(c) This section shall apply only to conveyances which become operative to transfer title on or after October 1, 1961.

N.C.G.S. § 39-6.3 (1984) (emphasis added).

Prior to the enactment of N.C.G.S. § 39-6.3, a long line of North Carolina decisions held that contingent interests could be voluntarily sold, assigned, transmitted, or devised provided the identity of the persons who would take upon the happening of the contingency could be ascertained. *Jernigan v. Lee*, 279 N.C. 341, 345, 182 S.E. 2d 351, 355 (1971). Also, prior to the enactment of N.C.G.S. § 39-6.3, our decisional law consistently denied attempts by creditors to execute on a contingent future interest.

In *Watson v. Dodd*, 68 N.C. 528 (1873), this Court denied relief to a creditor who attempted to reach the debtor's contingent future interest. Chief Justice Pearson noted that although the interest was not assignable at law, a court of equity could compel transfer if there were an assignment for valuable consideration. *Id.* at 530. The rule of *Watson*—that contingent remainders were not subject to a judgment creditor's execution—was dictated by the fact that a legal rather than an equitable remedy was sought. Although law and equity were merged at the time, the decision seems to rest largely on the basis that law courts did not recognize an *inter vivos* transfer of a future interest.

Commenting on the rule established by *Watson* and its progeny, the late Dean Mordecai stated:

While possibilities and contingent interests may be alienated in equity, they cannot be sold under execution; *for*

*execution sales are governed in this respect by the strict rules of law applicable to the transfer of such interests.*

S. Mordecai, *Law Lectures* 654 (1907) (emphasis added). *See also Bourne v. Farr*, 180 N.C. 135, 137, 104 S.E. 170, 172 (1920) (dicta: although contingent interest could be transferred, interest not subject to execution). In view of the enactment of N.C.G.S. § 39-6.3 allowing for a legal conveyance of a future interest, and the recognition of one form of civil action, N.C.R. Civ. P. 2, *Watson* seems to be a relic of our legal history.

In jurisdictions that have addressed the question presented here, considerations of public policy have often dictated whether contingent future interests should be subject to creditors' claims. In an exhaustive study, Professor Halbach summarized the arguments in favor of and against allowing a creditor to execute on a contingent future interest:

> Two general considerations favor not permitting creditors to reach future interests to satisfy their claims, even if the interests are alienable: (1) the general policy which opposes frustration of the donor, grantor, or testator's intent; and (2) the general opposition to the forced sale of property under speculative conditions, at great sacrifice to the debtor and disproportionately small return to the creditor. If an estate *in futuro* is sold under these conditions, and at a later date happens to "materialize[,]" much of the creditor's claim goes unsatisfied due to the small realization on the sale of the property. The debtor has also been deprived of that part of the value of the property which could have been obtained if he had been allowed to retain the interest until it materialized, less the amount of the creditor's claim. The only party who gains is the buyer of the property, whose windfall is actually a reward for gambling.
>
> On the other hand, it is somewhat harsh to deny a creditor access to a property interest which his debtor can voluntarily transfer. Further, assets are generally not exempt from execution merely because they are not readily marketable. Apparently, there is nothing inherent in a future interest which warrants preferred treatment over other assets not having an *in futuro* nature. Moreover, unvested estates are

> generally viewed with *disfavor* because of the complications they cause land titles and transactions.
>
> These are the considerations upon which courts and legislatures should decide whether the peculiarities of the contingent future interests justify special immunity from creditors' claims.

Halbach, *Creditors' Rights in Future Interests*, 43 Minn. L. Rev. 217, 232 (1958) (footnotes omitted).

The drafters of the Restatement of Property adopt the position that contingent future interests are subject to the claims of creditors. Restatement of Property § 166 (1936). Likewise, a substantial majority of jurisdictions, by statute or judicial decision, allow a judgment creditor to reach a contingent future interest. *See* 2A R. Powell, *The Law of Real Property* ¶ 27[3][b] n. 19 (Rohan rev. ed. 1986); 1 A. Casner, *American Law of Property* § 4.79 (1952 & Supp. 1962); 4 L. Simes & A. Smith, *The Law of Future Interests* § 1924, at 217 (2d ed. 1956 and Supp. 1985).

We are sympathetic to defendant's argument that a forced sale of a contingent future interest may provide little satisfaction to the creditor at the expense of a potentially significant interest of the debtor. However, because the General Assembly has approved of the *inter vivos* conveyances of contingent future interests, N.C.G.S. § 39-6.3 (1983), it follows that a judgment creditor should be allowed to pursue an otherwise nonexempt future interest. To hold otherwise would amount to sanctioning an intolerable anomaly by which otherwise nonexempt property would be placed beyond the legitimate reach of creditors. We hold that contingent future interests are subject to execution by a judgment creditor of a remainderman. To the extent that *Watson v. Dodd*, 68 N.C. 528, and *Bourne v. Farr*, 180 N.C. 135, 104 S.E. 170, are inconsistent with our holding today, those opinions are hereby overruled.

For the reasons stated herein, we reverse the Court of Appeals and remand the case to that court for reinstatement of the trial court's judgment.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. CORNELIUS EARL WILLIAMS

No. 298A86

(Filed 3 February 1987)

1. **Constitutional Law § 45— right to appear pro se—right to appointed counsel—no right to both**

The trial court did not err in a prosecution for robbery and murder by refusing to allow defendant to participate as co-counsel at trial. There is no right to appear both *in propria persona* and by counsel.

2. **Criminal Law § 15.1— change of venue denied—pretrial publicity—no error**

The trial court did not err in a prosecution for murder and robbery by refusing to grant defendant's pretrial motions for change of venue where those motions were based on newspaper articles about the robbery-murder and publicity surrounding defendant's withdrawal of his guilty plea. There was no basis for disturbing the trial court's determination that the intent of the articles was factual and not inflammatory and the court took steps to insure a fair trial by instructing the jury pool to avoid publicity surrounding the trial and by dismissing all potential jurors present when it announced that defendant intended to plead guilty.

3. **Criminal Law § 71— description of victim's wounds—shorthand statement of fact—no error**

The trial court did not err in a prosecution for robbery and murder by failing to instruct the jury to disregard the portions of an officer's testimony in which he referred to gunshot wounds on the body of the victim. The witness was stating the instantaneous conclusion of his mind as to the appearance or condition of the victim, and the testimony was admissible as a shorthand statement of fact. N.C.G.S. 8C-1, Rule 701.

4. **Robbery § 4.3; Homicide § 21.5— robbery and first degree murder—evidence sufficient**

The trial court did not err by denying defendant's motion to dismiss charges of armed robbery and first degree murder where the State's evidence showed that a convenience store was robbed and an employee of the store was killed by a twelve-gauge shotgun blast; an electrical cash register was forcibly removed from the premises along with $121.57 in cash; a stolen car and portions of the cash register were found at a church seven and one-half miles from the store; officers searching the stolen vehicle found two twelve-gauge shotgun shells, one fired and one not fired; a twelve-gauge double-barrel shotgun was seized from defendant's residence; and defendant confessed that he had entered the store, shot the clerk to prevent identification, and taken the cash

register to the church, where he forced it open and removed approximately $125. N.C.G.S. 14-87, N.C.G.S. 14-17.

5. **Searches and Seizures § 23— search warrant—probable cause—evidence sufficient**

In a prosecution for robbery and murder, the affidavit used in obtaining a search warrant contained facts sufficient to support a probable cause finding where three informers identified as "A," "B" and "C" provided information; "A" said that he saw defendant take a black Chevrolet Camaro from Charles Street in Henderson and that defendant did not own such a vehicle; "B" said that he had heard "X" state that he had been with defendant during the robbery and was present when defendant killed the clerk; "C" said that defendant had admitted his involvement and that he had personal knowledge that the twelve-gauge sawed-off shotgun used in the robbery-murder was located at defendant's residence; and an officer stated that each of the informers was reliable and gave specific factors supporting their reliability, including independent evidence that corroborated the information supplied.

6. **Criminal Law § 75.11— incriminating statements—waiver of rights—freely, knowingly, and intelligently made**

The trial court did not err in a prosecution for robbery and murder by failing to suppress incriminating statements made by defendant following his arrest where the court found that defendant was advised of his constitutional rights, understood those rights, and executed a written waiver prior to making each confession; defendant was eighteen years of age, had completed the eighth grade, and could read well; defendant was in good physical condition during both interrogations; defendant's judgment was affected by neither drugs nor alcohol; no promises, offers of reward or inducements were made to persuade defendant to make any statements; defendant was not threatened with force or suggestions of violence; defendant never indicated a desire to stop talking, nor did he ask to be represented by counsel or have counsel present during his interrogation; and defendant had been found competent to stand trial after undergoing psychiatric evaluation.

7. **Constitutional Law § 67— confidential informant—no disclosure of identity—no error**

The trial court did not err in a prosecution for robbery and murder by denying defendant's motion to disclose the identity of confidential informants where the only informant about whom defendant presented an argument was a mere tipster who observed illegal activity. N.C.G.S. 15A-978 (1983).

APPEAL by defendant pursuant to N.C.G.S. 7A-27(a) from a judgment imposing a life sentence entered by *Smith, Donald L., J.*, at the 3 February 1986 Regular Criminal Session of Superior Court, VANCE County. Defendant's petition to bypass the Court of Appeals with regard to a judgment imposing a fourteen-year sentence was allowed on 8 July 1986.

*Lacy H. Thornburg, Attorney General, by Reginald L. Watkins, Special Deputy Attorney General, for the State.*

*J. Henry Banks and Arthur Dale Faulkner for defendant-appellant.*

WHICHARD, Justice.

Defendant was convicted of first degree murder committed with premeditation and deliberation, and of robbery with a dangerous weapon. He was sentenced to life imprisonment on the murder conviction and to fourteen years imprisonment on the robbery conviction, the sentences to run consecutively. Evidence pertinent to the arguments presented is set forth *infra.* We find no error.

**[1]** Defendant contends the court erred in refusing to allow him to participate as co-counsel at his trial. He was represented by three attorneys, two of whom were court-appointed.

In *State v. Porter,* 303 N.C. 680, 687-88, 281 S.E. 2d 377, 383 (1981), this Court upheld the denial of a motion to participate as co-counsel where the defendant had elected to retain the services of his court-appointed attorney. There is no right in this jurisdiction to appear both *in propria persona* and by counsel. *Id.* This assignment of error is therefore overruled.

**[2]** Defendant contends the court erred in refusing to grant his pretrial motions for change of venue. In the first motion defendant argued, *inter alia,* that a local newspaper had published numerous articles of an inflammatory nature about the robbery-murder. Emphasizing that the victim was white and he is black, defendant claimed that it would be particularly difficult to obtain a fair trial without a venue change because of Vance County's size, rural nature and racial bias. After considering the articles and arguments of counsel, the trial court determined that the articles were factual and non-inflammatory and concluded that no showing of prejudice had been made. The motion was therefore denied.

Defendant made a second motion after he moved to withdraw a guilty plea. As grounds for this motion, defendant noted that the trial court had announced to the jury that defendant intended

to plead guilty. He also cited publicity surrounding his guilty plea.

This motion for change of venue was also denied. The court found that defendant had failed to establish that the publicity surrounding his plea change warranted a change of venue. The order further stated that jurors reporting to court on 4 February 1986 were "instructed not to listen to any radio broadcasts or to watch any television newscasts or to read any newspapers concerning [the] trial, and that all jurors other than those who were so instructed [had] been excused." The transcript also reveals that the court dismissed all jurors present when it announced that defendant intended to plead guilty, and that the jurors who sat on this case were not those who were present when the court made the announcement.[1]

In a similar case, *State v. Vereen*, 312 N.C. 499, 324 S.E. 2d 250, *cert. denied*, 471 U.S. 1094, 85 L.Ed. 2d 526 (1985), this Court upheld denial of a change of venue because the defendant failed to show, under the "totality of the circumstances," that a probability of prejudice existed so as to deny him due process. The motions in *Vereen*, as here, were based on publicity surrounding the trial and community bias. The defendant there, as here, was tried in Vance County for murder, and the articles complained of in both cases were published in the same newspaper.

In *Vereen* this Court reiterated the rule that "where a defendant shows only that publicity consists of factual, non-inflammatory news stories, . . . denial of [a] motion for a change of

1. The Court stated on the record:

> Now, I realize that the initial panel of jurors have been told that he had pleaded guilty. . . . The clerk has already been instructed to tell those jurors not to report, and what we've got coming in are the jurors that reported on Tuesday and weren't told anything except that they are not to read any newspaper articles, not to watch any TV or to listen to any radio broadcasts concerning this trial. . . .
>
> In addition, I've instructed the clerk to issue an order for fifty additional jurors for Friday. . . . [W]e've got jurors coming in that if they followed the Court's instructions, they don't know not only that he pleaded guilty but don't know that he moved to withdraw his plea.

Defendant has excepted to the statement, but the record contains nothing that counters it.

venue is proper." *Id.* at 511-12, 324 S.E. 2d at 259. We have reviewed the articles here, and we find no basis for disturbing the determination that their content was factual and non-inflammatory. Moreover, the court took steps to ensure a fair trial by instructing the jury pool to avoid publicity surrounding the trial and by dismissing all potential jurors present when it announced that defendant intended to plead guilty. Defendant has presented no evidence to support his argument that community bias prevented the selection of a fair and impartial jury. We therefore hold that, considering the "totality of the circumstances," defendant has failed to show that he was denied a fair and impartial jury by the denial of his motions for a change of venue.

**[3]** Defendant contends the court erred in failing to instruct the jury to disregard portions of Officer J. M. Cordell's testimony in the following exchange with the district attorney:

> Q. What did you observe about the body of the white male, Mr. Cordell, at the time that you observed and saw him?
>
> A. The subject had been shot which appeared to be—
>
> MR. BANKS: Objection.
>
> THE COURT: Sustained.
>
> MR. BANKS: Motion to strike.
>
> THE COURT: Motion to strike allowed.
>
> BY MR. WATERS:
>
> Q. What injuries, if any, did you see and observe about the body?
>
> A. Gunshot wounds—
>
> MR. BANKS: Objection.
>
> THE COURT: Sustained.
>
> MR. BANKS: Motion to strike.
>
> THE COURT: Motion to strike allowed.
>
> BY MR. WATERS:
>
> Q. Did you observe his arm?
>
> A. Yes, sir, I did.

Q. Either one or both of them?

A. Yes, sir.

Q. Did you observe any defect about either arm?

A. Yes, sir, I did.

Q. What did you observe?

A. The left arm had been shot—

MR. BANKS: Objection.

THE COURT: Sustained.

The record reveals that the court sustained these objections on the ground that the testimony was inadmissible opinion evidence.

A lay witness may testify in the form of an opinion if the opinion is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C.G.S. 8C-1, Rule 701 (1986). The official commentary specifically states that nothing in this rule bars evidence that is commonly referred to as a "shorthand statement of fact." *Id.* (Official Commentary).

> This Court has long held that a witness may state the "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." Such statements are usually referred to as shorthand statements of facts.

*State v. Spaulding*, 288 N.C. 397, 411, 219 S.E. 2d 178, 187 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210 (1976) (quoting *State v. Skeen*, 182 N.C. 844, 845, 109 S.E. 71, 72 (1921)).

The witness here was stating the "instantaneous conclusions of [his] mind as to the appearance [or] condition" of the victim, and we find the testimony admissible as a "shorthand statement of facts." *Id.* It thus would not have been error to admit the testimony, and it was not error to fail to instruct the jury to disregard it. Assuming error, *arguendo*, it was clearly harmless. N.C.G.S. 15A-1443(a) (1983).

**[4]** Defendant contends the court erred in denying his motion to dismiss. We disagree.

> On a motion to dismiss on the ground of insufficiency of the evidence, the question for the court is whether there is substantial evidence of each element of the crime charged and of the defendant's perpetration of such crime. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982); *State v. Riddle*, 300 N.C. 744, 268 S.E. 2d 80 (1980). In evaluating the motion, the trial judge must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978).

*State v. Young*, 312 N.C. 669, 680, 325 S.E. 2d 181, 188 (1985).

The elements necessary to constitute armed robbery under N.C.G.S. 14-87 are:

> (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened. "Force or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense." *State v. Mull*, 224 N.C. 574, 576, 31 S.E. 2d 764, 765 (1944). Ownership of the property is generally immaterial as long as the proof is sufficient to establish ownership in someone other than the defendant. *State v. Rogers*, 273 N.C. 208, 159 S.E. 2d 525 (1968).

*State v. Beaty*, 306 N.C. 491, 496, 293 S.E. 2d 760, 764 (1982).

N.C.G.S. 14-17 defines first-degree murder to include:

> A murder . . . perpetrated by . . . willful, deliberate, and premeditated killing, or . . . committed in the perpetration or attempted perpetration of any . . . robbery . . . or other felony committed or attempted with the use of a deadly weapon . . . .

This Court has said, with regard to premeditation and deliberation:

> Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980). Deliberation means an intent to kill carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982). . . .
>
> Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence. *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975). Among other circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 117, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983). We have also held that the nature and number of the victim's wounds is a circumstance from which premeditation and deliberation can be inferred.

*State v. Brown*, 315 N.C. 40, 58-59, 337 S.E. 2d 808, 822-23 (1985).

Applying these principles to the evidence here, we find the following:

The State's evidence showed that a convenience store was robbed. During the robbery an employee of the store was killed by a twelve-gauge shotgun blast. An electrical cash register was forcibly removed from the premises, along with $121.57 in cash.

Officers found portions of the cash register, as well as a black Camaro that had been reported stolen, at a church located ap-

proximately seven and one-half miles from the store. When they searched the stolen vehicle, the officers found two twelve-gauge shotgun shells, one fired and one unfired. On the basis of leads from confidential informers and of corroborating evidence, a warrant was issued to search defendant's residence. There officers seized a double-barrel, twelve-gauge, sawed-off shotgun.

Defendant was then arrested. He confessed that he had entered the store, shot the clerk to prevent the clerk's identifying him, and taken the cash register to the church where he forced it apart and removed approximately $125.00.

The foregoing constituted substantial evidence of each element of armed robbery and first-degree murder committed with premeditation and deliberation, and of defendant as the perpetrator. The court thus properly denied the motion to dismiss.

**[5]** Defendant contends the court erred in denying his motion to suppress evidence obtained as a result of the search of his residence. He argues that the affidavit used in obtaining the search warrant did not contain facts sufficient to support the probable cause finding. We disagree.

In *State v. Arrington*, 311 N.C. 633, 643, 319 S.E. 2d 254, 261 (1984), this Court adopted the "totality of circumstances" test set forth in *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed. 2d 527, *reh'g denied*, 463 U.S. 1237, 77 L.Ed. 2d 1453 (1983), for determining the constitutionality of a magistrate's finding of probable cause. Under this test the question is whether the evidence as a whole provides a substantial basis for concluding that probable cause exists. In making this determination "great deference should be paid a magistrate's determination of probable cause and . . . after-the-fact scrutiny should not take the form of a *de novo* review." *Arrington*, 311 N.C. at 638, 319 S.E. 2d at 258.

The facts here were sufficient under this test to support a finding of probable cause. In the application for the search warrant, three informers identified as "A," "B," and "C" provided information. "A" said that he saw the defendant take a black Chevrolet Camaro from Charles Street in Henderson and that defendant did not own such a vehicle. "B" said he heard a person, referred to as "X," state that he, "X," had been with the defendant during the robbery and that he, "X," was present when de-

fendant killed the clerk. Finally, "C" said that when he discussed the robbery and murder with defendant, defendant admitted his involvement. "C" also said he had personal knowledge that the sawed-off, twelve-gauge shotgun used by defendant in committing the robbery-murder was located at defendant's residence.

In the application for the search warrant, an officer stated that each of the informers was reliable and gave specific factors supporting his reliability, including independent evidence that corroborated the information he supplied. Thus, viewed as a whole, the informers' statements and corroborating evidence provided a substantial basis for the probable cause finding.

**[6]** Defendant contends the court erred in failing to suppress incriminating statements he made following his arrest. We disagree.

The trial court found as a fact that defendant was advised of his constitutional rights, understood those rights, and executed a written waiver prior to making each confession. It further found that he was eighteen years of age, had completed the eighth grade, and could read well. He was in good physical condition during both interrogations, and his judgment was affected by neither drugs nor alcohol. One of the two interrogating officers testified at the hearing, and the trial court found as a fact, that no promises, offers of reward, or inducements were made to persuade defendant to make any statement. The officer also testified that defendant was not threatened with force or suggestions of violence. The court further found that defendant never indicated a desire to stop talking during these interrogations, nor did he request to be represented by counsel or have counsel present during his questioning. In its final finding the court noted that defendant had been found competent to stand trial after undergoing psychiatric evaluation.

Upon these findings the court concluded that defendant had waived his constitutional rights prior to confessing. It further concluded that his waiver was freely, knowingly, and intelligently made, and that the incriminating statements had been voluntarily given.

Findings of fact concerning admissibility of a confession are conclusive and binding if supported by competent evidence. *State*

*v. Simpson*, 314 N.C. 359, 368, 334 S.E. 2d 53, 59 (1985). "This is true even though the evidence is conflicting." *Id.* The findings here were supported by competent evidence. On the basis of these findings the court properly concluded that defendant made a valid waiver of his constitutional rights. Denial of his motion to suppress thus was also proper.

**[7]** Defendant finally contends the court erred in denying his motion to disclose the identity of confidential informants. As noted above, information supplied by three confidential informants was used in applying for the warrant to search defendant's home. In a pretrial motion defendant requested compulsory disclosure of the informants' identities, citing N.C.G.S. 15A-978 (1983) and the due process clause of the Fourteenth Amendment. Defendant specifically contends that he was denied a fair trial because he was not afforded the opportunity to confront and cross-examine Informer "A." He presents no argument as to disclosure of the identity of the remaining informants. He thus has abandoned this assignment of error to the extent that it relates to Informers "B" and "C." Rule 28(a), Rules of Appellate Procedure.

In *Roviaro v. United States*, 353 U.S. 53, 1 L.Ed. 2d 639 (1957), the United States Supreme Court enunciated a balancing test for determining whether the identity of a confidential informant should be revealed on request of the defendant:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

353 U.S. at 62, 1 L.Ed. 2d at 646. In *State v. Watson*, 303 N.C. 533, 537, 279 S.E. 2d 580, 582 (1981), however, this Court noted that:

> [B]efore the courts should even begin the balancing of competing interests which *Roviaro* envisions, a defendant who requests that the identity of a confidential informant be re-

vealed must make a sufficient showing that the particular circumstances of his case mandate such disclosure. [Citations omitted.]

At the motions hearing, and in his brief, defendant's only argument for revealing the identity of any of the informants was that "A" participated in the crime. His argument that "A" was a participant, however, is based solely on "A's" statement to an officer that he saw defendant take a black Camaro, and he knew defendant did not own such an automobile.

Participation in the crime charged was clearly a factor relied on by the U.S. Supreme Court in *Roviaro* in finding that disclosure of the informant's identity was mandated. In *Roviaro*, however, the informant whose identity the defendant sought to have revealed allegedly had bought the heroin defendant was convicted of selling. 353 U.S. at 55, 1 L.Ed. 2d at 642. Here, by contrast, there is no indication that "A" participated in any way in the stealing of the car or the robbery-murder. The information in the application for the search warrant indicates that "A" was a mere tipster who observed illegal activity. *See State v. Grainger*, 60 N.C. App. 188, 190-91, 298 S.E. 2d 203, 205 (1982) (evidence tended to show knowledge that illegal activity was occurring but failed to show that informant actually participated). Under these circumstances defendant's motion to compel disclosure of the informant's identity was properly denied.

No error.

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STATE OF NORTH CAROLINA v. HARRY MALOY HICKS

No. 254A86

(Filed 3 February 1987)

**1. Witnesses § 1.2— competency of child to testify**

The trial court did not abuse its discretion in finding that a seven-year-old sexual assault victim was competent to testify, notwithstanding the *voir dire* record reveals that she did not understand her obligation to tell the truth from a religious point of view and she had no fear of certain retribution for mendacity, where the victim indicated a capacity to understand and relate facts to the jury concerning defendant's assaults upon her, a comprehension of the dif-

ference between truth and untruth, and an obligation to tell the truth and her intention to do so. N.C.G.S. 8C-1, Rule 601(a), (b).

2. **Rape and Allied Offenses § 5— first degree rape—sufficient evidence**

Testimony by the seven-year-old victim, her mother, the examining physician and a psychologist who had been treating the victim was sufficient to support defendant's conviction of first degree rape by having vaginal intercourse with a child under the age of thirteen when defendant was over the age of twelve and at least four years older than the victim. N.C.G.S. 14-27.2.

3. **Rape and Allied Offenses § 5— first degree sexual offense—insufficient evidence**

The evidence was insufficient to support defendant's conviction of first degree sexual offense where the only evidence introduced by the State tending to show the commission of such offense was the seven-year-old victim's ambiguous testimony that defendant "put his penis in the back of me," and there was no corroborative evidence such as physiological or demonstrative evidence that anal intercourse occurred.

4. **Indictment and Warrant § 17.2; Rape and Allied Offenses § 5— time of rape—no fatal variance**

There was no fatal variance between indictment and proof in a prosecution for first degree rape of a child in which the indictment alleged that the offense occurred "on or about and between the months of" January through March 1985 where defendant was not deprived of his defense by uncertainty as to the exact date of the offense.

APPEAL of right by defendant pursuant to N.C.G.S. 7A-27(a) from convictions of first degree rape and first degree sexual offense before *Downs, J.*, and the imposition of two consecutive life sentences at the 2 December 1985 Criminal Session of Superior Court, MECKLENBURG County. Heard in the Supreme Court 9 December 1986.

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

*Theo X. Nixon for defendant-appellant.*

WHICHARD, Justice.

Testimony presented by witnesses for the State tended to show that Ethel Ferrell and her three young children were living with defendant throughout the winter of 1984-85. In the spring of 1985, Mrs. Ferrell moved out with her children in anticipation of divorcing her husband and marrying defendant. When she asked her children how they felt about her plans, they responded nega-

tively, and Denise, one of the 6-year-old twins, explained to her mother that defendant had put his "privacy" into her "privacy."

Denise later testified that on several evenings when her mother was away at the store or at school, defendant took her into her mother's bedroom and "put his penis in my vagina." She testified that defendant had also "put his penis in the back of me."

The physician who treated Denise testified that Denise had told him that "she had been touched in her privates, not once but many times over a period of weeks, and that the last time had been four or five days before she came to see me." He testified that his physical examination revealed a broken hymen and a genital rash that appeared to be a yeast infection. The physician testified that these findings were consistent with Denise's having engaged in sexual intercourse, and that cases of similar symptoms appearing in the absence of sexual intercourse in girls of Denise's age were "very, very rare."

A psychologist who had been treating Denise and her family since July 1985 testified that Denise had also told him that "Harry put his private in my private," and that he diagnosed her as suffering from post-traumatic stress disorder following sexual assault.

The jury returned verdicts of guilty of first degree rape and first degree sexual offense. Defendant appeals and presents four assignments of error.

**[1]** First, defendant contends that the trial court abused its discretion in finding that seven-year-old Denise was competent to testify, because she arguably did not understand the nature and obligation of an oath or the necessity for telling the truth. Defendant points to the following exchanges from his attorney's cross-examination of Denise on voir dire, in which counsel probed Denise's familiarity with the Bible and her comprehension of the consequences of telling a lie:

> Q. That book there that is in front of you, do you know what that is?
>
> A. The Bible.

Q. Okay. Do you know why it is that when people come into court, they put their left hand on that Bible and raise their right hand?

A. No.

Q. Do you know why we do that in here?

A. No.

Q. Okay. Let me ask you this. This lady, Ms. Ponder [the prosecutor] over here asked you what happens to you when you tell a lie, and you said you get a whipping. Is that right?

A. Yes, sir.

* * *

Q. Okay. What if nobody knew that you were telling a lie? Only you knew that you were telling a lie, and if you did come in here and tell a lie, what would happen to you? Would anything happen?

A. I don't know.

Q. Okay. If nobody else found out about it?

A. I don't know.

* * *

Q. Okay. Now, let's just suppose for a few minutes that you came in here and put your hand on the Bible and raised your right hand and told a lie, and your mama and your daddy didn't know about it. What would happen to you?

A. Nothing.

Q. So if your mama and daddy didn't know about it, you could lie and nothing would happen to you at all?

A. Right.

Prior to this exchange, however, Denise had responded to direct examination as follows:

Q. Denise, do you know what it means to tell a fib or a story?

A. Yes, ma'am.

Q. What does that mean?

A. It means you get a whipping.

* * *

Q. If I were to tell you that [t]his book right here was green, would that be the truth or a lie?

A. It would be a lie.

* * *

Q. Why would that be a lie?

A. Because it isn't green. It's red.

Q. It is red. Will you tell the truth about what happened to you, here in court?

A. Yes, ma'am.

The competency of witnesses testifying in trials occurring after 1 July 1984 is determined by Rule 601 of the North Carolina Evidence Code, which provides in pertinent part that "[e]very person is competent to be a witness" except "when the court determines that he is . . . (2) incapable of understanding the duty of a witness to tell the truth." N.C.G.S. 8C-1, Rule 601(a), (b) (1986); *State v. Gordon*, 316 N.C. 497, 502, 342 S.E. 2d 509, 512 (1986). This Court has defined competency under both the new rules and the case law prior to their adoption as "the capacity of the proposed witness to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth of the matters as to which it is called upon to decide." *State v. Fearing*, 315 N.C. 167, 173, 337 S.E. 2d 551, 554 (1985), *quoting State v. Turner*, 268 N.C. 225, 230, 150 S.E. 2d 406, 410 (1966).

The voir dire record reveals that although Denise did not understand her obligation to tell the truth from a religious point of view, and although she had no fear of certain retribution for mendacity, she knew the difference between the truth and a lie. The prosecutor twice asked her whether she would be truthful about what defendant had done to her, and she twice responded, "Yes, ma'am." She indicated a capacity to understand and relate facts to the jury concerning defendant's assaults upon her, and a

comprehension of the difference between truth and untruth. She also indicated that she recognized her obligation to tell the truth, and she affirmed her intention to do so.

Further, the competency of a witness "is a matter which rests in the sound discretion of the trial judge in the light of *his examination and observation of the particular witness.*" *State v. Fearing*, 315 N.C. at 173, 337 S.E. 2d at 554-55, *quoting State v. Turner*, 268 N.C. at 230, 150 S.E. 2d at 410. Absent a showing that the ruling as to competency could not have been the result of a reasoned decision, the ruling must stand on appeal. *E.g., State v. McNeely*, 314 N.C. 451, 453, 333 S.E. 2d 738, 742 (1985); *State v. Lyszaj*, 314 N.C. 256, 263, 333 S.E. 2d 288, 293 (1985). We are satisfied that Denise's testimony met the standards of Rule 601, and we consequently hold that there was no abuse of discretion here.

By defendant's second assignment of error, he contends that the evidence was insufficient to support the charges of first degree sexual offense and first degree rape and that the trial court therefore erred in not granting his motion to dismiss. In ruling on a motion to dismiss, the trial court is to consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from that evidence. *State v. Bell*, 311 N.C. 131, 138, 316 S.E. 2d 611, 615 (1984). Whether the trial court erred under these circumstances depends upon whether substantial evidence was introduced of each essential element of the offense charged and of defendant's being the perpetrator. *See State v. Gardner*, 311 N.C. 489, 510-11, 319 S.E. 2d 591, 605 (1984).

**[2]** The testimony of Denise, her mother, the psychologist, and the examining physician provided substantial evidence as to the occurrence of the essential elements of first degree rape—vaginal intercourse with a child under the age of thirteen by one over the age of twelve and at least four years older than the victim. N.C.G.S. 14-27.2 (1986). Denise's testimony was sufficient to implicate defendant as the perpetrator. We thus find no error in the refusal to dismiss the rape charge.

**[3]** For a charge of first degree sexual offense to withstand a motion to dismiss, there must be substantial evidence that defendant committed a sexual act with Denise. *See State v. Gard-*

*ner*, 311 N.C. 489, 510-11, 319 S.E. 2d 591, 605. A "sexual act" is defined by statute as cunnilingus, fellatio, analingus, anal intercourse or the penetration by any object into the genital or anal opening of another person's body. N.C.G.S. 14-27.1 (1986). The only evidence introduced by the State tending to show the commission of any of these offenses was Denise's ambiguous testimony that defendant "put his penis in the back of me." Cross-examination of the physician who examined Denise included the following exchange:

> "Q. Did you find any evidence of sexual intercourse anally with her?
>
> A. No.
>
> Q. None at all?
>
> A. No."

Given the ambiguity of Denise's testimony as to anal intercourse, and absent corroborative evidence (such as physiological or demonstrative evidence) that anal intercourse occurred, we hold that as a matter of law the evidence was insufficient to support a verdict, and the charge of first degree sexual offense should not have been submitted to the jury. *See State v. McKinney*, 288 N.C. 113, 119, 215 S.E. 2d 578, 583 (1975). We accordingly reverse the conviction on the charge of first degree sexual offense.

Defendant's third assignment of error concerns what he contends is a fatal variance between the type of offense and the time period in which it occurred as alleged in the indictments and as revealed by the evidence elicited at trial. Defendant argues that the original warrant and the bill of particulars alleged that the underlying offense for the charge of first degree sexual offense was cunnilingus, not anal intercourse. Because we reverse the conviction on this charge, we need not address this aspect of the assignment.

**[4]** In regard to the charge of first degree rape, the indictments alleged that the offenses occurred "on or about and between the month[s] of" January through March 1985. The State's response to defendant's motion for a bill of particulars narrowed the time period to a ten-day span between 8 January and 18 January. Ex-

cept for testimony by Denise that defendant began molesting her around 8 January, defendant contends that no other evidence points to later occurrences, and that no evidence corroborated Denise's telling the physician that the latest occurrence had been four or five days before she saw him on 7 May 1985.

Statutory and case law both reflect the policy of this jurisdiction that an inaccurate statement of the date of the offense charged in an indictment is of negligible importance except under certain circumstances. N.C.G.S. 15-155 explicitly provides that no judgment shall be reversed or stayed because an indictment omits stating "the time at which the offense was committed in any case where time is not of the essence of the offense, nor [because it states] the time imperfectly . . . ." This Court has repeatedly noted that "a child's uncertainty as to the time or particular day the offense charged was committed" shall not be grounds for nonsuit "where there is sufficient evidence that the defendant committed each essential act of the offense." *State v. Effler*, 309 N.C. 742, 749, 309 S.E. 2d 203, 207 (1983). *See also State v. King*, 256 N.C. 236, 123 S.E. 2d 486 (1962); *State v. Tessnear*, 254 N.C. 211, 118 S.E. 2d 393 (1961).

This policy of leniency as to the time of the offenses stated in an indictment governs so long as the defendant is not thereby deprived of his defense. *See, e.g., State v. Sills*, 311 N.C. 370, 376, 317 S.E. 2d 379, 382 (1984). Here, defendant has failed to show that he was prejudiced. This Court's summation of the same issue raised by the defendant in *State v. Effler* is equally applicable here:

> The record is devoid of any indication whatsoever that defense witnesses were unavailable; that defendant was surprised in any way by the State's evidence; or that defendant intended to present an alibi defense. In post-trial motions and on appeal, no affidavit or statement has been presented regarding the prospective testimony of any witness not called at trial. In sum, the defendant has failed to meet his burden of establishing prejudice.

*Effler*, 309 N.C. at 750, 309 S.E. 2d at 208.

Finally, defendant assigns error to occurrences in the sentencing hearing which resulted in the imposition of consecutive

life sentences. Because we reverse the conviction on the charge of first degree sexual offense, we need not address this assignment.

Case No. 85CRS39441 (first degree rape)—no error.

Case No. 85CRS39447 (first degree sexual offense)—reversed.

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STATE OF NORTH CAROLINA v. JOE DAVID ALLISON

No. 206PA86

(Filed 3 February 1987)

**Robbery § 4.7; Criminal Law § 2— armed robbery—informant as participant—insufficient evidence of intent**

In a prosecution for armed robbery, there was insufficient evidence that defendant had the requisite specific intent to unlawfully deprive the store owner of personal property where the uncontradicted evidence presented by the State showed that defendant had been asked by the Gaston County Police to act as an informant about break-ins at grocery stores possibly involving Donnie Welch; defendant slipped away shortly after learning of Welch's plan to rob a convenience store and attempted to reach his police contact by telephone; defendant left several messages for the detective to call back; before he left with Welch, defendant instructed his wife to call and inform the detective of all the details of the planned robbery of which defendant then had knowledge; following the robbery, defendant immediately stopped the car in which he and Welch were traveling upon being instructed to do so by officers in an unmarked car; and defendant thereafter fully cooperated with officers in gathering evidence. N.C.G.S. 14-87.

ON grant of a writ of certiorari to review an unpublished decision of the Court of Appeals, filed 5 March 1985, which found no error in defendant's trial before *Beaty, J.*, and a jury, at the 28 November 1983 Criminal Session of Superior Court, GASTON County. Heard in the Supreme Court 10 December 1986.

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

*Richard A. Rosen and Dorothy V. Kibler, for defendant-appellant.*

FRYE, Justice.

Defendant raised two questions before this Court: (1) whether the trial court erred in denying his motions at the close of the State's evidence and at the close of all the evidence to dismiss the charge of attempted robbery with a dangerous weapon, and (2) whether the trial court committed reversible error by inadequately instructing the jury in regard to his sole defense. We find the first question dispositive of the matter before this Court and we therefore do not reach the second question.

Defendant Joe David Allison was indicted and jointly tried with codefendant Donnie Welch on charges of attempted robbery with a dangerous weapon (attempted armed robbery) and first degree murder of store owner Paul H. Clemmer. Allison moved for dismissal at the close of the State's case. The murder charge against Allison was dismissed, but the attempted armed robbery charge was not. Allison offered no evidence. After codefendant Welch's evidence was completed, Allison renewed his motion to dismiss the attempted armed robbery charge. This motion also was denied. Allison was convicted by the jury of attempted robbery with a dangerous weapon and received the statutory minimum fourteen year sentence. Codefendant Welch was convicted of both charges and received consecutive sentences of life plus twenty years. Welch's convictions and sentences were upheld on direct appeal by this Court. *State v. Welch*, 316 N.C. 578, 342 S.E. 2d 789 (1986).

Defendant Allison appealed to the Court of Appeals which found no error in an opinion reported per N.C. R. App. P. 30(e). Defendant's petition for a writ of certiorari to review the decision of the Court of Appeals was allowed by this Court on 4 June 1986.

The State's evidence showed that in 1982 defendant, an illiterate man with a learning disability, became a drug informant for the Gaston County Police Department as a substitute for Barbara Allison, his wife. Mrs. Allison, in exchange for dismissal of forgery charges against her, had agreed to act as a drug informant but quit when undercover agent Detective William Durst's participation in an arrest exposed her identity. Detective Douglas Ivey, Allison's contact with the police department, instructed Allison not to originate or instigate any criminal scheme or plan but to go along with any such scheme or plan proposed to him

and relay information to Ivey. Allison operated under the code name of "Terry," the name of a relative and therefore easy for him to remember. The charges against Mrs. Allison were dropped after Allison provided Ivey with information which led to search warrants for drugs. However, Allison continued to supply Ivey with information on drugs in exchange for pay.

When arrested for breaking and entering in May of 1983, Allison was approached by Lt. Robert Stacey of the Gaston County Police. Lt. Stacey requested that Allison supply Detective Ivey with information about drug crimes and other crimes, in particular break-ins at grocery stores possibly involving Donnie Welch. Detective Ivey reiterated Lt. Stacey's request and told Allison that the district attorney had agreed to take his role as an informant into consideration in prosecuting the breaking and entering charge pending against him.

On 30 June 1983 at about 6 p.m., Donnie Welch came to Allison's house. He told Allison that at 10 p.m. he planned to rob a store located on the edge of Belmont and wanted Allison to drive for him in return for one-half of the robbery proceeds. Welch would not, however, reveal the name of the store or its exact location. Allison called his wife and asked her to accompany him to the store "to get a coke." Once in the car, Allison told her that he wanted to call Detective Ivey from a pay phone to inform him about the robbery proposed by Welch. Allison called Detective Ivey from a convenience store phone booth. Ivey was out. Allison left his code name, the phone number of the booth and a message requesting Ivey to return his call. Detective Durst, who was at the time dining with Detective Ivey, received the message and returned Allison's call. Allison, because of his distrust of Durst stemming from the previous exposure of Mrs. Allison as an informant, did not report the proposed robbery to Durst. Instead Allison fabricated a story about marijuana information and told Durst to have Detective Ivey call back at the phone booth. Allison waited at the booth for Ivey's call, called the police department several more times, again leaving messages for Ivey to return his call and, after forty-five minutes—worried that Welch had become suspicious—returned home without having talked with Ivey. Before the Allisons got home, Allison asked his wife to call Detective Ivey and give him all the information which Allison had concerning the robbery proposed by Welch.

Once back at the house, Welch instructed Allison to change the license plate on the Allison car. Allison complied. As Welch and Allison were about to leave the house, Allison secretly told his wife to call and inform Detective Ivey that Welch was going to rob a store on the edge of Belmont around 10 p.m. Allison and Welch left the house between 7 p.m. and 7:30 p.m. Upon Welch's request, Allison drove to a third party's house where Welch borrowed a shotgun.

About ten to fifteen minutes after the two left the Allison home, Mrs. Allison received a call from Detective Ivey. Mrs. Allison told Ivey that her husband and Welch had left together in her automobile, which she described, and that Welch planned to rob a store somewhere on the edge of Belmont at 10 p.m. She also informed Detective Ivey that defendant Allison had told her to reveal this information to him.

The information supplied by Mrs. Allison was relayed to Lt. Robert Stacey who in turn called the assistant district attorney, George Hill. Stacey told Hill that he had learned through an informant that a possible robbery was to take place; Stacey also inquired whether the informant's going along would constitute entrapment. Hill advised that it would not constitute entrapment but the risk of injury was too great and the whole thing should be called off. Lt. Stacey then took steps to stop the robbery. He broadcasted a radio message to members of the Gaston County Police Department warning of the possible robbery and ordering the officers to intercept Allison and Welch.

At 10 p.m. Donnie Welch entered Clemmer's Superette wearing a stocking mask and armed with a shotgun. Allison remained in the car. Welch demanded money and when the store owner, Mr. Clemmer, reached for his gun, Welch shot and killed him. Welch ran out of the store and got into the Allisons' car, and defendant Allison drove away.

Detectives Durst, Ivey and Lt. Stacey, patrolling in an unmarked car, spotted the Allisons' car on Interstate 85. They pulled alongside the car and motioned to Allison to stop. Allison did so immediately. Both men were arrested and charged with attempted armed robbery and murder. Allison, however, continued to cooperate with the officers. He gave a statement to the police detailing his and Welch's activities. He helped the police officers

with the search for physical evidence and voluntarily let the officers into his home where he found for them the two pieces of pantyhose that Welch had discarded from his mask.

The dispositive question on this appeal is whether the trial court erred in denying defendant's motions to dismiss.

> 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 . . . . The trial judge must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . .

*State v. Brown*, 310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984). (Citations omitted.)

> The trial court in considering such motions is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight . . . . The trial court's function is to test whether a *reasonable inference* of the defendant's guilt of the crime charged may be drawn from the evidence . . . .

*State v. Powell*, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1979). (Citations omitted.) (Emphasis in original.)

Defendant was charged with attempted robbery with a dangerous weapon in violation of N.C.G.S. § 14-87. One of the elements of an attempt to commit a crime is that defendant have the intent to commit the substantive offense. *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981); *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). An attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result. *See State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439; *see also, State v. May*, 292 N.C. 644, 235 S.E. 2d 178 (1977). Defendant contends that there was no substantial evidence that

he had the requisite specific intent to unlawfully deprive the store owner of personal property and therefore the evidence was insufficient to overcome his motions to dismiss. We agree.

The uncontradicted evidence presented by the State showed that the defendant had been asked by the Gaston County Police to act as an informant about break-ins at grocery stores possibly involving Donnie Welch. Shortly after learning of Welch's plans to rob a convenience store, Allison slipped away and attempted by telephone to reach his police contact, Detective Ivey. Failing in this, Allison left several messages requesting Detective Ivey to call him back. In addition, Allison, before leaving his home with Welch, instructed his wife to call and inform Detective Ivey of all the details of the planned robbery known to Allison at the time. Following the robbery, Allison, upon instruction by the officers who were in an unmarked police vehicle, immediately stopped the car in which he and Welch were travelling, and thereafter cooperated fully with the officers in gathering evidence.

Viewing all the evidence as we must in the light most favorable to the State, we hold that the uncontradicted evidence offered by the State in this case, that Allison informed the police of the intended robbery beforehand and later assisted the police in gathering evidence, does not permit a reasonable inference that defendant had the specific intent to unlawfully deprive the store owner of his personal property.

In a similar case in Illinois, *Price v. People*, 109 Ill. 109 (1884) (reversing a conviction on grounds that defendant lacked criminal intent), the defendant went to a constable on the day of an intended burglary and told him where and what time the offense was to be committed. The defendant then actually participated in the burglary and afterwards cooperated with the police in apprehending his confederates. The Illinois Supreme Court found that his actions in informing the authorities about the crime before it happened, taken together with his cooperation after the crime, negated any possible criminal intent on the defendant's part. The court reasoned in *Price*: "That a sane person, really guilty of committing so grave a crime as the one imputed to the accused, would thus act, is so inconsistent with all human experience as not to warrant the conviction of any one under the circumstances shown." *Id.* at 112. Similarly, the evidence presented by the State

in the instant case, that Allison informed the police of the intended robbery beforehand and assisted in gathering evidence afterwards, negates the requisite criminal intent since it manifestly shows that defendant intended that the Gaston Police foil the efforts of Welch to unlawfully deprive the store owner of his personal property.

The State ordinarily is not bound by the adverse testimony of its witnesses but may offer other contradicting evidence. *State v. Robinson*, 229 N.C. 647, 648, 50 S.E. 2d 740, 741 (1948). "[H]owever, [when] the State's case is made to rest entirely on testimony favorable to the defendant and there is no evidence *contra* which does more than support a possibility or raise a conjecture, demurrer thereto should be sustained." *Id.* at 649, 50 S.E. 2d at 741.

In the instant case the State presented no evidence which contradicted its evidence that this defendant lacked the requisite specific intent for attempted armed robbery. Defendant offered no evidence. The State has thus failed to produce substantial evidence of Allison's specific intent to unlawfully deprive the victim of personal property, an essential element of attempted armed robbery. Thus, the trial court erred in denying defendant's motions to dismiss.

The decision of the Court of Appeals finding no error in defendant's conviction and sentence for attempted robbery with a dangerous weapon is therefore reversed.

Reversed.

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STATE OF NORTH CAROLINA v. ADAM JOE LEWIS JORDAN, JR.

No. 742A85

(Filed 3 February 1987)

**Criminal Law § 66.18— in-court identification—appellate review—necessity for objection**

Defendant waived his right to have the admission of an in-court identification considered on appellate review by failing to object at trial to the in-court identification. Moreover, admission of the identification testimony was not error.

**State v. Jordan**

APPEAL by defendant from judgment of life imprisonment imposed by *Ross, J.*, at the 19 August 1985 session of Superior Court, CABARRUS County. Heard in the Supreme Court 8 December 1986.

*Lacy H. Thornburg, Attorney General, by Norma S. Harrell, Assistant Attorney General, for the state.*

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

MARTIN, Justice.

It is not necessary to recite the sordid details of this case in order to resolve defendant's appeal. Defendant's sole argument is that his conviction of rape in the first degree was erroneous because the victim was allowed to testify as to her in-court identification of the defendant. Defendant's contention is without merit.

The record discloses the challenged testimony by the victim to be:

> Q. Do you see the person in the courtroom today, ma'am?
>
> MR. RUSSELL: Objection.
>
> THE COURT: Approach the bench.
>
> BENCH CONFERENCE
>
> THE COURT: Overruled.
>
> Q. Do you see the man in the courtroom today—
>
> A. Yes, I do.
>
> Q. —who assaulted you sexually back on the 10th of February, 1985?
>
> A. Yes, I do.
>
> Q. Would you please point him out, ma'am?
>
> A. Right there.
>
> Q. Are you indicating the fellow seated next to Mr. Russell?

A. Yes, I am.

MR. SPEAS: Your Honor, I'd like the record to reflect she has pointed to Adam Joe Lewis Jordan, the defendant.

THE COURT: Let the record reflect that the witness . . . has identified Adam Joe Lewis Jordan, Jr., as the individual who assaulted her on February 10, 1985.

At the point that defendant objected the state had not asked the victim to identify her assailant. Thereafter, defendant failed to object to the victim's in-court identification of him and thus defendant has waived his right to have this contention considered on appellate review. N.C.G.S. § 15A-1446(b) (1983). As this Court held in *State v. Foddrell*, 291 N.C. 546, 557, 231 S.E. 2d 618, 626 (1977):

> The rule is as quoted in *State v. Jones*, 280 N.C. 322, 339-340, 185 S.E. 2d 858, 869 (1972): "It is elementary that, 'nothing else appearing, the admission of incompetent evidence is not ground for a new trial where there was no objection at the time the evidence was offered.' . . . An assertion in this Court by the appellant that evidence, to the introduction of which he interposed no objection, was obtained in violation of his rights under the Constitution of the United States, or under the Constitution of this State, does not prevent the operation of this rule." *See State v. Lowery*, 286 N.C. 698, 213 S.E. 2d 255 (1975); *State v. Gurley*, 283 N.C. 541, 196 S.E. 2d 725 (1973); 4 Strong's North Carolina Index 3d *Criminal Law* § 162 (1976).

The present appeal is on all fours with *State v. Hammond*, 307 N.C. 662, 300 S.E. 2d 361 (1983) (holding that failure to renew objection to in-court identification testimony waived appellate review). We also note that defendant does not argue that the admission of the testimony constituted plain error.

Nevertheless, in our discretion we have examined the record carefully and have determined that the admission of the testimony was not error. *See id.* Additionally, we note that after the above-quoted testimony the victim testified without objection:

> Q. Are you absolutely sure that the man that assaulted you that evening is Adam Joe Lewis Jordan, Jr.?

A. Yes, I am.

Q. Is there any doubt in your mind whatsoever?

A. No, sir, there is not.

Thus, even if defendant had objected to the previous testimony, his failure to object to the same evidence later admitted would have constituted a waiver of the hypothetical objection. *State v. Whitley*, 311 N.C. 656, 319 S.E. 2d 584 (1984); *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984). The new Evidence Code, chapter 8C of the General Statutes of North Carolina, does not change this law. 1 Brandis on North Carolina Evidence § 30 (Cum. Supp. 1986).

Defendant received a fair trial, free of prejudicial error.

No error.

BAGRI v. DESAI

No. 667P86.

Case below: 83 N.C. App. 150.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

BALLENGER v. ITT GRINNELL INDUSTRIAL PIPING

No. 736PA86.

Case below: 83 N.C. App. 55.

Petition by defendants for writ of certiorari to the North Carolina Court of Appeals allowed 3 February 1987.

BAUM v. GOLDEN

No. 708P86.

Case below: 83 N.C. App. 218.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

BOWENS v. N.C. STATE BD. OF DENTAL EXAM.

No. 10P87.

Case below: 83 N.C. App. 676.

Petition by plaintiff for writ of supersedeas and temporary stay denied 21 January 1987. Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 21 January 1987.

BRANKS v. KERN

No. 662PA86.

Case below: 83 N.C. App. 32.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 3 February 1987.

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

CAROLINA MEDICAL PRODUCTS COMPANY v. SOUTHEASTERN HOSPITAL SUPPLY CORP.

No. 479P86.

Case below: 82 N.C. App. 149.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

CHISHOLM v. DIAMOND CONDOMINIUM CONSTR. CO.

No. 670P86.

Case below: 83 N.C. App. 14.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

COBB v. COBB

No. 760P86.

Case below: 83 N.C. App. 540.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 February 1987.

COXE v. WYATT

No. 683P86.

Case below: 83 N.C. App. 131.

Petition by defendant (The March Development Corporation) for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

DRAUGHON v. DRAUGHON

No. 747P86.

Case below: 82 N.C. App. 738.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 February 1987.

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

FAIRCLOTH v. BEARD

No. 682PA86.

Case below: 83 N.C. App. 235.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 3 February 1987. Motion by plaintiffs to dismiss appeal for lack of substantial constitutional question denied 3 February 1987.

FLEET REAL ESTATE FUNDING CORP. v. BLACKWELDER

No. 668P86.

Case below: 83 N.C. App. 27.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

GREEN HI-WIN FARM, INC. v. NEAL

No. 700P86.

Case below: 83 N.C. App. 201.

Petition by defendant (Neal) for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

GUPTON v. BUILDERS TRANSPORT

No. 671PA86.

Case below: 83 N.C. App. 1.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 3 February 1987.

HOCHHEISER v. N. C. DEPT. OF TRANSPORTATION

No. 642PA86.

Case below: 82 N.C. App. 712.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 3 February 1987. Motion by defendant to dismiss appeal for lack of substantial constitutional question denied 3 February 1987.

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

HYSINGER v. SIMMONS

No. 696P86.

Case below: 83 N.C. App. 343.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

IN RE CHARTER PINES HOSPITAL, INC. v.
N. C. DEPT. OF HUMAN RESOURCES

No. 707P86.

Case below: 83 N.C. App. 161.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

LITTLE v. CITY OF LOCUST

No. 701P86.

Case below: 83 N.C. App. 224.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

McGARITY v. CRAIGHILL, RENDLEMAN,
INGLE & BLYTHE, P.A.

No. 694P86.

Case below: 83 N.C. App. 106.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

NATIONWIDE MUTUAL LIFE INS. CO. v. PITTMAN

No. 645P86.

Case below: 82 N.C. App. 756.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

RILEY v. ROBINSON

No. 665P86.

Case below: 83 N.C. App. 159.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

STATE v. ALFORD

No. 716P86.

Case below: 65 N.C. App. 425.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 February 1987.

STATE v. BOWEN

No. 651P86.

Case below: 83 N.C. App. 159.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

STATE v. CRANDALL

No. 669P86.

Case below: 83 N.C. App. 37.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

STATE v. CRAWFORD

No. 2P87.

Case below: 83 N.C. App. 135.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 February 1987.

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

STATE v. ERVING

No. 695P86.

Case below: 83 N.C. App. 160.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

STATE v. HOPKINS

No. 693P86.

Case below: 83 N.C. App. 342.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

STATE v. HUMPHRIES

No. 613PA86.

Case below: 82 N.C. App. 749.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 3 February 1987. Petition by defendant (Humphries) for discretionary review pursuant to G.S. 7A-31 allowed 3 February 1987. Petition by defendant (Jamison) for discretionary review pursuant to G.S. 7A-31 allowed 3 February 1987.

STATE v. McCARVER

No. 761P86.

Case below: 83 N.C. App. 344.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 February 1987.

STATE v. MASON

No. 689P86.

Case below: 83 N.C. App. 160.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

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

STATE v. PEKEROL

No. 688P86.

Case below: 83 N.C. App. 342.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

STATE v. RADER

No. 664P86.

Case below: 83 N.C. App. 159.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

STATE v. SHELTON

No. 687P86.

Case below: 83 N.C. App. 160.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

STATE v. TAYLOR

No. 657P86.

Case below: 83 N.C. App. 160.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

STATE v. WILKES

No. 648P86.

Case below: 73 N.C. App. 180.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 February 1987.

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

WARD v. PITT COUNTY MEMORIAL HOSPITAL

No. 753P86.

Case below: 81 N.C. App. 521.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 3 February 1987.

WHITE v. FLEET FINANCE AND MORTGAGE, INC.

No. 709P86.

Case below: 83 N.C. App. 541.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987.

STATE OF NORTH CAROLINA v. MICHAEL RAY REESE

No. 468A83

(Filed 4 March 1987)

1. **Constitutional Law § 63; Jury § 7.11— death qualification of jury—no denial of cross-section right**

The practice of allowing the prosecutor in a first degree murder case to "death qualify" the jury before the guilt-innocence phase of the trial does not deny defendant the constitutional right to trial by a representative cross-section of the community.

2. **Jury § 6— first degree murder case—individual voir dire not required**

There was no merit to defendant's contention in a first degree murder case that a potential "domino effect" required individual *voir dire* and sequestration of potential jurors.

3. **Jury § 7.12— excusal of jurors for death penalty views**

The trial court properly excused certain jurors based on answers regarding the death penalty where the answers of such jurors to the prosecutor's questions clearly disclosed that they met the standard set forth in *Wainwright v. Witt*, 469 U.S. 412 (1985).

4. **Jury § 7.11— death penalty views—excusal of jurors for cause—refusal to permit rehabilitation**

The trial judge did not err in refusing to permit defendant to rehabilitate certain jurors before ruling on the prosecutor's challenge for cause on *Witherspoon* grounds because several jurors apparently changed their minds when the prosecutor's general questions became more specific where the record shows no reason to believe that these jurors would have subsequently given defendant different answers from those they gave the prosecutor.

5. **Jury § 6.4— death penalty views—improper questions**

The trial court did not err in sustaining the prosecutor's objections to questions defendant sought to ask a potential juror which impermissibly attempted to "stake out" the juror's position on the types of situations in which he would vote for the death penalty.

6. **Criminal Law § 75.10— confession—voluntary waiver of right to silence**

There was sufficient evidence, considering the totality of the circumstances, to support the trial court's conclusion that defendant's waiver of his right to remain silent was voluntary, although defendant presented evidence that his cell was cold due to a heat outage affecting the whole building and that an officer told him that things would go better for him if he confessed, where the State presented evidence that the jail staff provided inmates with blankets and space heaters, that the heat failure occurred after defendant's confession, and that the officer did not tell defendant that things would go better for him if he confessed.

7. **Criminal Law § 75.10— confession—counsel unavailable—knowing waiver of right to silence**

There was sufficient evidence, considering the totality of the circumstances, to support the trial court's conclusion that defendant knowingly waived his right to remain silent when, upon twice being informed that his appointed counsel was out of town and would not be available to advise him, defendant stated that he still desired to make a statement.

8. **Criminal Law § 75.10— confession—intelligent waiver of right to silence—attorney's desire for no further interrogation—absence of knowledge by defendant**

There was no merit to defendant's contention that he did not intelligently waive his right to remain silent because he had not been informed that his appointed attorney had asked the appointing judge to announce in open court that he wanted no further interrogation of defendant until he had a chance to talk with him and that his attorney had called the sheriff with essentially the same request.

9. **Criminal Law § 75.4— invocation of right to counsel—subsequent confession**

Defendant's Fifth Amendment right to counsel during interrogation was not violated when defendant confessed after having previously invoked his right to counsel where the trial court found upon supporting evidence that defendant initiated the conversation which led to his confession and that defendant knowingly, voluntarily and intelligently waived his right to counsel.

10. **Criminal Law § 75.4; Constitutional Law § 49— right to counsel—waiver—no knowledge of attorney's wishes**

Defendant made a valid waiver of his Sixth Amendment right to the assistance of counsel during interrogation although he had not been informed that his appointed attorney had asked the police not to interrogate defendant further until he had a chance to talk with defendant.

11. **Criminal Law § 75.4; Constitutional Law § 49— right to counsel—waiver against attorney's wishes**

The right to counsel belongs to the defendant, and he retains it even after counsel is appointed. Thus, if defendant's waiver of his right to counsel is otherwise voluntary, knowing, and intelligent, his lawyer's wishes that he not waive his right to counsel are irrelevant.

12. **Criminal Law § 169.3— admission of evidence—error cured by other evidence**

Any error in admitting an officer's identification of defendant as the man he had seen with a codefendant near a store in Aulander some time before midnight on the date in question was rendered harmless by the subsequent admission of defendant's own statement that he was the man who was with the codefendant in Aulander that evening.

13. **Criminal Law § 43.4; Homicide § 20.1— admission of photographs and color slides**

The trial court in a robbery-murder case did not err in admitting black and white photographs used to illustrate an SBI agent's verbal descriptions of

the crime scene where they were relevant to the State's attempt to prove the viciousness of the attack and the movement of the victim during and after the attack; they depicted different scenes and thus were not repetitious; and they were not so gruesome and inflammatory that their value was outweighed by their prejudicial effect. Nor did the court err in admitting color slides used to illustrate testimony by a pathologist concerning the location, type and size of the various wounds he observed on the victim.

**14. Homicide § 15— size and health of victim—relevancy**

Testimony by a robbery-murder victim's daughter to the effect that the victim was sufficiently large and able-bodied to have struggled with a single assailant was relevant and material to the State's contention that two people actively participated in the killing.

**15. Homicide § 21.5— premeditated and deliberate murder—participation in stabbing—insufficient evidence**

The evidence in a first degree murder case raised only a suspicion that defendant stabbed the victim or held her as she was being stabbed and was insufficient for submission to the jury on the issue of defendant's guilt of a premeditated and deliberate murder on the theory that he participated in the stabbing where the State introduced defendant's statement to the effect that he was outside in the car during the stabbing of a robbery victim by a codefendant, and where the State's circumstantial evidence tended to show that there was no defensive stab or cut wounds on the victim's arms, that the victim was a strong woman who could not have been subdued by the codefendant alone, that there were marks on the victim's neck suggesting a choke hold, that there were two large pools of blood and large smears of blood on the floor suggesting a struggle, that the victim indicated that there were two of them who did "it," and that defendant had concealed bloodied shoes and clothing.

**16. Homicide § 2.1— premeditated and deliberate murder—acting in concert theory—necessity for showing mens rea**

While it would not be necessary for defendant to be actually present in order to be convicted of premeditated and deliberate murder under the acting in concert theory, the requisite *mens rea*—willfulness, premeditation, and deliberation—must still be shown.

**17. Homicide § 18.1— felony murder rule—number of victim's wounds—no imputation of premeditation and deliberation to felony participant**

While the felony murder rule allows the court to dispense with proof of premeditation and deliberation in order to convict, and while the number of wounds inflicted on the victim will support a jury's determination that a killing was premeditated and deliberate on the part of the killer, neither of these principles allows the imputation of premeditation and deliberation from the person inflicting the wounds to one who is only held culpable for the murder by reason of his participation in the underlying felony.

**18. Homicide § 18.1— premeditation and deliberation—inference upon an inference**

An inference that defendant and a codefendant both intended from the start to kill a robbery victim because both men entered the victim's store un-

masked was speculative "inference stacking" and was thus insufficient to support defendant's conviction of a premeditated and deliberate murder where the only suggestion that defendant and the codefendant were unmasked was itself an inference from the silence of the record.

**19. Homicide § 18.1— premeditation and deliberation—knowledge of codefendant's intent to kill—insufficient evidence**

There was insufficient evidence to permit a jury finding that defendant knew that a codefendant intended to kill a robbery victim so as to allow the imputation of premeditation and deliberation to defendant where there was no evidence that defendant discussed anything other than the robbery with the codefendant; there was no evidence in the guilt-innocence phase of the trial that the codefendant was not masked when he went into the victim's store; and there was no evidence presented in the guilt-innocence phase of the trial that the codefendant knew the victim or that defendant knew that the codefendant knew the victim.

**20. Homicide § 21.6— felony murder—sufficiency of evidence**

The evidence was sufficient to support defendant's conviction of first degree murder under the felony murder rule where it tended to show that defendant and a codefendant planned to rob a grocery store, that a store clerk was stabbed to death during the robbery, and that defendant was at least constructively present during the robbery-murder and available to assist the codefendant. Whether there was sufficient evidence to show that defendant either committed the killing himself, intended that the killing take place, or even knew the killing would take place is irrelevant for the purpose of determining defendant's guilt under the felony murder theory.

**21. Criminal Law § 135.8— first degree murder—armed robbery as aggravating circumstance—improper submission**

The trial court erred in the submission of the aggravating factor that a first degree murder was committed during an armed robbery where defendant was not properly convicted of premeditated and deliberate murder but was properly convicted only on the theory of felony murder. N.C.G.S. 15A-2000 (e)(5).

**22. Criminal Law § 135.8— first degree murder—avoidance of arrest aggravating factor—insufficient evidence**

The trial court erred in the submission of the aggravating factor that a first degree murder was committed to avoid a lawful arrest where the only evidence relied upon to support this factor was the killing itself. N.C.G.S. 15A-2000(e)(4).

**23. Criminal Law § 135.8— first degree murder—heinous, atrocious or cruel aggravating factor—sufficient evidence**

The trial court did not err in the submission of the heinous, atrocious or cruel aggravating factor in a first degree murder case where there was evidence that the victim struggled violently against death, that she was stabbed repeatedly, and that she remained conscious for many minutes before dying. N.C.G.S. 15A-2000(e)(9).

**24. Criminal Law § 135.7— first degree murder—sentencing hearing—Enmund issues—Pattern Jury Instruction—substitution of "would" for "might"**

In paragraph (c) of the "Enmund" Pattern Jury Instruction, N.C.P.I. § 150.10, the word "would" should be substituted for the word "might" in the phrase "contemplated that deadly force might be used."

Justice MITCHELL dissenting.

Justice MARTIN joins in this dissenting opinion.

APPEAL by defendant, pursuant to N.C.G.S. § 7A-27(a), from a sentence of death imposed by *Barefoot, J.*, following a jury recommendation, upon his conviction for first-degree murder at the 9 May 1983 Criminal Session of Superior Court, NORTHAMPTON County (judgment and sentence of death entered 18 May 1983; concurrent three-year sentence for conviction of felonious conspiracy entered 9 May 1984). Heard in the Supreme Court 9 December 1986.

Mrs. Martha Blowe Martin, night manager and cashier of the Red Apple Market in the Town of Woodland, was attacked and stabbed during the course of an armed robbery of the store occurring in the early morning hours of 3 December 1982. Mrs. Martin sustained five stab wounds and approximately ten other incised wounds and abrasions. The cause of death was two of the stab wounds, one of which severed the right jugular vein and the other an abdominal wound which perforated the portal vein and the inferior vena cava. There was no eyewitness testimony as to the attack.

Defendant was arrested on 3 December 1982 pursuant to warrants charging him with murder and armed robbery. He was subsequently indicted on 10 January 1983 for first-degree murder, armed robbery, and conspiracy to commit armed robbery. The case came on for trial at the 9 May 1983 Criminal Session of Superior Court, Northampton County, with Barefoot, J., presiding. On defendant's motion, a special venire of jurors was drawn from and selected in Bertie County. Defendant elected to remain silent and offered no evidence at the guilt-innocence phase of the trial. The jury returned verdicts of guilty of felonious conspiracy and of first-degree murder on the dual bases of premeditation and deliberation and felony murder. The charge of armed robbery was merged with the felony murder charge on submission to the jury.

At the sentencing phase of the trial, commenced on 16 May 1983, the State and the defendant presented evidence. The jury found as factors in aggravation that the murder was especially heinous, atrocious, or cruel; that it was committed during an armed robbery; and that it was done to avoid a lawful arrest. It found in mitigation that defendant had assisted the police in solving the crime. The jury recommended a sentence of death, and the trial judge sentenced defendant accordingly. Defendant appealed to this Court as a matter of right pursuant to N.C.G.S. § 7A-27(a) (1986). The State failed to pray judgment on the conviction of felonious conspiracy, and a resentencing hearing was held before the same judge at the 9 May 1984 Criminal Session of Superior Court, Northampton County, by special commission of the Chief Justice of this Court, for the purpose of acting on the State's prayer for judgment on the felonious conspiracy conviction. At the hearing, the trial judge denied defendant's motion to dismiss the State's prayer for judgment and sentenced defendant to the presumptive term of three years to run concurrently with the death penalty. Defendant gave notice of appeal to the Court of Appeals. His motion to bypass the Court of Appeals was allowed by this Court on 5 June 1985.

*Lacy H. Thornburg, Attorney General, by Barry S. McNeill, and Thomas J. Ziko, Assistant Attorneys General, for the State.*

*Rosbon D. B. Whedbee and Mitchell S. McLean for defendant-appellant.*

MEYER, Justice.

Defendant raises numerous assignments of error in both the guilt-innocence and sentencing phases of his trial. These assignments can be grouped into four categories: errors in jury selection, errors in the guilt-innocence phase of the trial, errors in sentencing, and the disproportionality of the sentence. We find that there were no errors in jury selection. However, we find that there was insufficient evidence to support the jury's verdict of guilt on the theory of premeditation and deliberation. There was also error in the submission of two aggravating factors in the sentencing hearing. This error requires a resentencing on the felony-murder conviction. The proportionality of defendant's sentence is accordingly not properly before us here.

On the night of Thursday, 2 December 1982, Mrs. Martha Blowe Martin was working the 11:00 p.m. to 7:00 a.m. shift at the Red Apple Market. She was the only employee on that shift. Between midnight and about 12:50 a.m. on 3 December, she was seen in the store by several customers and a citizen on Community Crime Watch duty. Shortly thereafter, she was brutally attacked and stabbed by one or more assailants. At approximately 1:00 a.m., Mrs. Frances Johnson, who had gone to the store to purchase an item, found Mrs. Martin lying on the floor of the store in a pool of blood, still alive but mortally wounded. Mrs. Johnson rushed home and informed her husband that something had happened at the Red Apple Market. Mr. Johnson then telephoned the wife of the Chief of Police of Woodland, who contacted her husband by radio.

When Woodland Police Chief Joseph White arrived on the scene at 1:17 a.m., he first checked the store to see if anyone else was there and then knelt beside the victim to see what he could do. She was still alive. He cleared her mouth and throat and asked her if she knew "who did it." She nodded and mumbled something that sounded like "Harmon" or "hundred." Police Chief White confirmed at the sentencing hearing that it did not sound at all like "Reese." Since Mrs. Martin was having difficulty speaking, Chief White told her to respond to his questions by nodding "yes" or shaking her head "no." He then asked her if "they" were white, and she shook her head, indicating "no"; if "they" were black, and she nodded, indicating "yes." He asked if "they" were young, and she nodded, indicating "yes"; if "they" were old, and she shook her head, indicating "no." He then asked if there were more than one, to which she nodded, indicating "yes"; if there were two, to which she nodded, indicating "yes"; and if there were three, to which she shook her head, indicating "no." Some of these questions and responses were repeated. The victim died minutes later, just before the rescue squad arrived. An autopsy revealed that she had received five stab wounds, six abrasions, two cuts, and some bruises. She died from two of the stab wounds.

After interviewing witnesses who had been near the store between midnight and 1:00 a.m., the sheriff's department put out an APB (all points bulletin) for a blue vehicle occupied by two young black men. Such a vehicle had been seen leaving the Red

Apple. The witness who reported it, Johnny Vincent, another Woodland resident, did not identify either of the two men. As a result of the APB, Chief Deputy Otis Wheeler, the officer in charge of the case, received a telephone call from Police Chief Jerry Hathaway of Aulander. Chief Hathaway reported seeing such a car in Aulander earlier in the evening in front of the Red Apple there. He had taken the license number of the car. A check disclosed that the car was registered to one Della Futrell Harmon of nearby Conway. Deputy Wheeler went to the Harmon residence, where he found one Lynvelt Harmon. He also found and impounded the car, a blue 1972 Plymouth. At some time in the afternoon of 3 December, after talking to Harmon, Deputy Wheeler obtained warrants for the arrest of both Harmon and defendant. Chief Hathaway later identified Lynvelt Harmon and defendant as the two men he had seen in the blue car in front of the Red Apple in Aulander.

Defendant turned himself in on the evening of 3 December 1982 before the warrants against him were otherwise served. He was given *Miranda* warnings, but nevertheless made a statement denying any involvement. When Deputy Wheeler indicated disbelief, defendant refused to talk further and asked for a lawyer. Three days later, defendant made a statement admitting involvement in the robbery only. According to this statement, he and Harmon had first gone to Aulander to rob the Red Apple. They had decided not to because of the number of people around. It had been Harmon's idea to go back to Woodland and rob the Red Apple there. Defendant had objected because he was known in Woodland and was afraid of being identified. Harmon had ridiculed defendant's fears and proposed that he, Harmon, would go into the store with a knife and force the clerk to lie face down. Defendant could then go in and take the money from the cash register. The clerk would thus never see defendant. Defendant finally agreed. When it appeared that Mrs. Martin was alone, Harmon went in. After an interval, defendant followed and, also according to his statement, was horror-stricken to find Mrs. Martin on the floor, bleeding. Defendant grabbed some money from the cash register. As they were leaving, defendant asked Harmon if he had the knife. Harmon had left the knife near the body. Defendant picked up the knife; wiped it on his clothing; and after the two

were in the car, asked Harmon what to do with the knife. Harmon said to throw it out, and defendant did so.

Defendant's statement indicated that his shoes and clothing had blood on them. The shoes were never found. Defendant's clothing had been washed by the time it was turned over to the police. Three tiny drops of human blood, two of which were submitted for analysis and found to be human rather than animal, were found on the running board on the passenger's side of Harmon's car. A small blood smear was also found on the back rest on the passenger's side seat. Neither the age nor the blood type of these spots could be determined.

The State introduced no evidence connecting defendant to the crime other than his confession and the physical evidence.

At trial, the State argued that defendant's confession was false in certain key respects and that the defendant had himself participated in the stabbings. First, the State argued that two people must have stabbed Mrs. Martin. She had marks on her throat that could have been made by a cord used to choke the victim, and there were no defense-type knife wounds on her hands and arms; thus, the State argued, her arms had been held while she was being stabbed. Although the pathologist who performed the autopsy testified that his findings were consistent with a frantic attack by either one or two assailants, the State argued that the difference in physical stature between Harmon and the victim[1] and the lack of defensive knife wounds proved that Harmon alone could not have both held and stabbed her. Second, the prosecutor argued that the defendant made no attempt to conceal his identity. Because defendant committed an armed robbery of someone who could identify him, he must have intended to leave no witness. The prosecutor argued that defendant must not have concealed his identity because he had not said in his statement that he was masked. Although defendant's statement indicated he had seen the victim "millions" of times, no direct evidence was admitted on the witness elimination theory.

1. The victim was in her late forties, five feet, three inches tall, weighed 160 pounds, and was capable of performing tasks normally done by women of her age. Harmon was nineteen years old, just over six feet tall, and weighed about 137 pounds.

The State elected not to try Harmon and defendant together; nor did Harmon testify at defendant's trial. Harmon was subsequently tried separately on the identical charges. The State accepted a plea of guilty to armed robbery, and Harmon was sentenced to the mandatory minimum fourteen-year term of imprisonment.

Other pertinent facts will be discussed herein as they relate to our treatment of specific issues.

JURY SELECTION ISSUES

**[1]** Defendant argues first that the practice of allowing the prosecutor to "death qualify" the jury before the guilt-innocence phase of the trial denied him the constitutional right to trial by a representative cross-section of the community. He contends that such juries may be more prone to convict than non-death qualified juries. This Court has repeatedly rejected defendant's argument, *see, e.g., State v. Rogers*, 316 N.C. 203, 341 S.E. 2d 713 (1986); *State v. Wingard*, 317 N.C. 590, 346 S.E. 2d 638 (1986), as has the United States Supreme Court, *Lockhart v. McCree*, 476 U.S. 162, 90 L.Ed. 2d 137 (1986).

**[2]** Defendant next contends that the trial judge erred in denying his motion for individual voir dire of jurors and sequestration of jurors during voir dire. His argument is that group voir dire allows a so-called "domino effect": when prospective jurors are allowed to hear questions addressed to other jurors, they quickly discover the type of responses or answers that will free them from jury duty. Defendant bolsters this argument with the fact that some jurors apparently changed their minds about the death penalty during the course of the voir dire.

Motions for individual voir dire and jury sequestration are directed to the discretion of the trial judge. *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983); *see* N.C.G.S. § 15A-1214 (1983). The exercise of this discretion will not be reversed on appeal absent a showing of abuse. *State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986); *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703. This Court has specifically rejected defendant's argument that a potential "domino effect" requires individual voir dire and sequestration. *See State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *reh'g denied*, 448

U.S. 907, 65 L.Ed. 2d 1137 (1980). The trial judge may presume that prospective jurors will be truthful about their beliefs. The simple fact that some jurors disclosed opposition to capital punishment only upon closer questioning does not by itself show that the judge erred in this presumption.

**[3]** Defendant next contends that the trial judge erred in excusing certain jurors based on answers regarding the death penalty that did not meet the standard set forth in *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776 (1968). In *Witherspoon*, the United States Supreme Court held that jurors could not be excluded for cause for expressing conscientious objections to the death penalty unless their answers made it "unmistakably clear" that they would automatically vote against the death penalty or that their views would prevent them from making an impartial decision about a defendant's guilt. *Id.* at 522 & n.21, 20 L.Ed. 2d at 785 & n.21. In 1985, the United States Supreme Court "clarified" *Witherspoon* and held that the proper standard was whether a juror's views would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L.Ed. 2d 841, 851-52 (1985) (quoting from *Adams v. Texas*, 448 U.S. 38, 45, 65 L.Ed. 2d 581, 589 (1980)). We have carefully examined the voir dire testimony of each of the jurors whom defendant contends were improperly excluded. Their answers to the prosecutor's questions clearly disclose that they met the standard set forth in *Witt*. Accordingly, the trial judge did not err in allowing them to be excused for cause.

**[4]** Defendant also contends that the trial judge erred in refusing to allow him to rehabilitate certain jurors before ruling on the prosecutor's challenge for cause on *Witherspoon* grounds. Defendant argues that these jurors had apparently changed their minds, rendering their positions on the death penalty "ambiguous," and that examination by defendant could have clarified these "ambiguities."

The regulation of the manner and extent of inquiry by counsel at the voir dire rests largely in the trial judge's discretion. *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981).

> When challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor

> and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow the defendant to question the juror challenged.

*State v. Oliver*, 302 N.C. at 40, 274 S.E. 2d at 191 (citations omitted). We have carefully examined the testimony of those jurors who defendant claims might have been rehabilitated. Defendant has made no showing that additional questioning might have produced different answers. Although he emphasizes that several jurors apparently changed their minds when the district attorney's general questions became more specific, we find in the record no reason to believe that these jurors would have subsequently given defendant answers different from those they gave the prosecutor. We note that defendant's only attempt at rehabilitation was unsuccessful in obtaining different answers from juror Bessie Byrd or saving her from challenge. Defendant has failed to show an abuse of discretion.

**[5]** Finally, defendant argues that the trial court erred in sustaining the prosecutor's objections to questions defendant sought to put to a potential juror. Defendant's questions appear on examination to be merely an impermissible attempt to "stake out" the juror's position on the types of situations in which he would vote for the death penalty. *See State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390. Accordingly, we find no error in the trial judge's decision to sustain the prosecutor's objections.

## GUILT-INNOCENCE PHASE

Defendant's first argument relating to the guilt-innocence phase of his trial is that the judge erred in admitting defendant's pretrial statement into evidence. Defendant contends that the taking of the statement violated both his fifth amendment right to remain silent and his sixth amendment right to assistance of counsel.

The combination of a number of important factors makes the taking of the statement and its admission into evidence particularly significant to defendant's case. There was no eyewitness to the killing; the coparticipant, Harmon, did not testify at defendant's trial; and defendant did not testify during the guilt-inno-

cence phase. There was no direct testimony which placed defendant inside the store when the actual stabbing took place. Thus, the content of defendant's statement was, other than the physical facts, the only evidence presented as to defendant's participation in the events that transpired inside the store. While there is other substantial evidence of defendant's participation in the *robbery*, his statement is the only nonphysical evidence of his participation in the actual *killing*. The statement therefore is particularly significant to the State's premeditation and deliberation theory. Because of its importance, we treat the taking and admission into evidence of this statement at length.

The warrants for defendant's arrest were issued on 3 December 1982. On that evening at about 8:00 p.m., the defendant, with his father present, surrendered himself at the Murfreesboro Police Department. He was taken to the Northampton County Sheriff's Department where Chief Deputy Sheriff Otis Wheeler, in the presence of SBI Agent Eugene Bryant, Chief of Police Joseph White, and Deputy Sheriff Edward Buffaloe, advised the defendant that a warrant had been issued for his arrest on a charge of murder. After apprising the defendant of the charge against him, Deputy Wheeler advised him of his *Miranda* rights, including his right to remain silent, his right to talk to an attorney before answering questions, his right to have an attorney present during questioning, his right to have an attorney appointed to represent him, his right to stop answering questions at any time, and his right to stop answering questions until he talked to an attorney. After Deputy Wheeler read the defendant each of his rights, he asked if the defendant understood that right. Defendant indicated that he understood each of his rights. In fact, defendant testified on 14 March 1983 at his suppression hearing that he had understood each of his rights at that time and had voluntarily agreed to talk to Deputy Wheeler. After being advised of his rights and indicating that he understood each of his rights, the defendant signed a waiver of rights form indicating his desire to waive his rights.

After being advised of his rights and executing a waiver of his rights, the defendant gave a short statement to Deputy Wheeler in which he claimed to have last seen the codefendant, Lynvelt Harmon, at 9:30 p.m. on the night of the murder. The defendant told Deputy Wheeler that he did not go to Aulander

with Lynvelt Harmon on the night of the crime. After the defendant had made his statement, Deputy Wheeler said he did not believe that defendant had not been to Aulander that night. The defendant reiterated his claim and then terminated the interrogation by saying, "Why don't you carry me to jail? I've told you all I'm going to tell you. I don't know what you're talking about till [sic] I talk to a lawyer."

The defendant remained confined in the Northampton County Jail from the evening of Friday, 3 December 1982, until the morning of Monday, 6 December 1982, at which time he was taken to the Northampton County District Court for his first appearance. During that first appearance, the defendant requested court-appointed counsel, and the court informed him that Rosbon Whedbee would defend him. After his appearance, the defendant was returned to the Northampton County Jail. During the time they were transporting the defendant to and from the courtroom, the law enforcement officers had no conversation with the defendant about the charges against him.

Later in the afternoon of Monday, 6 December 1982, Deputy Buffaloe had occasion to deliver to the defendant in his jail cell an order directing him to appear and submit to certain nontestimonial identification procedures, i.e., the removal of hair and blood samples. While Deputy Buffaloe was serving the nontestimonial identification order on him, the defendant asked, "Where is Otis Wheeler?" In response to defendant's inquiry, Deputy Buffaloe stated that he thought Deputy Wheeler had gone home and asked the defendant why he wanted to know. The defendant then said, "I wanted to see him, I might want to talk to him—you know."

Deputy Buffaloe left the jail, telephoned Deputy Wheeler at his home, and informed him that the defendant had requested to see him. Upon being notified of defendant's request, Deputy Wheeler left his home and arrived at the defendant's jail cell approximately ten or fifteen minutes after the conclusion of the defendant's conversation with Deputy Buffaloe.

The defendant testified at the suppression hearing that following the arrival of Deputy Wheeler, the following conversation occurred:

A. He asked me, said, You want to see me? and I said, Yes, sir, I said, Wait—can you get in contact with my lawyer?[2]

After this short exchange, Deputy Wheeler left the jail for approximately five or ten minutes.

The defendant testified that once Deputy Wheeler returned to the jail cell, the following conversation occurred:

[T]hen he come back, said, Your lawyer is out of town. Then he told me, said, Well, if you got anything to say—you know—it would be better for you to say it—you know—he told me it was another guy over at—I think it was another attorney—you know—if I got anything to say it would be better, and I said, Yeah, I would like to talk to you, so we left and went over there to the courtroom—I mean—over to his office and we talked.[3]

Both the defendant and Deputy Wheeler testified to the effect that Deputy Wheeler did not approach the defendant until after the defendant had asked for him. Moreover, the defendant could not recall telling Deputy Wheeler on that day that he did not want to talk to him, but would rather wait until he could talk to his lawyer. In fact, the defendant admitted that he had told Deputy Wheeler that he wanted to tell "[his] side of the story."

After the defendant had been informed that his lawyer was unavailable and after the defendant had reiterated his desire to talk to Deputy Wheeler, he was taken from his cell to Deputy Wheeler's office where a member of the district attorney's staff, Mr. Sam Barnes, was waiting with a tape recorder. Once the defendant was in his office, Deputy Wheeler again advised him of his *Miranda* rights. After being advised of his rights, the defendant executed a form indicating his desire to waive those rights and make a statement. The defendant's signature on the waiver of rights form was witnessed by Mr. Barnes. After the defendant

2. This testimony substantially corroborates the testimony of Deputy Wheeler with the exception that Deputy Wheeler testified that he, rather than the defendant, interrupted the conversation to attempt to contact the defendant's attorney.

3. This testimony is in substantial agreement with Deputy Wheeler's testimony, with the exception that Deputy Wheeler denied telling the defendant it would be better if he gave a statement.

had executed the waiver of rights form, Deputy Wheeler made the following statement to him:

> Mike, Michael besides these warning[s] of your right[s] you know I have told you that the court has appointed Mr. Whedbee of Ahoskie to represent you on these charges, Mr. Whedbee is now in Winston-Salem and will not be back until Wednesday. With this in mind you still want to tell me what you want to talk to us about, what happened and tell your side of it.

In response to this information, the defendant once again indicated that he desired to talk to Deputy Wheeler and tell him his version of the events on the night of the murder.

Prior to trial, counsel for the defendant filed a timely motion to suppress the statement the defendant had given Deputy Wheeler on the night of 6 December 1982. A hearing on the defendant's motion to suppress was held on 14 March 1983. The transcript of the hearing on defendant's motion to suppress reveals this question on cross-examination and Deputy Wheeler's response:

> [Q.] . . . After taking the statement from him what, if anything, did you do at that time?
>
> A. After he got through making the initial statement, I went back over this thing about he knew his lawyer was not present and knew his lawyer could not be present. He still wanted to talk to us and he did talk to us and it was freely on his own. He said, Yes, sir.

Indeed, the transcript of defendant's taped statement (State's exhibit No. 40) contains these words, spoken near the beginning of the tape:

> Wheeler: You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until

you talk to a lawyer. Ok I have read or have had read to me this statement of my right[s] and I understand what my rights are. With these rights in mind, I am willing to make a statement and answer questions. I do not want a lawyer at this particular time. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me. Is this true?

Reese: Yes Sir.

Wheeler: Ok, if you will sign your name here. The time is December 6, 1982, at seven minutes past six. Mike, Michael besides these warning[s] of your right[s] you know I have told you that the court has appointed Mr. Whedbee of Ahoskie to represent you on these charges, Mr. Whedbee is now in Winston-Salem and will not be back until Wednesday. With this in mind you still want to tell me what you want to talk to us about, what happened and tell your side of it.

Reese: Yes Sir.

At the conclusion of that hearing, the court denied the defendant's motion to suppress his statement. During the trial, the defendant renewed his motion to suppress his statement on grounds that he did not knowingly waive his right to counsel prior to making the statement and that the statement had been obtained in violation of the United States Supreme Court's holding in *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378 (1981). At that time, the trial court again denied the motion to suppress and made the following findings of fact:

The Court finds as a fact that the defendant on his own request caused Officer Otis Wheeler to come to the Northampton County Jail from his home from an afternoon off where he was fixing dinner for his wife; that upon arriving at the Northampton County Jail, the defendant informed him that he wanted to make a statement—a voluntary statement; that he was again advised of his rights, he was informed that an attorney had been appointed for him that day; that his attorney was in Winston-Salem and that he had the right to wait for him and talk with him prior to making any voluntary statement that he wanted to make; that the defendant said that he knew that he had an attorney—that an attorney had

> been appointed for him; that he wanted to, quote, get it off his chest. He signed and was advised of all his "Miranda" rights, freely, voluntarily and of his own accord signed a waiver of all the rights that he had.

Following the court's decision to deny the motion to suppress, the defendant's statement was read into evidence.

Defendant next makes a series of related arguments regarding the denial of his motion to suppress his statement and its subsequent admission at trial. He argues that both his fifth and sixth amendment rights were violated in the taking of the statement by the police and that his confession should therefore have been suppressed by the trial judge. We disagree.

Defendant first argues that the statement was taken in violation of his fifth amendment right against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966). The State contends that defendant effectively waived his rights. Fifth amendment rights may only be waived if that waiver is made knowingly, voluntarily, and intelligently. *Moran v. Burbine*, 475 U.S. 412, 89 L.Ed. 2d 410 (1986); *Johnson v. Zerbst*, 304 U.S. 458, 82 L.Ed. 1461 (1938).

The test for the effectiveness of the waiver was set out by the United States Supreme Court in *Moran*:

> The inquiry has two distinct dimensions. First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

*Moran*, 475 U.S. at 421, 89 L.Ed. 2d at 421 (citations omitted).

**[6]** Defendant first argues that the "totality of the circumstances" in this case compels a conclusion that his confession was not voluntary. As evidence for this proposition, the defendant points to the fact that his cell was unheated and to his con-

tradicted testimony that Deputy Wheeler told him that things would go better for him if he confessed. He concludes that his confession was the result of threats and promises on the part of the police and should have been suppressed as involuntarily made. *See Brady v. United States*, 397 U.S. 742, 25 L.Ed. 2d 747 (1970).

The State first contends that there was sufficient evidence to support the trial judge's conclusion that defendant voluntarily waived his right to remain silent. While it is apparently true that defendant's cell was cold (due to a heat outage affecting the whole building), there was also evidence that the jail staff provided the inmates with blankets and space heaters. Moreover, members of the defendant's family came to visit him but apparently did not bring him blankets. Finally, the State's evidence was that the heat failure occurred after the defendant's confession. As to the statement attributed to Deputy Wheeler to the effect that it would go better for defendant if he confessed, the State's evidence was that no such statement was made, that the defendant sought out Deputy Wheeler to make a statement, and that no promises or inducements were offered in exchange. Such conflicts or contradictions in the evidence are for the finder of fact to weigh. *State v. Jenkins*, 311 N.C. 194, 203, 317 S.E. 2d 345, 350 (1984). The trial judge concluded that the defendant's statement was voluntarily made. Considering the totality of the circumstances, it appears that there was sufficient evidence to support the trial judge's conclusion that the waiver was voluntary.

**[7]** Defendant next contends that his waiver was not knowing. We disagree. The totality of the circumstances here reveal a 24-year-old adult with a twelfth grade education who had previous experience with law enforcement authorities and was aware of his rights as a suspect in a criminal proceeding. After a warrant had been issued for his arrest for first-degree murder, the defendant, knowing he had been charged with first-degree murder, turned himself in to the authorities. On that same night he was advised of his *Miranda* rights and waived those rights prior to giving a short statement denying any involvement in the crime in question. When the investigating officer disputed the truthfulness of the defendant's statements on that occasion, the defendant himself terminated the interrogation by insisting upon his right to silence and his right to assistance of counsel. Defendant was in-

carcerated in the Northampton County Jail for three days. During that time, defendant's family visited with him and he had several encounters with law enforcement authorities that did not lead to any interrogation relevant to the investigation of the crime in question. After being in jail three days, the defendant, on his own initiative, indicated a desire to speak with Deputy Wheeler, the officer who had interrogated him earlier. When Deputy Wheeler arrived at the defendant's cell, the defendant indicated that he wanted to make a statement and get the whole matter off his chest. Deputy Wheeler, knowing that the defendant had been appointed counsel, reminded defendant of that fact, then left the defendant for a short time to find out whether the defendant's counsel could be contacted. When he was informed that defendant's counsel would not return to Northampton County for several days, Deputy Wheeler returned to the defendant's cell and told him that his attorney was out of town. Deputy Wheeler then asked the defendant if, in light of that fact, he still desired to make a statement. Despite being informed that counsel would not be available to advise him, the defendant stated that he nevertheless wanted to speak to Deputy Wheeler. The defendant was then removed from his cell and taken to Deputy Wheeler's office, where, in the presence of a member of the district attorney's staff, he was once again advised of his *Miranda* rights and waived those rights. After having waived his rights, the defendant was once again asked whether, knowing he had been appointed a lawyer and knowing that his lawyer would not be available to assist him until Wednesday, he still wanted to make a statement. Defendant reiterated his desire to make a statement and then proceeded to give the statement which was introduced into evidence. We conclude from the totality of the circumstances that the waiver was knowingly made.

**[8]** Defendant insists, however, that while his waiver may have been knowing and voluntary, it was not intelligently made. When defendant's attorney was first appointed—only a few hours before defendant gave Deputy Wheeler his inculpatory statement—the attorney was in Winston-Salem, unable to return for at least a day. He asked the appointing judge to announce in open court that he wanted no further interrogation of defendant until he had a chance to talk with him. The attorney also called the sheriff with essentially the same request, but the sheriff neither agreed

nor disagreed. Defendant was never told that his attorney had made these requests. He contends that had he been informed of his attorney's instruction, he would not have confessed.

In *Moran v. Burbine*, the United States Supreme Court was confronted with a somewhat similar situation. In that case, Burbine had been arrested for burglary by local police, who were informed by telephone that he was connected with a murder in another city. He was held for questioning. A public defender, acting at the behest of the defendant's sister with regard to the burglary charge, called the police who were holding the defendant and informed them that she would be acting as defendant's legal counsel in the event the police intended to question defendant. The public defender was told that defendant would not be questioned and was not informed that defendant was a suspect in a murder case. The defendant was not informed that counsel had been retained or that counsel had called and was trying to reach him. Defendant was, in fact, questioned that night and, after being informed of his *Miranda* rights, executed a written waiver and signed three statements admitting the murder. The state court denied defendant's motion to dismiss, and he was convicted of the murder. The Supreme Court of Rhode Island affirmed the conviction, and the United States District Court rejected defendant's claims that the police violated his fifth and sixth amendment rights. The United States First Circuit Court of Appeals reversed, finding that the "[d]eliberate or reckless" conduct of the police, in particular their failure to inform defendant of the telephone call, fatally undermined the validity of the otherwise proper waiver and required the exclusion of the three inculpatory statements. The United States Supreme Court reversed, saying:

> We find this conclusion untenable as a matter of both logic and precedent.
>
> Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. . . . No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self in-

terest in deciding whether to speak or stand by his rights. Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law. . . .

. . . .

. . . [R]eading Miranda to require the police in each instance to inform a suspect of an attorney's effort's [sic] to reach him would work a substantial and, we think, inappropriate shift in the subtle balance struck in that decision. Custodial interrogations implicate two competing concerns. On the one hand, "the need for police questioning as a tool for effective enforcement of criminal laws" cannot be doubted. Admissions of guilt are more than merely "desirable," they are essential to society's compelling interest in finding, convicting and punishing those who violate the law. On the other hand, the Court has recognized that the interrogation process is "inherently coercive" and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion. Miranda attempted to reconcile these opposing concerns by giving the *defendant* the power to exert some control over the course of the interrogation. Declining to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation, the Court found that the suspect's Fifth Amendment rights could be adequately protected by less intrusive means. Police questioning, often an essential part of the investigatory process, could continue in its traditional form, the Court held, but only if the suspect clearly understood that, at any time, he could bring the proceeding to a halt or, short of that, call in an attorney to give advice and monitor the conduct of his interrogators.

. . . Because, as Miranda holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation

> process, a rule requiring the police to inform the suspect of an attorney's efforts to contact him would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all. This minimal benefit, however, would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt. . . . Because neither the letter nor purposes of Miranda require this additional handicap on otherwise permissible investigatory efforts, we are unwilling to expand the Miranda rules to require the police to keep the suspect abreast of the status of his legal representation.

*Moran v. Burbine*, 475 U.S. at 422-23, 426-27, 89 L.Ed. 2d at 421-22, 424-25 (citations omitted; footnote omitted).

We conclude from the totality of the circumstances that defendant made an intelligent, as well as knowing and voluntary, waiver of his fifth amendment rights.

**[9]** Defendant's next argument is that his fifth amendment right to the presence of counsel during interrogation was violated. *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378 (1981).

It is defendant's contention that he invoked his right to the presence of counsel on 3 December when he said "I don't know what you're talking about till [sic] I talk to a lawyer." He argues that he was interrogated after invoking his right to counsel. Defendant concludes that the statement should have been suppressed as resulting from a fifth amendment violation.

The State agrees that defendant's right to the presence of counsel had already attached when the defendant's statement was taken on 6 December. It is the State's contention that the defendant effectively waived this right before confessing when he initiated the conversation with Deputy Wheeler.

As we have already noted, the evidence was in conflict regarding whether the defendant or Deputy Wheeler initiated the contact leading to the defendant's confession. The trial judge found that the defendant himself renewed the contact with the police. Such determination is binding upon us on appeal, as there is ample evidence in the record to support it. We take it as fact, therefore, that the defendant initiated the further contact with the police when he asked to speak to Deputy Wheeler. There is

no fifth amendment violation where the defendant himself initiates the conversation. *North Carolina v. Butler*, 441 U.S. 369, 60 L.Ed. 2d 286 (1979). We conclude therefore that there was no violation of the *Edwards* prohibition against police reinitiation of interrogation.

Even when, as here, a defendant initiates the discussion leading to the confession, it must also appear that the defendant intended to waive his right to counsel. *North Carolina v. Butler*, 441 U.S. 369, 60 L.Ed. 2d 286. Our further inquiry is thus whether the defendant, in addition to giving up the right to remain silent, knowingly, voluntarily, and intelligently waived the right to presence of counsel. *Oregon v. Bradshaw*, 462 U.S. 1039, 77 L.Ed. 2d 405 (1983).

Defendant repeats his argument that his relinquishment of the right to presence of counsel was neither knowing, voluntary, nor intelligent. He stresses that the police withheld the information that his lawyer did not want defendant interrogated. We have already held that defendant effectively waived his right to remain silent. Applying the same standard here we also conclude under the totality of the circumstances that his waiver of the right to the presence of counsel was knowing, voluntary, and intelligent.

**[10]** The defendant's final argument regarding the admission of his statement into evidence is that his sixth amendment right to the assistance of counsel was violated. *United States v. Massiah*, 377 U.S. 201, 12 L.Ed. 2d 246 (1964). A defendant has a right to effective representation at all "critical stages" of a criminal prosecution. The State concedes that defendant's sixth amendment rights had attached but argues that defendant effectively waived those rights.

Defendant insists, however, that since he was not informed that his lawyer did not want him interrogated, his waiver of his sixth amendment rights was not intelligently made and was therefore invalid. Defendant argues that the information that his lawyer did not want him interrogated was necessary for an intelligent decision to waive his rights. We do not agree.

The standard for the validity of a sixth amendment waiver is that it be voluntarily, knowingly, and intelligently made. *Faretta*

*v. California*, 422 U.S. 806, 45 L.Ed. 2d 562 (1975); *Boyd v. Dutton*, 405 U.S. 1, 30 L.Ed. 2d 755 (1972); *see also Michigan v. Jackson*, 475 U.S. 625, 89 L.Ed. 2d 631 (1986). Having already held that the waiver was knowing, voluntary, and intelligent for the purposes of the fifth amendment, we also conclude that defendant made a valid waiver of his sixth amendment right to assistance of counsel.

**[11]** Defendant argues, however, that he *could not* waive his right to assistance of counsel under the circumstances of this case. His argument is that when an attorney represents a criminal defendant, he "speaks for" the defendant. Thus, he argues, by instructing the police not to question defendant further, the attorney was exercising defendant's sixth amendment rights for him. Defendant is urging this Court to adopt the rule set forth in *People v. Arthur*, 22 N.Y. 2d 325, 239 N.E. 2d 537 (1968) (once a lawyer represents a defendant in connection with criminal charges under investigation, the defendant may not waive his right to counsel in the absence of his lawyer). This Court has twice rejected this rule, *State v. Bauguss*, 310 N.C. 259, 311 S.E. 2d 248, *cert. denied*, 469 U.S. 838, 83 L.Ed. 2d 76 (1984); *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978), and we decline to adopt it now.

In *Bauguss*, the Court was faced with a situation similar to the case at hand. Defendant's attorney instructed the police not to question defendant on certain criminal charges. Defendant voluntarily confessed, and his confession was held admissible. In reaching this decision, this Court relied at least in part upon the fact that the attorney did not represent defendant on the charges under investigation. The Court said:

> We attach significance to the fact that Attorney Freeman represented the defendant in a matter unrelated to the Absher murder investigation. As the State points out, prior to defendant's inculpatory statements, defendant was not a suspect in the murder case, but was merely a witness cooperating with law enforcement officials in their investigation. We agree that if Attorney Freeman had represented the defendant on the murder and robbery charges, he could have controlled access to the defendant.

*Bauguss*, 310 N.C. at 266, 311 S.E. 2d at 252.

Here, defendant did ask for an attorney, and the attorney who asked that he not be questioned any further on the murder and robbery charges did represent him on those charges. However, the law in North Carolina is that the right to counsel belongs to the defendant, and he retains it even after counsel is appointed. *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674. Thus, the attorney may advise a defendant, but he cannot control defendant's own exercise of his constitutional rights. If defendant's waiver of his right to counsel is otherwise voluntary, knowing, and intelligent, his lawyer's wishes to the contrary are irrelevant. To the extent that the paragraph quoted from *Bauguss* suggests a different result, it is overruled. The federal constitution does not require a different result. *See Brewer v. Williams*, 430 U.S. 387, 51 L.Ed. 2d 424 (1977).

The totality of the circumstances here reveals both an uncoerced choice and the requisite level of comprehension. We therefore conclude that the defendant knowingly, voluntarily, and intelligently waived his fifth and sixth amendment rights. The trial court did not commit error when it permitted the State to introduce that confession into evidence.

**[12]** Defendant also argues that the trial court erred in allowing Police Chief Jerry Hathaway of Aulander to testify that he had seen defendant and Harmon near the Red Apple in Aulander sometime before midnight on the evening of 2 December 1983. Defendant argues that under the circumstances Hathaway described, he was unlikely to have seen defendant clearly enough to be able to identify him accurately and that the in-court identification was impermissibly tainted by an earlier identification at an unconstitutionally conducted "lineup" where defendant's lawyer was not present.

Assuming, *arguendo*, that defendant is correct, we conclude that any error in admitting Chief Hathaway's identification was rendered harmless by the subsequent admission of defendant's own statement. Defendant identified himself in his statement as the man who was with Harmon in Aulander that evening. We have previously held that this statement was properly admitted. Chief Hathaway's identification was thus merely duplicate information that was otherwise admissible. *See State v. Monk*, 291

N.C. 37, 229 S.E. 2d 163 (1976); *State v. Waters*, 308 N.C. 348, 302 S.E. 2d 188 (1983).

**[13]** Defendant argues next that the trial court erred in allowing the introduction of black-and-white photographs and color slides that were "repetitious" and "gory" and which were used to inflame the jury.

The photographs about which the defendant complains were introduced to illustrate the testimony of SBI Agent Bryant, who testified as to the condition of the interior of the convenience store. The agent testified that the photographs fairly and accurately depicted the scene as he observed it at approximately 3:30 a.m. on 3 December 1984. The photographs were primarily used to illustrate his description of the store and his testimony concerning the location and size of various pools and trails of blood. These photographs were allowed into evidence for illustrative purposes over defendant's objection. The rule regarding the use of such photographs to illustrate the testimony of a witness is well stated in *State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579 (1979):

> It is settled law that the unnecessary use of inflammatory photographs in excessive numbers solely for the purpose of arousing the passions of the jurors may deny defendant a fair and impartial trial. *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969); *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963). It is equally well settled that photographs are admissible to illustrate the testimony of a witness and their admission for that purpose under proper limiting instructions is not error. *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974), *death sentence vacated*, 428 U.S. 903 (1976); *State v. Cutshall*, 278 N.C. 334, 180 S.E. 2d 745 (1971). *See generally* 1 Stansbury, N.C. Evidence § 34 (Brandis Rev. 1973). The fact that a photograph depicts a horrible, gruesome or revolting scene does not render it incompetent. When properly authenticated as a correct portrayal of what it purports to show, a photograph may be used by the witness to illustrate his testimony, and its admission for that purpose is not error. *State v. Duncan*, 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969).

*Sledge*, 297 N.C. at 231, 254 S.E. 2d at 582-83.

Applying these principles to the photographs in question, we conclude that they were properly admitted. Each was admitted to illustrate the witness' verbal descriptions of the scene and they were relevant to the State's attempt to prove the viciousness of the attack and the movement of the victim during and after the attack. They were not repetitious, as they depicted different scenes. Nor were they so gruesome and inflammatory that their value was outweighed by their prejudicial effect. The same is true of the several color slides used by Dr. Harris, the expert pathologist and medical examiner, to illustrate his testimony concerning the location, type, and size of the various wounds he observed on the victim. Such testimony, as illustrated by the slides used to illustrate it, was clearly relevant to the extent and nature of the wounds. The total number of photographs and slides admitted was not excessive, and the jury was properly instructed to consider them for the sole purpose of illustrating the testimony of the witnesses. *See State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980). The trial judge did not err in admitting these photographs and slides.

Defendant complains of the admission into evidence of certain items of real evidence, such as the victim's false teeth, which bore scratch marks, on the basis that their admission had no purpose other than to inflame the jury. We have examined the record with respect to each item of which defendant complains and find this argument meritless.

Defendant also contends that the trial court erred in allowing the State to introduce certain items of real evidence without showing an adequate chain of custody. We have examined the testimony with respect to these items and find that the State established an adequate foundation for each one admitted into evidence.

**[14]** Defendant further contends that the trial judge erred in allowing the victim's daughter to testify as to her mother's normal activities. Defendant's main complaint is that the daughter was noticeably distraught during her testimony. This evidence, to the effect that the victim was sufficiently large and able-bodied to have struggled with a single assailant, was relevant and material to the State's contention that two people actively participated in the killing.

Defendant contends summarily that the trial court erred in allowing hearsay, leading questions on direct examination, and admission of inadmissible opinion testimony. Our examination of the record with respect to these assignments of error fails to disclose any error.

Finally, defendant makes a series of related arguments based on the sufficiency of the evidence to support his convictions. At the close of the State's case, defendant moved to dismiss the charge of first-degree murder. This motion was denied. Defendant argues that there was insufficient evidence to go to the jury on the issue of premeditated and deliberate murder. We agree.

The evidence before Judge Barefoot when he ruled on defendant's motion to dismiss was largely the defendant's own pretrial statement.[4] The statement was largely exculpatory, being inculpatory only to the extent that it placed defendant at the Red Apple, prepared to participate in the robbery. The defendant denied in his statement that he either participated in, intended, or contemplated the killing. The rest of the State's case was based upon the physical evidence of the killing: the condition of the body, the scene of the killing, and the testimony of witnesses placing defendant at the scene. The question before Judge Barefoot was whether this evidence was sufficient to go to the jury on the charge of premeditated and deliberate murder.[5]

In reviewing the sufficiency of the evidence needed to survive defendant's motion to dismiss, we are guided by several principles. The evidence is to be viewed in the light most favorable to the State. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978). All contradictions in the evidence are to be resolved in the State's favor. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984). All reasonable inferences based upon the evidence are to be indulged in. *Id.* Our cases also establish that defendant's evidence

4. While the defendant did testify at a suppression hearing and at a later sentencing hearing, this testimony was not presented to the jury and did not, of course, figure into the judge's decision.

5. Defendant was eventually convicted of first-degree murder under both the theories of premeditation and deliberation and felony murder. Since the application of aggravating factors to murders depends in part on the theory under which the defendant was convicted, we must determine whether the evidence supports each of the two theories.

may be considered on a motion to dismiss where it clarifies and is not contradictory to the State's evidence or where it rebuts permissible inferences raised by the State's evidence and is not contradictory to it. *State v. Bates*, 309 N.C. 528, 308 S.E. 2d 528 (1983); *State v. Bruton*, 264 N.C. 488, 142 S.E. 2d 169 (1965). The same principle obtains where, as here, the defendant's statement is introduced by the State. *State v. Todd*, 222 N.C. 346, 23 S.E. 2d 47 (1942). Finally, while the State may base its case on circumstantial evidence requiring the jury to infer elements of the crime, that evidence must be real and substantial and not merely speculative. Substantial evidence is evidence from which a 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 fact to be proved, even if the suspicion is strong. *State v. Malloy*, 309 N.C. 176, 305 S.E. 2d 718 (1983). When the evidence requires the jury to infer an element, that inference must be based upon direct evidence and not upon another inference. *State v. LeDuc*, 306 N.C. 62, 291 S.E. 2d 607 (1982); *State v. Parker*, 268 N.C. 258, 150 S.E. 2d 428 (1966).

In order for the jury to have properly concluded under the facts of this case that defendant was guilty of premeditated and deliberate murder, it must have determined beyond a reasonable doubt that the defendant himself inflicted deadly blows on the victim or that he participated in inflicting those blows or that he was ready and willing to help Harmon stab Mrs. Martin to death. *State v. Miller*, 315 N.C. 773, 340 S.E. 2d 290 (1986); *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985); *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980). The jury was instructed that if it found that defendant killed, or only helped Harmon kill, Mrs. Martin, it must find beyond a reasonable doubt that defendant himself premeditated and deliberated the killing before it could properly return a verdict of guilty on that theory. We hold that the evidence was insufficient for the jury to have reasonably concluded beyond a reasonable doubt that defendant participated in the actual killing or that he premeditated and deliberated the killing.

**[15]** While there was circumstantial evidence that might have created a suspicion—even a strong suspicion—that defendant probably participated in the stabbing, there was no direct evidence of defendant's participation in the stabbing; certainly

nothing to show that defendant himself stabbed Mrs. Martin. The defendant's statement was the only direct evidence on this point and was to the effect that defendant was outside in the car during the stabbings.[6] The State relied on circumstantial evidence to support its theory that the defendant was in the store and either stabbed Mrs. Martin or held her while she was being stabbed by Harmon. While the State is entitled to rely on circumstantial evidence to show either the *mens rea* or the *actus reus* of the crime, this evidence must be substantial and real, not speculative. *State v. Joplin*, 318 N.C. 126, 347 S.E. 2d 421 (1986); *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981); *State v. Alston*, 233 N.C. 341, 64 S.E. 2d 3 (1951). An examination of the evidence in the record before us convinces us that there was insufficient evidence from which a reasonable jury could determine beyond a reasonable doubt that defendant participated in the killing.

The State points to the circumstances surrounding the killing and argues that these circumstances compel the conclusion that two persons must have jointly killed Mrs. Martin. It argues that there were no "defensive" stab or cut wounds on the victim's arms, that the victim was a strong woman who could not have been subdued by Harmon alone, that there were marks on the victim's neck suggesting a choke hold, that there were two large pools of blood and large smears of blood on the floor suggesting a struggle, and that the victim indicated that there were two of them who did "it." The State also relied on the absence of any evidence by defendant to bolster its case. The prosecutor suggested in argument that the defendant had concealed evidence in the form of bloodied shoes and clothing. These items, argued the prosecutor, would have shown that defendant had actually perpetrated or participated in the stabbings.[7]

6. We note that the statement by defendant rebuts any inference raised by the State that defendant participated in Mrs. Martin's death. As such, this statement may be considered favorably to the defendant. *State v. Todd*, 222 N.C. 346, 23 S.E. 2d 47 (1942).

7. The State had SBI Agent Bryant testify that when he went to defendant's home on 5 December to get the sweatshirt worn by the defendant on the night of the crimes, the shirt was wet because it had been recently washed. The prosecutor argued that this showed attempts on the part of the defendant to conceal his guilt by destroying evidence. Moreover, the defendant testified at the suppression hearing that he did not know the current whereabouts of the shoes. The prosecutor argued that there was blood on the top of the shoes and that this would have in-

Even taking the evidence in the light most favorable to the State, we must conclude that it merely raised a suspicion that defendant stabbed Mrs. Martin or held her as she was being stabbed. A suspicion, even a strong suspicion, is insufficient to support a guilty verdict. *State v. Malloy*, 309 N.C. 176, 305 S.E. 2d 718. We note that the physical evidence could also be used to support a theory that no more than one person stabbed Mrs. Martin. Dr. Harris testified that the stab wounds were consistent with either one or two assailants. The fact that Mrs. Martin was apparently able to struggle effectively enough to get into several locations in the store suggests that she was not being restrained and thus there may have been only one assailant. While she did not have any stab or cut wounds on her arms, there was a bruised area on her left arm and a bruised and abraded area on her right index finger. These could have been injuries sustained in struggling against a single assailant. The marks on her neck may show that she was being held as she was being stabbed. However, it is just as likely that she was being held around the neck by one person who was stabbing her from behind, as that she was being held around the neck and having both arms restrained by one person while a second person was stabbing her. Finally, Mrs. Martin's indication that there were two of them who did "it" is ambiguous in this multiple-crime context.

It is not necessary, however, for defendant to have personally stabbed or held Mrs. Martin while she was being stabbed to be found guilty of premeditated and deliberate murder. One who is actually or constructively present, aids, abets, incites, or otherwise acts in concert with a perpetrator is held guilty as a principal as long as he has the requisite *mens rea*. *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 33 L.Ed. 2d 761 (1972).[8] In this case, the

dicated that the defendant was either stabbing Mrs. Martin or holding her while she was being stabbed.

In addition, the prosecutor suggested in argument that the defendant had purposefully hidden the shoes to conceal his guilt.

8. We note that there is language in *Westbrook* suggesting that once a defendant participates in a felony, he is held responsible for all crimes arising out of that felony. *Westbrook*, 279 N.C. at 41-42, 181 S.E. 2d at 586. *Westbrook*, however, does not change the rule that, for crimes requiring a specific *mens rea*, that *mens rea* must be shown as to each defendant. Thus, here, as in *Westbrook*, defendant is

jury was instructed that it would find defendant guilty of premeditated and deliberate murder if it found that he acted in concert with Harmon to kill Mrs. Martin.

**[16]** The State argued to the jury that the killing of Mrs. Martin was a part of a common scheme between defendant and Harmon. Thus, even though there was insufficient evidence to place defendant inside the store at the time of the killing, defendant could nonetheless be properly convicted of premeditated murder based on his admitted participation in the *robbery*. We agree that it would not be necessary for defendant to be actually present in order to be convicted of premeditated and deliberate murder under the acting in concert theory. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). However, the requisite *mens rea*—willfulness, premeditation, and deliberation—must still be shown. *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979).

**[17]** The State argued that premeditation and deliberation can be imputed to defendant from any of three sources. First, the number of wounds inflicted on Mrs. Martin could be the basis of premeditation and deliberation. We agree that the number of wounds can, under some circumstances, give rise to an inference of premeditation and deliberation. *State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974). However, the number of wounds is not evidence of the *mens rea* of an accomplice who does not actively participate in the stabbings. It is a fundamental notion of criminal law that where a crime calls for a particular *mens rea*, it must be proved by the State beyond a reasonable doubt. *See* 1 W. LaFave & A. Scott, *Substantive Criminal Law*, § 3.4 (1986). The requisite *mens rea* for first-degree murder, except murders committed by certain enumerated methods, is willfulness, premeditation, and deliberation. N.C.G.S. § 14-17 (1986). While the felony murder rule allows the court to dispense with proof of premeditation and deliberation in order to convict, *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981), and while the number of wounds inflicted on the victim will support a jury's determination that a killing was premeditated and deliberate on the part of the killer, *State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794, neither of

guilty of felony murder, a crime not requiring specific intent. However, neither Mr. Westbrook nor defendant here was shown to have the specific intent necessary to convict a person of premeditated and deliberate murder.

these principles allows us to impute premeditation and deliberation from the person inflicting the wounds to one who is only held culpable for the murder by reason of his participation in the underlying felony.

**[18]** The State's second argument as to defendant's mental state was that both men intended from the start to kill Mrs. Martin as a potential witness. The jury was asked to believe that the defendant and Harmon were both known to Mrs. Martin, that they took no precautions against being identified, and that they therefore intended from the start to kill Mrs. Martin as a potential identifying witness. This conclusion, however, is speculative "inference stacking." The first inference is that the two men did not conceal their identity. There was no direct evidence on this point in the guilt-innocence phase of defendant's trial.[9] Rather, defendant's statement to Deputy Wheeler that he was concerned about being identified and his failure to say that he was masked could have led the jury to infer that he and Harmon went into the store unmasked. Having inferred that the men went into the store unmasked, the jury may have inferred their intent to kill Mrs. Martin. While this latter inference would have been permissible if there was direct evidence that the two men made no efforts to hide their identity, it was impermissible where the only suggestion that they were unmasked was itself an inference from the silence of the record.

**[19]** Third, the State argues that the evidence shows that Reese knew that Harmon intended to kill Mrs. Martin, and therefore premeditation and deliberation can be imputed to him.

There are circumstances under which a defendant may be held responsible for a murder committed entirely by another and neither intended, premeditated, nor deliberated by the defendant. Thus, under the felony murder rule, when two people act in concert to commit a robbery, each person is responsible not only for that crime, but for a murder committed during the course of the

9. In the sentencing hearing, the defendant did provide some direct evidence on the question of masks. When asked if Harmon was unmasked, the defendant said "Yes." Defendant was then asked if he himself was not unmasked when he went into the store. The defendant gave an ambiguous reply, to the effect that he would not have been recognized because Mrs. Martin was to be on the floor behind a counter.

robbery. *State v. Maynard*, 247 N.C. 462, 101 S.E. 2d 340 (1958); *see also State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572. Since the evidence in this case was that the defendant planned and participated with Harmon in the robbery of Mrs. Martin, defendant is responsible for the killing under the felony murder rule, even if the killing was entirely Harmon's deed. However, this evidence does not bear on the question of whether defendant committed *premeditated* and *deliberate* murder.

We have already held that the evidence was insufficient to support a finding that the defendant participated in the actual killing or intended that a killing take place. We now also conclude that the evidence only allowed a speculation that the defendant knew that Harmon intended the killing. The State argued that defendant must have known of Harmon's intentions. The prosecutor suggested that since the two had spent the entire evening together, they must have worked out a detailed plan for committing the crime, including how to dispose of witnesses. Moreover, since Harmon was unmasked, defendant must have known that Harmon would kill Mrs. Martin. There are obvious flaws in this reasoning. First, there was no evidence that defendant discussed anything other than the robbery with Harmon. Second, there was no evidence presented in the guilt-innocence phase of the trial that Harmon was not masked when Harmon went into the Red Apple. Third, there was no evidence presented in the guilt-innocence phase of the trial that *Harmon* knew Mrs. Martin or that defendant knew that Harmon knew Mrs. Martin.[10] In short, there is nothing in the evidence to suggest that defendant knew that Harmon intended to kill Mrs. Martin.

We hold that there was insufficient evidence from which a reasonable jury could find beyond a reasonable doubt that defendant, acting alone or in concert with Harmon, committed premeditated and deliberate murder.

10. At the sentencing hearing, there was evidence that Harmon was not masked. Moreover, defendant testified that Harmon said that Harmon had killed the woman because she had recognized him. However, there was no evidence that defendant knew before the killing that Harmon would be recognized by the victim. Defendant testified that he thought Harmon would not have robbed the store if he would be recognized. None of this evidence was before the judge at the close of the State's case in the guilt-innocence phase.

**[20]** Nothing we have said affects the defendant's accountability, under the felony murder rule, for his participation in these crimes. Because defendant was found guilty on both the theories of premeditation and deliberation *and* felony murder, he is not entitled to a new trial on the murder charge.

A defendant may properly be found guilty of first-degree felony murder where he knowingly engages in the commission of a dangerous felony and where a killing takes place. *State v. Peplinski*, 290 N.C. 236, 225 S.E. 2d 568, *cert. denied*, 429 U.S. 932, 50 L.Ed. 2d 301 (1976). Here, there was ample evidence that defendant planned to rob the Red Apple and that he was at least constructively present and available to assist Harmon. Whether there was insufficient evidence to show that defendant either committed the killing himself, intended that the killing take place, or even knew that the killing would take place is irrelevant for the purpose of determining defendant's guilt under the felony murder theory. *State v. Shrader*, 290 N.C. 253, 225 S.E. 2d 522 (1976).

SENTENCING PHASE

Defendant makes several arguments directed to the constitutionality of the capital sentencing statute, as written and/or as applied to the defendant. Each of these arguments has been addressed several times by this Court. *See, e.g., State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985); *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197, *cert. denied*, 469 U.S. 963, 83 L.Ed. 2d 299 (1984); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). We find nothing in defendant's arguments to persuade us that the statute is unconstitutional.

Defendant next argues that the trial judge erred in submitting three aggravating factors to the jury: (1) that the murder was committed during the commission of an armed robbery; (2) that the murder was committed in order to avoid a lawful arrest; and (3) that the murder was especially heinous, atrocious, or cruel.

**[21]** Defendant first contends that the submission of the aggravating factor that the killing was committed during an armed robbery was erroneous. N.C.G.S. § 15A-2000(e)(5) (1983). We agree. This factor would have been a proper aggravating factor if the theory of premeditation and deliberation had been properly

before the jury. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 177 (1983). However, because we have held that the defendant was not properly convicted of premeditated and deliberate murder, we must consider this factor in that light.

We have held that where the underlying felony in a felony murder conviction is armed robbery, the fact that the murder occurred during the course of that robbery may not also be used as a factor in aggravation. *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551, *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 796 (1979). Here, the defendant was properly convicted only on the theory of felony murder. It follows, therefore, that the jury should not have considered this aggravating factor in making its sentencing recommendation. Defendant is therefore entitled to a new sentencing hearing without the submission of this aggravating factor. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

**[22]** Second, the prosecutor argued at sentencing that the killing was committed to avoid a lawful arrest. N.C.G.S. § 15A-2000(e)(4) (1983). Defendant contends that this was also error. Again, we agree. While this may be a proper aggravating factor where there is competent evidence that the killing was committed for this purpose, it must be supported by evidence to that effect. Here, the only evidence relied upon to support this factor was the killing itself. *See State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981). This factor may not be submitted to the jury on resentencing without evidence other than the killing itself that the murder was committed for the purpose of avoiding a lawful arrest.

**[23]** Finally, the defendant argues that it was error for the trial judge to have submitted to the jury the aggravating factor that the killing was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9) (1983). Here, we disagree. We have repeatedly held, in factual situations comparable to the one *sub judice*, that this factor is properly submitted where there is evidence that the killing involved a prolonged death or was committed in a fashion beyond that necessary to effect death. *See, e.g., State v. Stanley*, 310 N.C. 332, 312 S.E. 2d 393 (1984); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982); *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). Here, there was

plenary evidence that Mrs. Martin struggled violently against death. Dr. Harris testified that she was stabbed repeatedly, as if in a "frenzy." There was also evidence that Mrs. Martin remained conscious for many minutes before dying.

**[24]** Defendant argues that, regardless of any aggravating factors, he could not be sentenced to death for his participation in the crimes committed at the Red Apple, consistent with the eighth amendment to the United States Constitution prohibiting cruel and unusual punishment. Since we have found error in the sentencing phase of the trial and since defendant must therefore be resentenced, we need not reach this issue. However, we note a possible error in the instructions given the jury in the trial of this case, and invoking our supervisory power over the trial courts and Rule 2 of the North Carolina Rules of Appellate Procedure, we direct the trial court to refrain from repeating this instruction on resentencing.

In *Enmund v. Florida*, 458 U.S. 782, 73 L.Ed. 2d 1140 (1982), the United States Supreme Court, in construing and applying the eighth amendment, held that, before he may be sentenced to death, a participant must have killed or attempted to kill or intended or contemplated that life would be taken.

Our cases decided after *Enmund* have reflected that holding:

> Therefore, in instant case, at the new sentencing hearing and before the sentencing jury begins its consideration of aggravating and mitigating circumstances toward returning its recommendation as to punishment, the trial judge should submit to and the jury answer issues as follows:
>
> 1. Did defendant deliver the fatal blows which caused the victim's death?
>
> 2. If not, did defendant, while acting as an aider and abettor, attempt to kill, intend to kill, or contemplate that life would be taken during their commission of the felony?

*State v. Stokes*, 308 N.C. 634, 651, 304 S.E. 2d 184, 195 (1983).

Later cases from the United States Supreme Court have suggested that the *Enmund* requirement is met if the defendant in-

tended or contemplated that lethal force would be used if it became necessary to effectuate the crime:

> *Enmund* . . . imposes a categorical rule: a person who has not in fact killed, attempted to kill, or *intended* that a killing take place or that *lethal force be used* may not be sentenced to death.

*Cabana v. Bullock*, 474 U.S. 376, 386, 88 L.Ed. 2d 704, 716 (1986) (emphasis added); *see also Tison v. Arizona*, 142 Ariz. 454, 690 P. 2d 755 (1984), *cert. granted*, 475 U.S. 1010, 89 L.Ed. 2d 299 (1986).

In the case at bar, the trial judge gave the "*Enmund*" Pattern Jury Instruction, following N.C.P.I. § 150.10:

> So I charge that for you to recommend that the defendant be sentenced to death, the State must prove . . .:
>
> First, that Michael Reese himself either
>
> (a) Killed or attempted to kill Martha Martin, or participated in the killing with others; or
>
> (b) Intended that Martha Martha [sic] be killed in the course of robbery with a deadly weapon; or
>
> (c) Contemplated that deadly force *might* be used in the course of robbery with a deadly weapon.

(Emphasis added.)[11]

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11. The drafters of the Pattern Jury Instructions apparently derived the phrase "contemplated that deadly force might be used" from the following language in *Enmund*:

> It was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force *would or might be used* if necessary to effectuate the robbery or a safe escape.

*Enmund*, 458 U.S. at 788, 73 L.Ed. 2d at 1146 (emphasis added). As is obvious from our quotation of *Enmund*, the "or might" language was not included in the actual holding of the case.

As later United States Supreme Court cases make clear, however, the minimum *mens rea* for the death penalty in this context is intention or contemplation that deadly force will be used if necessary to effectuate the crime. *See Cabana v. Bullock*, 474 U.S. 376, 88 L.Ed. 2d 704.

We note that this instruction did not require the jury to find that defendant either intended or contemplated that deadly force *would* be used against Mrs. Martin, only that it *might* be used. On resentencing, the word "might" shall be omitted from the instruction and the word "would" substituted therefor in paragraph (c) of the Pattern Jury Instructions.

Defendant argues finally that the sentence imposed was disproportionate to the crime he committed. Since we have found error in the sentencing phase of the trial, this issue is not properly before us and therefore need not be addressed. *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. denied*, 454 U.S. 1117, 70 L.Ed. 2d 655 (1981).

For the reasons stated above, we find no error in defendant's conviction for murder on the theory of felony murder or in his conviction and sentencing for felonious conspiracy. For error in the sentencing phase on the murder conviction, we vacate the sentence of death and remand the case for resentencing for first-degree felony murder.

Case No. 83CRS187—Felonious conspiracy—no error.

Case No. 82CRS4976—First-degree murder—no error in the guilt phase; sentence vacated; remanded for new sentencing hearing for first-degree murder.

Justice MITCHELL dissenting.

I believe that the evidence was sufficient to support the defendant's conviction for first-degree murder on the theory of premeditation and deliberation as well as on the felony murder theory and that the sentence of death was properly entered. I would find no error in either the guilt or sentencing phases of the defendant's trial and would proceed to the proportionality review required of this Court in capital cases. Therefore, I dissent.

When viewed in the light most favorable to the State, as it must be on the defendant's motion to dismiss, the evidence here was sufficient to support a reasonable finding by the jury that the defendant participated in the killing of the victim and did so in a premeditated and deliberate manner. The victim unequivocally indicated to law enforcement officers that two people had done "it."

The jury quite reasonably could have found that the "it" the victim referred to was the stabbing and her imminent death, not a few dollars being taken from the store. Indeed, if the defendant's statement is believed, it is questionable whether the victim ever knew that anything had been taken from the store. According to the defendant's version of the events, he did not take anything from the store until the victim had been stabbed several times and lay helpless on the floor.

The victim's statement must be viewed in light of the physical evidence that she had been stabbed numerous times but that there were no stab wounds to her hands or arms to suggest she had been able to raise them to shield herself. Additionally, marks on her neck indicated that she had been severely strangled.

In my view, the victim's statement is direct evidence that two people inflicted the wounds which caused her death. The defendant's own statement supports a finding that he and his accomplice were those two people. The physical evidence supports a reasonable finding that the defendant either stabbed the victim himself or strangled her while his accomplice stabbed her. Evidence that the defendant knew before he entered the store that the victim could identify him and his efforts after the crime to conceal evidence also support a reasonable finding that he knew at the time he entered the store he would take the victim's life. Therefore, the evidence was sufficient to take the charge against the defendant to the jury on the theory of premeditated and deliberate murder.

Since I believe that the defendant's conviction on the theory of premeditated and deliberate murder was proper, I also must reject the majority's view that the jury could not consider the fact that the murder occurred during an armed robbery as an aggravating factor for sentencing. The majority's holding in this regard is based entirely upon its conclusion—erroneous I think—that the murder charge could only be submitted on a felony murder theory, and that the underlying felony of armed robbery could not be considered as aggravating. Again, I do not agree.

Finally, I reject the majority's view that there was no competent evidence to support the aggravating factor that the killing in this case was committed to avoid a lawful arrest. The majority is in error when it states that the only evidence relied upon to sup-

port this factor was the killing itself. The evidence showed that the defendant was well acquainted with the victim of the murder and knew that she would be working at the store on the evening in question. The defendant was concerned specifically about the fact that the victim would be able to identify him. The finding of the jury in the present case that the defendant engaged in the murder to prevent detection and lawful arrest was reasonable in light of the evidence that, despite his concern that the victim would identify him, the defendant went ahead and participated in the robbery and killing. Such evidence was sufficient to support a reasonable finding that prior to the robbery and killing the defendant had formed the intent to kill the victim in part at least to avoid detection and arrest.

This case is easily distinguishable from *State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981), relied upon by the majority, wherein the only evidence of this aggravating factor was the defendant's general expression, after the crime had been completed, indicating that he did not want to be apprehended. I do not believe that *Williams* is any authority for the holding of the majority that this aggravating factor was improperly submitted and found in the present case.

As I find no error in either the trial or sentencing of the defendant, I would so hold and proceed to address the question of whether the sentence of death is disproportionate in the present case. Since the majority holds that the case must be remanded for errors committed during the trial and sentencing phases, however, it would serve no useful purpose for me to discuss the proportionality issue here.

I respectfully dissent.

Justice MARTIN joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. NAVAS VILLABONA EVANGELISTA

No. 441A84

(Filed 4 March 1987)

1. **Homicide § 4.1— murder by starvation—dehydrated infant—evidence sufficient without specific intent to kill**

In a murder prosecution arising from a three day siege by police of a train car during which an 8-month-old infant barricaded with defendant died of dehydration, it was noted that the evidence would have supported a conviction of defendant for first degree murder by means of starvation without proof of a specific intent to kill. N.C.G.S. 14-17.

2. **Homicide § 21.5— premeditated murder—death of infant by dehydration—evidence sufficient**

In a murder prosecution arising from the dehydration death of an infant during a three day period in which defendant was barricaded in a train car, the evidence was sufficient to show that defendant deprived the infant of liquids with the specific intent to kill where defendant repeatedly refused food and liquids for the children; he was asked by negotiators to release the children but refused; when the older child cried for water, defendant told her to be silent and that they were all going to die; negotiators warned defendant that the baby would dehydrate; defendant acknowledged that the older child was dehydrated and that the 8-month-old infant had little resistance; defendant was told the infant would not last without nourishment; defendant on several occasions responded that he would kill himself and the children if anyone attempted to come into the compartment; police told defendant they had water for the children, but defendant stated that he wanted matches first; and defendant refused attempts to pass an I.V. tube through a bullet hole into the compartment so that the children could receive nourishment.

3. **Homicide § 21.5— first degree murder—identity of victims**

The evidence in a murder prosecution was sufficient to prove that the bodies found inside a train compartment were the two victims alleged in the indictments where the indictments stated the names of the victims as Juan Ramirez and Maria Ramirez; medical examiners observed the bodies in the compartment, in body bags, in the ambulance, and performed autopsies in Chapel Hill; a woman named Maria Inez was introduced to a police investigator as being a member of the family of defendant and the victims who had come to identify the two bodies; and Mrs. Inez presented birth certificates stamped with the seal of Colombia, South America containing the names Isabella Novas Villabona Ramirez and Juan Fernando Ramirez; and Ms. Inez was given possession of the bodies.

4. **Criminal Law § 17— murder on Amtrak train—not federal enclave—State jurisdiction proper**

The State was not preempted from assuming jurisdiction of murders committed on an Amtrak train on the theory that the federal courts have ex-

clusive jurisdiction because the train was part of a federal enclave where the act creating Amtrak expressly provided that it would not be an agency or establishment of the United States government.

5. **Homicide § 7— first degree murder—insanity defense—refusal to direct verdict for defendant—no error**

The trial court in a murder prosecution did not err by failing to direct verdicts of not guilty by reason of insanity where defendant presented strong evidence of insanity but the State presented evidence tending to controvert defendant's evidence and to support the presumption of defendant's sanity.

6. **Homicide § 7— murder—instruction on insanity defense—burden of proof—no error**

The trial court did not err in a prosecution for murder by instructing the jury that defendant had the burden of proving his insanity to the jury's satisfaction.

7. **Criminal Law § 50.1— murder—cocaine use—psychiatric and psychopharmacological expert—testimony admissible**

In a murder prosecution arising from the three day siege of defendant in an Amtrak car, the trial court did not err by introducing the testimony of an expert in psychology and psychopharmacology who made an analysis of tape recordings, reviewed psychological reports, interviewed witnesses and defendant, and concluded that defendant had used cocaine numerous times during the siege but that defendant's perception of real events was good and that the cocaine had not significantly interfered with his ability to respond. The trial court reasonably could have believed that the witness's experience and research placed him in a better position than the jury to determine whether defendant had used cocaine at the times in question and the effect of the cocaine on defendant's perceptions.

8. **Criminal Law § 138.23— aggravating factor—involuntary manslaughter—armed with firearm—error**

The trial court erred when sentencing defendant for involuntary manslaughter by finding as an aggravating factor that defendant was armed with a deadly weapon where, under the instruction of the court, the jury necessarily found that defendant was armed with and discharged a firearm. N.C.G.S. 15A-1340.4(a)(1).

9. **Criminal Law § 5.1— murder—insanity defense—last issue**

The trial court in a murder prosecution did not err by denying defendant's request that the jury be instructed to consider the issue of defendant's sanity before the issue of his guilt.

10. **Constitutional Law § 63— death qualified jury—constitutional**

The trial court did not err in a murder prosecution by death qualifying the jury.

APPEAL by the defendant from judgments entered by *Brewer, J.*, 29 February 1984, in Superior Court, WAKE County.

The defendant was charged in separate indictments with two counts of first degree murder. He was convicted of first degree murder and involuntary manslaughter. He received sentences of life imprisonment and an additional eight years' imprisonment to run consecutively. The defendant appealed the murder conviction and resulting life sentence to the Supreme Court as a matter of right. His motion to bypass the Court of Appeals with regard to the involuntary manslaughter conviction was allowed on 5 December 1985. Heard in the Supreme Court on 10 December 1986.

*Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State.*

*Gordon Widenhouse for the defendant appellant.*

MITCHELL, Justice.

The defendant brings forward numerous assignments of error. He contends: (1) the trial court erred by denying his motion to dismiss the charge of first degree murder of Juan Ramirez for insufficiency of the evidence to prove specific intent to kill; (2) the trial court erred in denying his motions to dismiss all charges for failure of the State to prove the identity of the victims; (3) the trial court lacked jurisdiction, because all pertinent acts were committed in a federal enclave; (4) the trial court erred in failing to direct verdicts of not guilty by reason of insanity; (5) the trial court violated the defendant's due process rights by instructing the jury that the defendant had the burden of proving his insanity to their satisfaction; (6) the trial court erred in allowing certain testimony based on psychopharmacology by a witness found to be an expert; (7) the trial court erred in finding as an aggravating factor to involuntary manslaughter that the defendant was armed with a deadly weapon, when that same evidence was necessary to prove an element of involuntary manslaughter; (8) the trial court erred in failing to find certain statutory mitigating factors supported by uncontradicted and credible evidence in sentencing the defendant for involuntary manslaughter; (9) the trial court erred in denying the defendant's request that the jury be instructed to consider the issue of his sanity before it considered his guilt; (10) the trial court erred in excusing for cause certain jurors who expressed an unwillingness to impose the death penalty, because the result was a jury prone to conviction.

We find no error in the defendant's trial for first degree murder or the resulting life sentence. We find merit, however, in the defendant's seventh assignment. Accordingly, we vacate his sentence for involuntary manslaughter and remand to the trial court for resentencing for that offense.

The State presented evidence which tended to show that on 8 October 1982, Amtrak train 82 which ran between Miami and New York arrived in Raleigh at 7:07 a.m. At that time, the baggage master went through the train to car 2475, a sleeper car, where he observed slivers of wood and a bullet on the floor. He saw bullet holes in the door to one of the compartments and heard someone inside speaking Spanish in a loud voice. He then summoned the conductor who had just come on duty. They went to the sleeper car where they heard a baby crying inside the compartment and the sound of breaking glass. Several passengers had also heard sounds from the compartment during the night, such as screaming, yelling, and the sound of shots being fired.

The police were called to the scene at 7:26 a.m. Railroad officials told the police that shots had been fired and that the compartment was occupied by a Spanish speaking man, his wife and two children. The occupants of the compartment were later identified as the defendant, his sister, and her children—an eight-month-old boy and three-year-old girl. Car 2475 and two adjacent cars were separated from the rest of the train. As a result of the cars being uncoupled, the electricity to them was cut off.

Police snipers and other law enforcement officers surrounded the car. After the remaining passengers had been removed, police searched the other compartments in the car including the compartment adjacent to the one occupied by the defendant. They were preparing to place a stethoscope against the partition dividing the two compartments in an attempt to hear any sounds emanating from the defendant's compartment when a shot was fired within. The officers immediately left the compartment as three more shots were fired in rapid succession. There were two other occasions in which gunfire in the defendant's compartment was heard.

For three days, until 10 October 1982, the defendant remained barricaded in the compartment as law enforcement officers attempted to negotiate with him. A Spanish speaking

negotiator spoke with the defendant directly using a "bull horn," first from a corridor around the corner from the defendant's compartment, then from a post outside after a window was removed from the car. The defendant's voice was transmitted to the police command post from a microphone that had been placed outside his compartment. His statements were translated and relayed through a "walkie-talkie" to the negotiators working with the police. Negotiators told the defendant that they were with the police and asked him repeatedly to come out, or at least release the children. He was offered food and liquids for himself and the children, but he refused. The defendant was warned many times about the safety of the children and told that they could not survive without food and water.

The defendant agreed to come out if police would contact his godfather in New York. As they awaited the arrival of the defendant's godfather, the defendant handed the little girl through the window of the train to Agent Romando Arras of the Federal Bureau of Investigation. Upon his godfather's arrival, the defendant came out of the train and was taken into custody.

When police entered the train, they found the bodies of a woman and an infant male. Expert testimony indicated that the woman had died from a bullet wound to the head, and the infant had died from dehydration.

The defendant relied upon a defense of insanity and presented evidence tending to show that during the entire siege, he suffered from paranoia. Several psychologists testified to the effect that the defendant was under the delusion that Colombian commandos were trying to kill him and his family. The defendant told them of his fear that these commandos had surrounded the train and had even infiltrated his compartment. The defendant also told them that he had remained on the top bunk in his compartment for days because he believed a commando was under the bottom bunk. He said that he refused food and water because he was afraid that it had been contaminated. He further claimed that the commandos killed his sister in the train compartment.

By his first assignment of error, the defendant contends that the trial court erred by denying his motion to dismiss the charge of first degree murder in the death of the infant, Juan Ramirez. He argues that the State failed to produce substantial evidence

that the defendant deprived the infant victim of liquids with the specific intent to cause his death. We do not agree.

In *State v. Brown*, 310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984) we again emphasized:

> [U]pon a motion to dismiss in a criminal action, all the evidence admitted, whether competent or incompetent, must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. Any contradictions or discrepancies in the evidence are for resolution by the jury. . . . The trial judge must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

(Citations omitted.)

N.C.G.S. § 14-17 defines murder and provides in pertinent part that:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or sex offense, robbery, kidnapping, burglary or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree. . . . All other kinds of murder . . . shall be deemed murder in the second degree. . . .

We have interpreted this statute as separating first degree murder into four distinct classes:

> (1) murder perpetrated by means of poison, lying in wait, imprisonment, starving or torture; (2) murder perpetrated by any other kind of willful, deliberate and premeditated killing; (3) murder committed in the perpetration or attempted perpetration of certain enumerated felonies; and (4) murder committed in the perpetration or attempted perpetration of any other felony committed or attempted with the use of a deadly weapon.

*State v. Johnson*, 317 N.C. 193, 202, 344 S.E. 2d 775, 781 (1986).

First degree murder most frequently has been defined as "the unlawful killing of a human being with malice and with premeditation and deliberation," and has included the element of a specific intent to kill. *State v. Johnson*, 317 N.C. at 202, 344 S.E. 2d at 781. However, it is also well established that proof of the elements of premeditation, deliberation and specific intent to kill is not necessary to sustain a first degree murder conviction based on the theory that the homicide was committed during the perpetration or attempted perpetration of a felony. *Id.* Likewise, we recently held that when a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the presence or absence of premeditation, deliberation and specific intent to kill is irrelevant. *State v. Johnson*, 317 N.C. at 203, 344 S.E. 2d at 781.

**[1]** We note that the evidence in the present case would have supported conviction of the defendant for the first degree murder of the infant on the theory of murder perpetrated by means of starvation, specifically declared to be first degree murder by the statute. The evidence tended to show that the defendant deprived the infant male of liquids and thereby caused his death. Liquids are necessary in the nourishment of the human body, especially as here in the case of an infant. Therefore, deprivation of life-sustaining liquids amounts to starvation under the statute. If the trial court had submitted the case to the jury on the theory of starvation, it would not have been necessary that the State prove a specific intent to kill. As we said in *State v. Johnson*, "a specific intent to kill is . . . irrelevant when the homicide is perpetrated by means of poison, lying in wait, imprisonment, starving, or torture. . . ." *Id.*

**[2]** From an abundance of caution, however, the trial court sent the charge of first degree murder of the infant to the jury with instructions relating only to the theory of "murder perpetrated by any other kind of willful, deliberate and premeditated killing," the second category of first degree murder proscribed by the statute. Specific intent to kill is an element of first degree murder based on that theory. Therefore, the defendant is correct in arguing that to sustain his conviction on that theory, substantial evidence must have been introduced tending to show that he deprived the infant male of liquids with the specific intent to kill. We conclude that the evidence was sufficient in this regard.

The evidence tended to show the defendant was repeatedly offered both food and liquids for himself and the children, but he refused to accept them. He was also asked by negotiators to release the children but refused. When the older child cried for water, the defendant told her to be silent and that they were all going to die. Negotiators warned the defendant that the baby would dehydrate. The defendant acknowledged that the older child was dehydrated and that the eight-month-old infant had little resistance. The defendant was told that the infant could not last without nourishment. But on several occasions the defendant responded that if anyone attempted to come into the compartment, he would kill himself and the children. Police told the defendant that they had water for the children, but the defendant stated he wanted matches first. Further, when the police attempted to insert an "I.V." tube through a bullet hole in the compartment so that the children could receive nourishment, the defendant refused to look for the tube. He refused other attempts to pass the tube to him.

Viewing the evidence in the light most favorable to the State, there is sufficient evidence from which a reasonable mind might conclude that the defendant had the requisite specific intent to kill. We therefore overrule this assignment of error.

**[3]** The defendant next contends that the trial court erred in denying his motions to dismiss all charges for which he was tried, because the State failed to produce sufficient evidence that the bodies found inside the Amtrak compartment were the two victims alleged in the indictments. He complains that the State offered no evidence in this regard during its case-in-chief, and that the only evidence concerning the identity of the victims was improperly introduced during the State's rebuttal. We find this assignment of error is without merit.[1]

By introducing evidence at trial, the defendant waived his right to except to the denial of his motion to dismiss at the close of the State's evidence. *State v. Jones*, 296 N.C. 75, 77, 248 S.E. 2d 858, 859 (1978); N.C.G.S. § 15-173. The defendant's exception to

1. It is not necessary in this case to reach the broader issue of whether the State must include the name of a homicide victim in the indictment or prove the identity of the victim at all. *See generally*, N.C.G.S. § 15-144.

the denial of his motion to dismiss made at the close of all of the evidence, however, presents the issue of the sufficiency of *all of the evidence* to go to the jury. *Id.* Therefore, for purposes of reviewing this assignment of error, we consider all of the evidence introduced at trial and need not determine whether that evidence was competent.

The indictments stated the names of the victims as Juan Ramirez and Maria I. Ramirez. Dr. Laurin Kaasa, Wake County Chief Medical Examiner, testified that he was present during the search of the compartment that had been occupied by the defendant and observed the bodies of the deceased woman and infant male found therein. Dr. Kaasa also observed the body of the infant once it had been removed from the compartment and placed in a body bag in an ambulance. Dr. Robert Thompson, Associate Chief Medical Examiner for the State of North Carolina, testified that he saw the body of the deceased woman at the train station in a body bag and further observed the body as it was placed in an ambulance. He testified that the body was transported to Chapel Hill where he performed the autopsy. Dr. Paul Beddinger, also with the office of the Chief Medical Examiner for the State, testified that he observed the body of the infant male at the train station. He saw the body as it was placed in an ambulance bound for Chapel Hill where he performed the autopsy.

J. C. Holder, an investigator with the Raleigh Police Department, testified that he interviewed a woman named Maria Inez, who was introduced to him as being a member of the family of the defendant and the victims. She had come to the medical examiner's office in Chapel Hill to identify the two bodies that were removed from the train compartment. She presented birth certificates stamped with the seal of Colombia, South America containing the names of Isabella Navas Villabona Ramirez and Juan Fernando Ramirez, and was given possession of the bodies. Viewing this evidence and all other evidence introduced in the light most favorable to the State and giving it all reasonable inferences favorable to the State, we conclude that there was substantial evidence tending to show that the bodies removed from the compartment were those of the victims named in the indictments.

**[4]** By his next assignment of error, the defendant contends that the assumption of jurisdiction by the trial court in this criminal

action was erroneous. He argues that the offenses charged were committed in an Amtrak passenger train, and that the federal courts have exclusive jurisdiction because the train was part of a "federal enclave." We find this argument unpersuasive.

The Rail Passenger Service Act of 1970, which created Amtrak, expressly provides that: "The Corporation will not be an agency or establishment of the United States Government." 45 U.S.C. § 541 (1981 and Supp. 1986). Since Amtrak is not a federal agency or establishment, but is a private corporation operated for profit, we do not believe that its tracks or cars are parts of a "federal enclave." Therefore, we conclude that the State is not preempted from exercising its police power in the present case. *See, e.g., National Railroad Passenger Corporation v. Miller*, 358 F. Supp. 1321 (D. Kan.), *affirmed*, 414 U.S. 948, 38 L.Ed. 2d 205 (1973). This assignment of error is overruled.

**[5]** By his next assignment of error, the defendant contends that the trial court erred in failing to direct verdicts of not guilty by reason of insanity. He argues that he was entitled to such directed verdicts as a matter of law because he produced overwhelming, uncontroverted evidence of his insanity from a number of expert and lay witnesses. We do not agree.

The test of insanity as a defense to a criminal charge is whether the defendant was laboring under such a defect of reason from disease or deficiency of mind at the time of the alleged act as to be incapable of knowing the nature and quality of his act or, if he did know this, was incapable of distinguishing between right and wrong in relation to such act. *State v. Corley*, 310 N.C. 40, 53, 311 S.E. 2d 540, 548 (1984); *State v. Vickers*, 306 N.C. 90, 94, 291 S.E. 2d 599, 603 (1982). This test is known as the M'Naghten Rule.

Every person is presumed sane until the contrary is shown, and the defendant has the burden of proving his insanity. *State v. Mize*, 315 N.C. 285, 289, 337 S.E. 2d 562, 565 (1985). However, unlike the State which must prove the defendant's guilt beyond a reasonable doubt, the defendant is merely required to prove his insanity to the satisfaction of the jury. *Id.*

On a motion for a directed verdict of not guilty by reason of insanity, the evidence for the State is taken as true with conflicts and discrepancies therein resolved in the State's favor, giving the

State the benefit of every reasonable inference which may be drawn from the evidence. *State v. Mize*, 315 N.C. at 290, 337 S.E. 2d at 565. All the evidence admitted, whether competent or incompetent, which is favorable to the State is considered by the Court in ruling upon the motion. *Id.* Further, in considering whether a trial court has erred in refusing to direct a verdict of not guilty by reason of insanity, we must bear in mind the rule that "in all cases there is a presumption of sanity, and when there is other evidence to support this presumption, this is sufficient to rebut defendant's evidence of insanity. . . ." *Id.* (quoting *State v. Harris*, 290 N.C. 718, 726, 228 S.E. 2d 424, 430 (1976)).

Testimony regarding mental capacity is not confined to expert witnesses alone.[2] *State v. Hammonds*, 290 N.C. 1, 5, 224 S.E. 2d 595, 598 (1976). Anyone who has had a reasonable opportunity to form an opinion is permitted to give his opinion upon the issue of mental capacity. *Id.* at 5-6, 224 S.E. 2d at 598.

In the present case, the defendant indeed presented strong evidence that he was insane when he shot Maria Ramirez and when he deprived Juan Ramirez of liquids. The defendant introduced extensive testimony by expert witnesses that his paranoia affected his actions, and that he was incapable of knowing right from wrong in relation to the acts charged.

However, the record reveals that the State presented evidence tending to controvert the defendant's evidence and to support the presumption of his sanity. Chief Frederick Heineman of the Raleigh Police Department testified that from his observations of the defendant throughout the seige, he was of the opinion that the defendant was in control of his situation and knew that what he was doing was wrong. Further, three agents of the Federal Bureau of Investigation who observed the defendant at the time of the offenses charged testified that they were of the opinion that he knew the difference between right and wrong. Agent Arras, who speaks Spanish and was the principal negotiator, also testified that when the defendant asked police to contact his god-

2. The trial of the present case was completed prior to 1 July 1984, the effective date of The North Carolina Rules of Evidence, N.C.G.S. ch. 8C, and those rules did not apply at trial. *State v. Freeman*, 313 N.C. 539, 330 S.E. 2d 465 (1985). Therefore, all evidentiary issues raised by the defendant on this appeal are controlled by the law of evidence in effect prior to 1 July 1984.

father, he was rational in giving the correct telephone number and correctly spelling the name.

We conclude that the defendant's evidence of insanity was neither uncontroverted nor overwhelming. Therefore, we overrule this assignment of error.

**[6]** The defendant additionally assigns as error the trial court's instruction to the jury that the defendant had the burden of proving his insanity to the jury's satisfaction. He argues that this instruction was contrary to principles of due process, because it relieved the State of its burden of establishing that he acted with the requisite *mens rea* when committing the acts charged. We have recently rejected an identical argument. *E.g., State v. Mize*, 315 N.C. at 293-94, 337 S.E. 2d at 567. We again decline to change our rule, and hold that the trial court did not err in its instructions to the jury in this regard.

**[7]** The defendant next assigns as error the admission of certain expert testimony of Dr. Ronald Siegel. Dr. Siegel was qualified as an expert in the fields of psychology and psychopharmacology.[3] He testified that he made an analysis of the tape recordings of the siege, reviewed psychological reports and interviewed witnesses and the defendant to determine the defendant's responses to different events and interpret the words and statements made by the defendant. Dr. Siegel concluded that the defendant used cocaine numerous times during the siege of the train. But he also concluded that the defendant's perception of the real events was good and the cocaine did not significantly interfere with his ability to respond. The defendant contends such testimony was erroneously allowed because it went beyond the scope of Dr. Siegel's field of expertise and was not based on a technique generally accepted in the scientific community.

Expert testimony is properly admissible when it can assist the jury in drawing certain inferences from facts and the expert is better qualified than the jury to draw such inferences. *State v. Bullard*, 312 N.C. 129, 139, 322 S.E. 2d 370, 376 (1984); *Cogdill v. Highway Commission*, 279 N.C. 313, 182 S.E. 2d 373 (1971). It is not necessary that an expert be experienced with the identical

3. Psychopharmacology is the study of the effect of drugs on the mind and behavior.

subject matter at issue or be a specialist, licensed, or even engaged in a specific profession. *State v. Bullard*, 312 N.C. at 140, 322 S.E. 2d at 376; *State v. Phifer*, 290 N.C. 203, 225 S.E. 2d 786 (1976), *cert. denied*, 429 U.S. 1123, 51 L.Ed. 2d 573 (1977). This Court has not adhered exclusively to the view that expert testimony must be based upon "generally accepted" scientific methods. *See generally, State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370. It is enough that the expert witness "because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Wilkerson*, 295 N.C. 559, 569, 247 S.E. 2d 905, 911 (1978). Further, "the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. at 140, 322 S.E. 2d at 376.

The record indicates that Dr. Siegel holds a Ph.D. in psychology and has conducted numerous studies and published numerous books and articles on the subjects of psychology, psychopharmacology and the effects of cocaine. He has taught courses in psychology and courses in the general area of drugs and behavior at The University of California at Los Angeles. He spent hundreds of hours listening to the tapes in the present case to distinguish sounds such as nasal sounds made by the defendant that would indicate he was using cocaine. Through his investigations he attempted to discover what occurred within the compartment during the days of the siege, so that he could give a professional opinion about the defendant's mental condition at that time.

The trial court reasonably could have believed that Dr. Siegel's experience and research placed him in a better position than the jury to determine whether the defendant had used cocaine at the times in question and the effect any such cocaine had on the defendant's perceptions. Therefore, we conclude that the trial court did not abuse its discretion by admitting the challenged testimony of Dr. Siegel. This assignment is overruled.

**[8]** The defendant next contends that the trial court erred in finding as a factor aggravating the involuntary manslaughter conviction that the defendant was armed with a deadly weapon. The defendant relies on N.C.G.S. § 15A-1340.4(a)(1), which provides that "[e]vidence necessary to prove an element of the offense may

not be used to prove any factor in aggravation . . . ." The defendant argues that proof of the unlawful killing element of involuntary manslaughter rested upon the evidence that the defendant shot and killed Maria Ramirez with a firearm, a deadly weapon. Therefore, the same evidence could not be used to support this aggravating factor. We agree with the defendant's argument.

Involuntary manslaughter is the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony or naturally dangerous to human life, or (2) a culpably negligent act or omission. *State v. McGill*, 314 N.C. 633, 637, 336 S.E. 2d 90, 92 (1985). Accordingly, the trial court instructed the jury as follows:

> For you to find that this defendant is guilty of involuntary manslaughter the State must prove two things beyond a reasonable doubt.
>
> First, that the defendant acted in a criminally negligent way, as I have previously defined that term to you, in discharging a firearm in a train compartment.
>
> Again, the general instructions concerning criminal negligence which I gave earlier would apply here.
>
> Second, the State must prove that this criminally negligent act of discharging a firearm in a train compartment proximately caused Maria Ramirez's death.

For the jury to convict the defendant of involuntary manslaughter under this instruction by the trial court, it necessarily found that the defendant was armed with and discharged a firearm. Therefore, the possession and discharge of the firearm in effect became an element of the offense, and the same evidence could not be considered as a factor aggravating the manslaughter for sentencing. *See State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983). We hold that the defendant must be given a new sentencing hearing on his conviction for involuntary manslaughter.

The defendant next assigns as error the trial court's failure to find certain statutory mitigating factors with regard to his conviction for involuntary manslaughter. As we have held that the defendant must receive a new sentencing hearing on his convic-

tion for that offense, it is unnecessary for us to consider the merits of this assignment of error. At the new sentencing hearing, the defendant may again present evidence and argue in support of his view that the statutory factors apply.

**[9]** The defendant also contends that the trial court erred in denying his request that the jury be instructed to consider the issue of his sanity before the issue of his guilt. We have followed the rule "that the jury should establish defendant's guilt or innocence of the crime first and reach the insanity issue only if it first found defendant guilty of the crime." *State v. Boone*, 302 N.C. 561, 568, 276 S.E. 2d 354, 359 (1981). We decline to change our rule, and hold that the trial court did not err in this regard.

**[10]** Finally, the defendant contends that the trial court erred in excusing for cause certain jurors who were unwilling to impose the death penalty. He argues that this process of "death qualification" violated his constitutional rights to due process and to a fair and representative jury from the community, because it resulted in a jury that was biased in favor of the prosecution. This assignment of error is without merit and is overruled. *Lockhart v. McCree*, --- U.S. ---, 90 L.Ed. 2d 137 (1986); *State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986); *State v. Johnson*, 317 N.C. 193, 200, 344 S.E. 2d 775, 779-80 (1986).

We hold that the defendant's trial and sentencing for first degree murder were without prejudicial error. Error in the sentencing of the defendant for involuntary manslaughter, however, requires that this action be remanded to the Superior Court, Wake County, for a new sentencing hearing on the defendant's conviction for involuntary manslaughter.

In Case No. 82CRS61201—First degree murder—no error.

In Case No. 82CRS61199—Involuntary manslaughter—remanded for new sentencing hearing.

IRVIN FRANK HILL, EMPLOYEE-PLAINTIFF v. HANES CORPORATION, EMPLOYER, AND AETNA LIFE & CASUALTY INSURANCE COMPANY, CARRIER-DEFENDANTS

No. 144A86

(Filed 4 March 1987)

**1. Master and Servant § 66— stress induced depression—total disability—evidence sufficient**

The evidence was sufficient to support an Industrial Commission conclusion that plaintiff was entitled to compensation under N.C.G.S. 97-29 for total disability due to stress induced depression where the testimony of plaintiff's psychiatrist as a whole formed a sufficient evidentiary basis for the Commission to find that plaintiff's depression was caused by his physical injuries and that the depression in turn caused him to be incapable of working, even though a contrary finding might also have been available.

**2. Master and Servant § 69— scheduled compensable injury—total incapacity for work—compensation for both**

An employee may be compensated for both a scheduled compensable injury under N.C.G.S. 97-31 and total incapacity for work under N.C.G.S. 97-29 where the total incapacity is caused by a psychiatric disorder brought on by the scheduled injury. The "in lieu of" provision of N.C.G.S. 97-31 applies only when all of the employee's injuries fall within those set out in the schedule.

**3. Master and Servant § 69— maximum medical improvement in 1980—total incapacity beginning in 1982—compensable**

The Industrial Commission did not err by making an award for total incapacity to begin on 8 November 1982, even though plaintiff had reached maximum medical improvement on 1 November 1980, where the Commission found that plaintiff had reached maximum medical improvement physically in 1980 and awarded compensation under the statutory schedule for the partial loss of his legs without regard to how this loss affected plaintiff's capacity to work; found that plaintiff's stress related depression rendered him totally disabled by 8 November 1982; and concluded that he was entitled to compensation for so long as he remained disabled. N.C.G.S. 97-31.

**4. Rules of Civil Procedure § 60.4; Master and Servant § 97.2— newly discovered evidence—Rule 60 motion in Court of Appeals—consideration by Court of Appeals—error**

In an Industrial Commission proceeding in which plaintiff was awarded compensation for a total disability due to a stress related depression arising from his injuries, the Court of Appeals erred by considering on the merits a motion filed by defendants for a new hearing under N.C.G.S. 1A-1, Rule 60(b)(2) and (6) based on newly discovered evidence of plaintiff engaging in physical activities inconsistent with testimony offered at the hearing. Defendants' request in the motion that the Court of Appeals decide the merits of the appeal prior to remanding the case to the Industrial Commission for considera-

tion of the motion effectively withdrew the motion; after deciding the merits of the case adversely to defendants, the Court of Appeals should have remanded the motion for an initial determination by the Industrial Commission. N.C.G.S. 97-47.

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

APPEAL by defendants from a decision of a divided panel of the North Carolina Court of Appeals, 79 N.C. App. 67, 339 S.E. 2d 1 (1986), affirming an opinion and award of the North Carolina Industrial Commission and denying a certain motion filed by defendants in the Court of Appeals. This Court allowed on 7 April 1986 defendants' petition for further review as to additional issues in the case not addressed by the dissenting opinion. The case was argued on 10 December 1986.

*William Z. Wood, Jr., for plaintiff appellee.*

*Womble, Carlyle, Sandridge & Rice, by Keith W. Vaughn and Nancy R. Hatch, for defendant appellants.*

EXUM, Chief Justice.

The employee-plaintiff, Irvin Frank Hill, sustained a compensable injury by accident while working for his employer, Hanes Corporation, on 12 March 1979 when he slipped, fell, and struck his upper back between the shoulder blades on the corner of a machine. As a result he was temporarily totally incapacitated for work. He later developed a "20 percent disability in the usage of both legs" caused by a thickening of the membrane surrounding his spinal cord at the point of impact. Finally he developed a mental depression, which the Industrial Commission found totally incapacitated him for work and was causally related to his earlier injury.

The Commission awarded Hill compensation under N.C.G.S. § 97-29 for temporary total disability due to his back injury; under the scheduled injury statute, N.C.G.S. § 97-31(15), for a 20 percent loss of use of both legs; and under N.C.G.S. § 97-29 for total disability caused by depression for so long as the depression persisted. The Court of Appeals affirmed. It also denied defendants' motion for a new hearing by the Commission. This motion, filed with the Court of Appeals pending that Court's decision on

the merits, was made pursuant to Civil Procedure Rule 60(b)(2) (newly discovered evidence) and (6) ("any other reason justifying relief . . ."). 

Questions presented are whether the Court of Appeals correctly concluded: (1) there was evidence sufficient to support the Commission's finding that Hill's depression totally incapacitated him for work and was causally related to his physical injuries suffered on the job; (2) the Commission properly awarded compensation under both N.C.G.S. § 97-31, the scheduled injury statute, and N.C.G.S. § 97-29 for total disability due to depression; and (3) defendants' Rule 60(b) motion should have been denied. We think the Court of Appeals made the correct conclusion in the first two instances and affirm its decision on these issues. We conclude that it erred in addressing defendants' Rule 60(b) motion, vacate its denial of that motion, and remand the motion to the Court of Appeals for further remand to the Industrial Commission for initial determination.

I.

All parties agree that the employee, Irvin Frank Hill, sustained a compensable injury by accident while working for his employer, Hanes Corporation, on 12 March 1979 when he slipped, fell, and struck his upper back between the shoulder blades on the corner of a machine. Taking into consideration the unchallenged evidence before and findings of the Industrial Commission, there seems to be no dispute between the parties as to the following facts: Hill's accident on 12 March 1979 caused him to experience pain in the back, but he continued to work until worsening pain in his back caused him to consult with Dr. Charles Gunn, Jr., who was employed by Hanes and whose duties included caring for patients at the plant where Hill worked. Dr. Gunn, upon taking a history of Hill's injury and noting Hill's complaint of pain in the thoracic, or chest, area of his spine, advised plaintiff to stop working. Following Dr. Gunn's advice, plaintiff did not return to work until 11 April 1979. He continued to work until 9 July 1979 when he began to experience such weakness in his legs that it became difficult for him to stand. He left work on 9 July 1979 and has done no work for wages since that date.

By agreements dated 18 April 1979 and 18 December 1979 defendants voluntarily agreed to pay plaintiff the sum of $156.79

per week (two-thirds of Hill's average weekly wage of $235.19) for the "necessary weeks" for "temporary total" disability.

There also seems to be no dispute in the case regarding the nature of Hill's physical injuries. The blow to his back caused a thickening of the membranes around his spinal cord. An October 1979 myelogram "revealed almost complete obstruction" of the space around the spinal cord at thoracic vertebrae 9-10. This insult to the spinal cord caused Hill to experience loss of sensation and weakness in both legs. Surgery to relieve the condition performed in October 1979 resulted in little improvement. According to the testimony of the neurosurgeon who performed the October 1979 surgery and who followed Hill as a patient through 1980, the weakness in Hill's legs in November 1980 so limited "his ability to perform his original job . . . that I believe him to be totally disabled. I do believe that Mr. Hill could theoretically perform some type of activities, particularly on the basis of part-time work and not full time, since he feels very easily exhausted and tired after most or any activity." The neurosurgeon rated Hill as having a 20 percent loss of use of each leg.

The neurosurgeon recommended that Hill be given a psychological evaluation, and on 8 November 1981, Hill came under the care of Dr. Branham, a psychiatrist. Dr. Branham diagnosed Hill as suffering from depression. According to Dr. Branham, Hill's depression manifested itself in insomnia, difficulty in concentration, accentuation of pain, psychomotor slowing and loss of interest in activities he formerly found enjoyable. Dr. Branham's testimony will be discussed in more detail below.

The Commission made unchallenged findings (paraphrased except where quoted) as follows:

> 1. Plaintiff sustained an injury by accident on 12 March 1979 when he slipped, fell, and struck his back between the shoulders, experiencing back pain.
>
> 2. His pain worsened, but he returned to work on 11 April 1979 and continued to work through 9 July 1979. He has done no work for wages since that date.
>
> 3. While under the care of Dr. Gunn in August 1979 he complained of back pain and loss of feeling, burning sensations and weakness in his lower extremities.

4. He was seen by Drs. Griffin and Jackson for evaluation of lower extremity weaknesses. Dr. Jackson hospitalized him in October 1979 for a myelogram. The myelogram revealed complete obstruction at thoracic vertebrae 9-10, for which plaintiff underwent a bilateral exploratory laminectomy with decompression of arachnoidal adhesions and blockage. The surgery was performed by Dr. Ernesto de la Torre to whom plaintiff had been referred by Dr. Jackson.

5. By 1 November 1980 plaintiff's "physical condition" had stabilized and he had reached "maximum medical improvement physically. His physical condition has remained essentially unchanged since that date." Plaintiff has sustained a 20 percent permanent partial disability of each leg.

6. Before March 1979 plaintiff had never experienced depression or other psychological problems. He is 54 years old, was a professional baseball player for nine years and has worked for defendant employer for 24 years before his injury in 1979.

7. Since 9 July 1979 plaintiff has been physically unable to perform the job he was doing or any other job offered to him by defendant employer. Because of the injury he has suffered he has been and remains unable to sit or stand on a prolonged basis.

II.

**[1]** The Commission concluded that Hill was entitled to compensation under N.C.G.S. § 97-29 for total disability due to "stress induced depression which rendered him totally disabled from 8 November 1982 . . . for so long as he remains so disabled." This conclusion was based on the Commission's Finding No. 8 (paraphrased except where quoted):

On 8 November 1982 plaintiff came under the care of Dr. Branham, a psychiatrist, and has since then remained under Dr. Branham's treatment, including antidepressant medications, for depression. "As a result of the injury by accident . . . and the attendant residuals in his lower extremities and his inability to work, he experienced stress which at least by 8 November 1982 resulted in depression and rendered him totally disabled." Plaintiff "continues to experience sleep

disturbance, difficulty in concentration, accentuation of pain, psychomotor slowing, sexual dysfunction, and constriction of interest by reason of . . . stress induced depression" and he remains totally disabled through 16 September 1983 when he was last examined by Dr. Branham.

The first question for decision is whether there is evidence in the record to support Finding No. 8, as a majority of the Court of Appeals concluded.

On appeals from the Industrial Commission, the Commission's findings of fact must be sustained if there is competent evidence in the record to support them. *Lawrence v. Hatch Mill*, 265 N.C. 329, 144 S.E. 2d 3 (1965). This is so even if there is evidence which would support a contrary finding, because "courts are not at liberty to reweigh the evidence and to set aside the findings of the Commission, simply because other inferences could have been drawn and different conclusions might have been reached." *Rewis v. Insurance Co.*, 226 N.C. 325, 330, 38 S.E. 2d 97, 100 (1946).

Dr. Branham testified:

> I saw Mr. Hill because of weakness in his legs, pain in his back, which had been present since an injury at work. Subsequent to the injury, the weakness and the pain persisted which resulted in bringing about some symptoms of a disease which we call depression. These symptoms as I saw in Mr. Hill were represented by dysphoria or depression, difficulty in sleep pattern, trouble in concentration, accentuation of the pain already being experienced, psychomotor slowing, constriction of interest in general in his usual way of going about conducting his life, which had been seriously altered in so much as he was unable to function in an employment situation.

Dr. Branham testified unequivocally, "I don't feel Mr. Hill is in a situation in which he can work. That has been borne out by the criteria for the social security disability people who have very definite criteria for inability to work because of psychiatric problems." When asked whether this incapacity was "related to [Hill's] physical or to psychiatric problems that you are treating him for," Dr. Branham replied:

> It's probably a combination of both, but it's more from my standpoint, I see it as being more from the physical limitation than from the psychiatric limitation. Mr. Hill has a great deal of difficulty in seeing his wife going to work every morning and he being the man of the household not being able to hold down a job and being at home. . . .
>
> . . . .
>
> Unless Mr. Hill can get some relief or some arrest or improvement from his physical situation, I think he's going to maintain to have a chronic state of depression, medications notwithstanding.

Earlier Dr. Branham had identified depression as a "stress related disorder."

Defendants contend that Dr. Branham's testimony can only be taken to mean first, that Hill's depression was caused not by his physical injuries but by his inability to work and second, Hill's incapacity to work was due not to his depression but to his physical injuries for which he had already been compensated. Defendants argue, therefore, that Dr. Branham's testimony does not support the Commission's Finding No. 8 that Hill's work-related physical injuries caused his depression and that his depression caused his incapacity for work.

We disagree. Although Dr. Branham's testimony is not rendered with as much precision and clarity as might be desirable, it is for the trier of fact, and not an appellate court, to resolve any ambiguities and inconsistencies in it. Dr. Branham's testimony, when viewed as a whole, forms a sufficient evidentiary basis for the Commission to find that Hill's depression was caused by his physical injuries and the depression in turn caused him to be incapable of working. This is so even if a contrary finding might also have been available to the Commission.

Dr. Branham testified: "Subsequent to the [work-related] injury, the weakness and pain persisted which resulted in bringing about some symptoms of a disease which we call depression." And, further, "[u]nless Mr. Hill can get . . . relief . . . from his physical situation, I think he's going to . . . have a chronic state of depression, medications notwithstanding." Clearly this testimony is sufficient to support the Commission's finding that Hill's

depression was caused by his physical, work-related injuries. Dr. Branham's testimony concerning Hill's inability "to function in an employment situation" is sufficient to support a finding that this inability was due to Hill's depression. The Commission was at least free to make this finding even if other findings might have been available to it.

Dr. Branham's testimony that Hill's inability to work was due "probably [to] a combination of both" his physical and his psychiatric limitations and "more from the physical than from the psychiatric limitation" can be taken to mean, when considered in context, that the genesis of Hill's problems was physical injury. This testimony, when considered with all else the psychiatrist said, did not preclude the Commission from finding Hill's incapacity for work to be causally related to his depression.

We are satisfied that the Commission's crucial Finding No. 8 is supported by the evidence; therefore, it must be sustained on appeal.

III.

**[2]** Defendants next contend that because the Commission made a scheduled award under N.C.G.S. § 97-31(15) for Hill's 20 percent loss of use of his legs, it is precluded as a matter of law from subsequently awarding compensation for total incapacity for work under N.C.G.S. § 97-29. The question is whether an employee may be compensated for both a scheduled compensable injury under N.C.G.S. § 97-31 and total incapacity for work under N.C.G.S. § 97-29 when the total incapacity is caused by a psychiatric disorder brought on by the scheduled injury. We conclude the answer is yes.

*Davis v. Edgecomb Metals Company*, 63 N.C. App. 48, 303 S.E. 2d 612 (1983), answered this precise issue favorably to the employee in a thoroughly considered and well-researched opinion by Judge, now Justice, Whichard. There, as here, the Commission awarded the employee compensation under the statutory schedule, N.C.G.S. § 97-31(15), for an injury to his leg. When the leg injury subsequently resulted in a "post traumatic neurosis with a depressive reaction" which rendered the employee totally incapacitated for work, the Commission awarded compensation under N.C.G.S. § 97-29 for total incapacity. The Court of Appeals, rely-

ing on its own precedents, cases from other jurisdictions, and A. Larson, *Workmen's Compensation Law*, and noting "[d]efendants cite no authority contrary," *Davis v. Edgecomb Metals Company*, 63 N.C. App. at 57, 303 S.E. 2d at 617, affirmed both awards. The Court of Appeals quoted with approval from 1B A. Larson, *Workmen's Compensation Law* § 42.22:

> [W]hen there has been a physical accident or trauma, and claimant's disability is increased or prolonged by traumatic neurosis, conversion hysteria, or hysterical paralysis, it is now uniformly held that the full disability including the effects of the neurosis is compensable. Dozens of cases, involving almost every conceivable kind of neurotic. psychotic, depressive, or hysterical symptom, functional overlay, or personality disorder, have accepted this rule. . . .
>
> There is almost no limit to the variety of disabling 'psychic' conditions that have already been recognized as legitimately compensable. . . .
>
> When the physical injury precipitating the neurosis is itself a scheduled injury, no special problems arise, since the case falls easily within the familiar rule that the schedule is not exclusive when the effects overflow beyond the scheduled member. . . .

One of the cases relied on in *Davis* is *Fayne v. Fieldcrest Mills, Inc.*, 54 N.C. App. 144, 282 S.E. 2d 539 (1981), *disc. review denied*, 304 N.C. 725, 288 S.E. 2d 380 (1982). In *Fayne* (as the record makes clear) the Industrial Commission awarded compensation under the statutory schedule for a work-related back injury. The Commission also, after finding on supporting evidence that the employee suffered from a totally disabling emotional condition, "directly related to and . . . caused by the back injury," awarded compensation under N.C.G.S. § 97-29 for total disability. The Court of Appeals, in an opinion by Judge, now Justice, Webb, affirmed.

*Davis* and *Fayne* were correctly decided and fully support the conclusion we reach on the question presented.

Defendants argue that since the scheduled injury statute, N.C.G.S. § 97-31, provides that compensation awarded thereunder "shall be in lieu of all other compensation . . .," the Court of Ap-

peals erred in affirming the Commission's award under both this statute and N.C.G.S. § 97-29. As this Court has made clear in several cases the "in lieu of" provisions of the scheduled injury statute apply only when *all* the employee's injuries fall within those set out in the schedule. *Fleming v. K-Mart Corp.*, 312 N.C. 538, 324 S.E. 2d 214 (1985); *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978). Indeed in *Little* the Court noted that an employee could be entitled to compensation "under G.S. 97-31 for such . . . injuries as are listed in that section, and to an additional award under G.S. 97-30 [the partial incapacity statute] for the impairment of wage earning capacity which is caused by any injuries *not listed* in the schedule in G.S. 97-31." *Id.* at 533, 246 S.E. 2d at 747. Even if all injuries are covered under the scheduled injury section an employee may nevertheless elect to claim under N.C.G.S. § 97-29 if this section is more favorable; but he may not recover under both sections. *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E. 2d 336 (1986).

Here all of Hill's injuries were not covered under the statutory schedule. Hence this statute's "in lieu of" provision is no bar to Hill's recovery under both the schedule and N.C.G.S. § 97-29.

**[3]** Finally defendants argue that since the Commission did not find that Hill's capacity to work had changed since he reached "maximum medical improvement" on 1 November 1980, the Commission improperly made an award for total incapacity to begin two years later on 8 November 1982. Defendants argue:

> Either the claimant had reached maximum medical improvement on November 1, 1980, or he had not reached maximum medical improvement as of that date. If the claimant had fully healed as of November 1, 1980, no award of benefits for total disability should have been made after that date, in the absence of a finding that the claimant's ability to work and earn wages changed *after* he reached maximum medical improvement. . . . If, on the other hand, the claimant had not yet reached maximum medical improvement, he was not entitled to an award of benefits for permanent partial disability. N.C. Gen. Stat. § 97-31.

This argument seems to arise from a misunderstanding of the Commission's order. The Commission did not find that Hill had

reached overall maximum medical improvement on 1 November 1980. It found, rather, that he had reached "maximum medical improvement *physically*" by that date. (Emphasis supplied.) The Commission then concluded that Hill, having "reached maximum physical medical improvement" on 1 November 1980, was entitled to payment under the statutory schedule for the physical injuries to his legs. Neither did the Commission make an award under N.C.G.S. § 97-31 for "permanent partial disability." The Commission made an award under the schedule for the partial loss of use of Hill's legs without regard to how this loss affected his capacity to work.

The Commission also found that Hill's stress-related depression subsequently developed and rendered him "at least by 8 November 1982 totally disabled." It then concluded he was entitled to compensation for "stress induced depression which rendered him totally disabled" from 8 November 1982 "for so long as he remains so disabled." The only award made which was based on Hill's incapacity for work, other than that for temporary incapacity in 1979 and 1980, was the award for his stress induced depression.

The Commission's findings support its conclusions which, in turn, support its award. There are no double payments for the same injury and no inconsistencies in its order. We find no merit in defendants' arguments to the contrary.

IV.

**[4]** The Commission's award was made on 23 October 1984. On 14 October 1985, while the case was pending in the Court of Appeals, defendants moved in that court for a new hearing before the Commission under Civil Procedure Rule 60(b)(2) and (6). Rule 60(b) provides for relief from final judgments, orders, or proceedings upon grounds listed in several subsections of the rule. Subsection (2) is for "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Subsection (6) is for "[a]ny other reason justifying relief from the operation of the judgment."

Affidavits in support of the motion tended to show that between 8 March 1985 and 6 May 1985 investigators observed Hill engaging in various physical activities such as carrying grocery

bags, mowing the lawn with a tractor, working on his automobile, and cutting lumber with a saw. The affidavits indicate that Hill had been observed in certain other activities which were, according to the affidavits, not consistent with some of the testimony offered at the hearing and that these other activities had been going on continuously since the late 1970's. The motion states that the Commission's award is "inconsistent with newly discovered evidence which by due diligence could not have been discovered in time to move for rehearing prior to filing the present appeal."

It is clear from defendants' motion that they contemplated the Court of Appeals would not rule on it but would remand it for consideration by the Industrial Commission in the event the Court of Appeals ruled adversely to defendants on the merits of their appeal. The motion states "defendants respectfully request that the North Carolina Court of Appeals decide the merits of the Appeal filed by defendants prior to remanding this case to the Industrial Commission for consideration of this Motion." The motion states further that a reversal by the Court of Appeals "would eliminate the need for consideration of the present Motion by the Industrial Commission."

Nevertheless a majority of the Court of Appeals decided to address the merits of defendants' Rule 60(b) motion and denied it on the grounds: (1) the evidence referred to in the affidavits could have with due diligence been discovered in time to ask the Industrial Commission for a new hearing; (2) there is nothing in the motion or affidavits justifying relief under subsection (6); and (3) the proper procedure for ending, diminishing or increasing a compensation award is a motion filed under N.C.G.S. § 97-47. The last cited statute provides:

> Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded . . .

Dissenting from this aspect of the majority's opinion, Chief Judge Hedrick wrote:

> [T]he majority has mishandled the Rule 60(b)(2) and (6) motion for 'relief from judgment.' This motion was properly filed in

this Court. *Swygert v. Swygert*, 46 N.C. App. 173, 264 S.E. 2d 902 (1980). With respect to hearing the Rule 60(b) motion in *Swygert*, Judge Frank Parker stated that 'the determination of plaintiff's motion will require the resolution of controverted questions of fact which the trial court is in a far better position to pass upon than is this Court. . . .' *Id.* at 181, 264 S.E. 2d at 907 (1980). I know no reason why we should treat a Rule 60(b) motion filed in this Court in an appeal from the Industrial Commission differently than we treat any other Rule 60(b) motion.

The request in the defendant's Rule 60(b) motion that we 'decide the merits of the appeal filed by the defendants prior to remanding this case to the Industrial Commission for consideration of this motion' effectively withdrew the motion. Thus we need not take action on the motion.

Furthermore, a motion made under G.S. 97-47 is certainly not the same as a motion under Rule 60. A motion by defendant before the Industrial Commission pursuant to G.S. 97-47 would not afford the same relief as a motion filed pursuant to Rule 60(b)(2) and (6). When this case is finally determined on appeal, the defendant can file its Rule 60(b) motions with the Industrial Commission.

On this aspect of the case we agree with Chief Judge Hedrick. It was error for the reasons he stated for the Court of Appeals to rule on defendants' Rule 60(b) motion. After deciding the merits of the case adversely to defendants, the Court of Appeals should have remanded this motion for initial determination by the Industrial Commission.

V.

The result is this: On the merits of the appeal the decision of the Court of Appeals is affirmed for the reasons we have given. On defendants' Rule 60(b) motion the decision of the Court of Appeals denying the motion is vacated. The motion is remanded to the Court of Appeals with directions that it remand the motion to the Industrial Commission for initial determination.

Affirmed.

Denial of Rule 60(b) motion vacated and motion remanded.

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

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STATE OF NORTH CAROLINA v. WILLIAM FOSTER STANTON

No. 80A86

(Filed 4 March 1987)

1. **Rape and Allied Offenses § 4.2— pregnancy, abortion, and lack of other sexual involvement—admissible**

In a prosecution for first degree burglary and first degree rape, the trial court did not err by permitting the victim to testify on direct examination that she had become pregnant, had had an abortion subsequent to the rape, and that she was not having sexual intercourse with anyone else during that time. The determination of the fact of penetration, an essential element of rape, is made more probable by evidence of the subsequent pregnancy and abortion; the evidence of the abortion was nothing more than an unembellished, simple statement which would have little tendency to inflame the jury; and, notwithstanding defendant's failure to object, there is no authority which would prohibit a victim from willingly testifying as to the lack of sexual involvement for purposes of corroboration. N.C.G.S. 8C-1, Rules 403 and 412.

2. **Criminal Law § 75.10— refusal to sign waiver of rights—admission not plain error**

In a prosecution for burglary and rape, the disclosure of defendant's failure to sign a waiver form after he was given his rights did not rise to the level of plain error where the revelation came about as a result of an unresponsive answer and was not elicited by the prosecution; there was no indication that the State in any way attempted to cause the jury to derive any particular import from the unsigned waiver; there was no indication that the point was ever again raised during the trial or closing arguments; and in view of the other evidence against defendant.

3. **Criminal Law § 77.2— statement by defendant—self-serving—not admissible**

The trial court did not err in a prosecution for burglary and rape by refusing to allow defendant to cross-examine the arresting officer about whether defendant had made a statement to the officer regarding the attack on the victim where defendant's question was designed to elicit a simple yes or no answer; the witness was about to give his version of the statement; the prosecutor objected because the answer would be self-serving; and defendant did not renew his attempt to elicit the simple fact that defendant did or did not give a statement. Since defendant had not yet testified, the court was justified

in assuming that the answer would serve only a substantive rather than a corroborative purpose and might very well be self-serving.

Justice FRYE concurring in the result.

Chief Justice EXUM and Justice MITCHELL join in this concurring opinion.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment entered 17 September 1985, imposing a life sentence upon defendant's convictions of first-degree burglary and second-degree rape returned at the 16 September 1985 Criminal Session of Superior Court, ROBESON County.

On 8 July 1985, the Robeson County Grand Jury returned bills of indictment charging defendant with first-degree burglary and first-degree rape. The cases were joined for trial and were tried before *E. Lynn Johnson, Judge* presiding, and a jury. The jury returned verdicts of guilty of first-degree burglary and second-degree rape. The cases were consolidated for purposes of judgment, and defendant was sentenced to life imprisonment. Heard in the Supreme Court 8 December 1986.

*Lacy H. Thornburg, Attorney General, by James Wallace, Jr., Assistant Attorney General, for the State.*

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

MEYER, Justice.

Defendant brings forward on appeal three issues, all relating to the admission of, or failure to admit, certain items of evidence. We find no error in defendant's trial and affirm his convictions and sentences.

The victim, Mary Jane Brown, returned to her apartment at Carolina Apartments in Maxton, North Carolina, at approximately 2:00 a.m. on the morning of 2 June 1985 following an all-day bus trip to King's Dominion, a recreational park in Virginia. She returned to Maxton at approximately 11:00 p.m. and stopped at her mother's to pick up one of her children. The other child spent the night at the grandmother's house. Upon reaching her apartment, she and the child took a bath and went to bed. The doors to her home were locked.

At approximately 4:45 a.m., while lying face down in her bed, she was awakened by the presence of someone on top of her,

beating her across her head and face and threatening to kill her if she moved. Her attacker was attempting to have sexual intercourse with her. After pleading with her attacker, she was permitted to turn over. He then held her down and had forcible vaginal intercourse with her against her will. It was after she was allowed to turn over that she recognized her attacker as the defendant, whom she had known previously. A light from the kitchen shone into the bedroom and permitted her to see defendant's face. The defendant had previously lived in the same mobile home park as the victim, and though she had never spoken with him, she had seen him "a lot." The forced intercourse lasted about five minutes, and defendant then left the apartment. Mrs. Brown's pocketbook had been moved, and $50.00 was missing.

Mrs. Brown gathered up her child and drove to her mother's and told her what had happened. Her mother went to the police station and told officers what had happened. An officer accompanied her mother back to her house and spoke with the victim. He then accompanied her to the hospital, where a rape kit was prepared.

Upon returning to her apartment from the hospital and the police station, Mrs. Brown found that the screen to a front window had been cut. Mrs. Brown gave the officers a statement concerning the attack and identified defendant as the man who had raped her.

At the trial, Mrs. Brown testified to the details of the attack and again identified defendant as her attacker. Over defendant's objection, Mrs. Brown testified that fourteen weeks after the rape, she found out that she was approximately fourteen weeks pregnant. She then testified that she had not had intercourse with anyone but defendant during that time frame. Also, over defendant's objection, she testified that she obtained an abortion.

Officer Andre McPhaul testified that he took Mrs. Brown's statement to the effect that defendant had raped her, that he took her to the hospital for the preparation of the rape kit, and that he had sent it to the State Bureau of Investigation in Raleigh for analysis. Officer McPhaul went to defendant's house and spoke with defendant and his wife. Defendant voluntarily agreed to accompany Officer McPhaul to police headquarters for questioning. McPhaul testified that he read defendant his *Miranda* rights

twice, but that defendant refused to sign the acknowledgment form.

No identifiable fingerprints were found in Mrs. Brown's apartment. SBI Agent Taub, a serology specialist, testified that semen was present in the rape kit swabs and that it originated from an AB secretor, a type which occurs in three percent of the nation's population. He testified that defendant's blood type was AB.

Maxton Police Chief Thompson testified that Mrs. Brown identified defendant at the police station on the morning of the attack as the man who raped her.

By his testimony, defendant denied any involvement. He offered alibi evidence through testimony of his wife, family members, and friends. He also offered the testimony of a neighbor of Mrs. Brown that she had seen a car pull up to Mrs. Brown's apartment on two occasions between 4:00 and 4:30 a.m. on 2 June 1985 and heard someone beating on her door.

[1] Defendant first argues that the trial judge committed reversible error by permitting the victim to testify, over objection, that she became pregnant and had an abortion subsequent to the rape. He also argues that it was plain error for the trial judge to permit the victim to testify, even in the absence of any objection, that she was not having sexual intercourse with anyone else during that time.

The testimony in question occurred during direct examination of Mrs. Brown by the assistant district attorney after she had testified as to the actual penetration. The transcript reveals the following exchange:

> Q. Now, after June the 2d, did you find out at a later date that you were pregnant?
>
> A. Yes.
>
> MR. ROGERS: Objection, Your Honor.
>
> THE COURT: Overruled. EXCEPTION NO. 1
>
> Q. (By Mr. Carter:) When did you find out you were pregnant?
>
> A. I'm not sure of the date.

Q. When you found out you were pregnant, do you know how many weeks or months you were pregnant?

A. Yes.

Q. How many weeks were you pregnant?

A. Fourteen.

Q. And did you calculate as to how many weeks that was after you had been assaulted by the defendant?

A. Yes.

Q. How many weeks was it?

A. Fourteen.

Q. Okay. As a result of finding out that you were pregnant and fourteen weeks pregnant, what, if anything, did you do?

MR. ROGERS: Objection, Your Honor.

THE COURT: Overruled. EXCEPTION NO. 2

THE WITNESS: I had an abortion.

[Q. (By Mr. Carter:) Now, during the time you were assaulted by the defendant, were you dating anyone on a regular basis?

A. No.

Q. Were you having sexual intercourse with anyone during that time?

A. No.] EXCEPTION NO. 3. NO OBJECTION STATED AT TRIAL

Defendant concedes the relevance of the evidence regarding the prosecutrix's pregnancy and abortion; he argues, however, that its probative value is far outweighed by its prejudicial effect. Defendant contends that evidence of the pregnancy and abortion added little if anything to the State's case because the evidence of the penetration was unequivocal. Defendant argues that this is precisely the sort of inflammatory evidence that Rule 403 of the North Carolina Rules of Evidence is calculated to exclude.

Rule 401 of our rules defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more prob-

able or less probable than it would be without the evidence." Unquestionably, the determination of the fact of penetration is made more probable by evidence of the subsequent pregnancy and abortion. Indeed, the defendant concedes as much. Rule 402 provides, in effect, that all "relevant evidence" is admissible unless it is made inadmissible by constitutional provision, legislative act, or any other Rule of Evidence. Defendant argues that Rule 403 is the rule which prohibits the admission of this evidence. Even prior to the adoption of the Rules of Evidence, our case law had long recognized that certain circumstances call for the exclusion of evidence which was of unquestioned relevance. *See* 1 Brandis on North Carolina Evidence § 80 (1982 & Supp. 1986), and cases cited therein. Rule 403 is the modern embodiment of that concept. Rule 403 provides as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

We find nothing in Rule 403 that causes us to depart from our prior holdings that evidence merely disclosing a subsequent pregnancy is admissible as tending to prove penetration, an essential element of the crime of forcible rape. Our case of *State v. Cross*, 284 N.C. 174, 200 S.E. 2d 27 (1973), is dispositive of the issue:

> Defendant first contends the trial court erred in permitting the prosecutrix to testify over objection that she became pregnant as the result of the rape. Defendant says this testimony was offered only to excite sympathy for the prosecutrix and to play upon the passions and prejudices of the jury.
>
> Rape is the carnal knowledge of a female forcibly and against her will. *State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225 (1969); *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967). There must be penetration of the sexual organ of the female by the sexual organ of the male to constitute carnal knowledge in a legal sense, but the slightest penetration is sufficient. *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968). The testimony of the prosecutrix concerning her pregnancy tended to show penetration, one of the elements of rape.

> Defendant's plea of not guilty placed upon the State the burden of proving beyond a reasonable doubt all the essential elements of the offense charged. Hence, evidence tending to prove penetration, an essential element of the offense, was properly admitted. *State v. McNeil*, 277 N.C. 162, 176 S.E. 2d 732 (1970); *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969); Annot., 62 A.L.R. 2d 1083 (1958), and cases therein cited. Such testimony was also competent to corroborate the testimony of the prosecutrix that a male person had carnally known and abused her. See *State v. Jones*, 249 N.C. 134, 105 S.E. 2d 513 (1958).

*Cross*, 284 N.C. at 176-77, 200 S.E. 2d at 29-30.

Mrs. Brown's simple statement that she had an abortion served the purpose of corroborating both the fact of penetration and the fact of her pregnancy. The mere fact that an abortion took place is not so inflammatory as to render it inadmissible. Defendant cites *Sullivan v. Commonwealth*, 260 Ky. 471, 86 S.W. 2d 135 (1935), for the proposition that testimony concerning the abortion was so inflammatory, and of so little probative value, as to warrant a new trial. Besides observing that *Sullivan* was decided more than fifty years ago, we fail to find that decision persuasive. In *Sullivan*, evidence that a young girl had attempted an abortion by drinking turpentine was found to be too far removed from the issue of defendant's guilt. While we would agree that morbid representations concerning an attempted abortion might prove unduly prejudicial, the evidence here is nothing more than a simple statement that the victim discovered her pregnancy some fourteen weeks after the attack and that "I had an abortion." Such simple statements as these, otherwise unembellished, have little tendency to inflame a jury. Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial judge, *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986), and we conclude that the trial judge did not abuse his discretion in admitting into evidence Mrs. Brown's statements regarding her subsequent pregnancy and abortion.

Defendant next contends that the trial court erred in allowing into evidence the testimony of Mrs. Brown that she was not having sexual intercourse with anyone else at the time of the rape. For purposes of clarity, we repeat a portion of the tran-

script previously set forth in this opinion regarding the testimony by Mrs. Brown:

> [Q. (By Mr. Carter:) Now, during the time you were assaulted by the defendant, were you dating anyone on a regular basis?
>
> A. No.
>
> Q. Were you having sexual intercourse with anyone during that time?
>
> A. No.] EXCEPTION NO. 3 NO OBJECTION STATED AT TRIAL

Defendant contends that the admission of this evidence somehow violates Rule 412. With certain exceptions not pertinent here, Rule 412 is the embodiment of its predecessor, N.C.G.S. § 8-58.6 (repealed by 1983 N.C. Sess. Laws (Regular Sess. 1984) ch. 1037, § 2 (effective 1 July 1984)), a part of what was commonly referred to as the Rape Shield Law. Defendant's failure to object at trial aside, we find no error in the admission of this evidence. Defendant cites no authority contrary to either Rule 412 or its predecessor statute, N.C.G.S. § 8-58.6, to prohibit a victim from willingly testifying as to the lack of sexual involvement for purposes of corroboration, and we decline to so construe it. It would strain credulity for this Court to hold that, while a victim may testify to the details of her rape and corroborate that testimony with further testimony concerning her pregnancy and subsequent abortion, she may not testify as to the lack of sexual involvement with anyone except the defendant and thereby fail to fix responsibility for the pregnancy on the defendant.

**[2]** Defendant next contends that certain testimony of Officer McPhaul revealing that defendant refused to sign a waiver form following receipt of *Miranda* warnings constituted "plain error" entitling him to a new trial. We disagree.

On direct examination by the assistant district attorney, Officer McPhaul was being examined concerning his contact with the defendant at the defendant's residence in the early morning hours of 2 June 1985, approximately thirty minutes after the rape in question had occurred. Toward the end of his direct examination, Officer McPhaul testified that he told defendant that he was not under arrest and that he wanted to talk to him downtown. Upon being asked if he questioned the defendant at any time, the following exchange took place:

Q. Did you at any time question the defendant?

A. Okay. I told him I wanted to talk to him. If he would, you know, come downtown. I asked his wife how long has he—was he home. Said he had just got there.

Q. He had just gotten there when you picked him up?

A. Yes.

[Q. Okay. Did you advise him of any rights?

A. Yes. I read the rights form to him twice, and he refused to sign it.

Q. He refused to sign it?

A. Yes, sir. I have a copy of the form.] NO OBJECTION STATED AT TRIAL EXCEPTION NO. 4

MR. CARTER: I have no further questions, Your Honor.

THE COURT: You may cross examine.

As the transcript indicates, defense counsel did not object to the question or move to strike that portion of Officer McPhaul's answer which was unresponsive to the question and about which defendant now complains. A failure to except or object to errors at trial constitutes a waiver of the right to assert the alleged error on appeal. For purposes of our analysis of defendant's contention, we assume, without deciding, that the failure to exclude the witness' answer was error. As the record here fails to reveal any manner in which the defendant is entitled to an exception by rule of law, this Court's role is limited to consideration of whether defendant has carried his burden of showing "plain error." In our recent case of *State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986), we reiterated our position,[1] that we will apply the plain error rule in only the most exceptional circumstances:

1. In *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983), we said:

"[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has ' "resulted in a miscarriage of

> The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. *State v. Odom*, 307 N.C. at 661, 300 S.E. 2d at 378-79. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. *State v. Black*, 308 N.C. at 741, 303 S.E. 2d at 806-07. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection. *Cf.* N.C.G.S. § 15A-1443(c) (defendant not prejudiced by error resulting from his own conduct).

*State v. Walker*, 316 N.C. 33, 39, 340 S.E. 2d 80, 83-84 (1986).

Our review of the entire record leads us to conclude that the disclosure of defendant's refusal to sign a waiver form after he was given his *Miranda* rights does not rise to the level of plain error. The revelation came about as a result of an answer by the witness that was unresponsive to the prosecutor's question. It cannot be said to have been elicited by the prosecution. There is no indication that the State in any way attempted to cause the jury to derive any particular import from the fact that the waiver form was not signed. Nor is there any indication in the record that the point was ever raised again at any time during the remainder of the trial or during closing argument. *See United States v. Muscarella*, 585 F. 2d 242 (7th Cir. 1978), and *State v. Harper*, 637 S.W. 2d 342 (Mo. App. 1982). In view of the victim's opportunity to observe her attacker; her immediate, unhesitating,

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> justice or in the denial to appellant of a fair trial" ' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.' "

*Id.* at 740-41, 303 S.E. 2d at 806-07 (quoting with approval *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L.Ed. 2d 513 (1982) ).

and repeated identification of defendant as her attacker, a man whom she knew and had seen "a lot"; and the serology evidence, we cannot conclude that absent this unresponsive statement revealing to the jury that the defendant refused to sign the waiver form after he had been informed of his *Miranda* rights, the jury would probably have reached a different verdict. The defendant has failed to carry his burden of showing "plain error."

**[3]** Finally, defendant argues that the trial judge committed reversible error in refusing to allow the defendant's counsel to cross-examine Officer McPhaul concerning whether defendant actually made a statement to the witness concerning the attack on Mrs. Brown. Defendant argues that the prosecution "opened the door" by introducing evidence of defendant's post-arrest silence through Officer McPhaul's answer that defendant refused to sign the waiver form.

Defense counsel attempted to cross-examine Officer McPhaul to show that defendant had indeed made a statement to the authorities; however, the trial judge would not allow the question. As the basis for this argument, defendant cites the following exchange:

> Q. Okay. Did Mr. Stanton give you a statement about this matter?
>
> A. He told me—
>
> MR. CARTER: Objection as self-serving at this point.
>
> THE COURT: Sustained at this point.
>
> THE WITNESS: Well, he told me—
>
> THE COURT: Sustained. EXCEPTION NO. 5

At the outset, it is to be noted that the defense attorney's question was designed to elicit a simple "yes" or "no" answer, but the witness in response was about to give his version of the contents of the statement. The prosecutor, recognizing this, objected—not to the fact that the witness responded, but to the fact that the response would be self-serving, as it was about to reveal the contents of the statement. At this point, the defendant did not renew his attempt to elicit the simple fact that defendant did or did not give an answer, if indeed that was the purpose of the

question. In view of the witness' attempt to give his version of the contents of the statement, the objection was properly sustained. Since the defendant had not yet testified, the court was justified in assuming that the answer would serve only a substantive, as opposed to a corroborative, purpose and might very well be "self-serving." The phrase "self-serving" does not describe an independent grounds for exclusion but rather is merely a convenient term to characterize a particular form of otherwise inadmissible hearsay. 1 Brandis on North Carolina Evidence § 140 (1982 & Supp. 1986). Testimony of a self-serving declaration made by a defendant following an alleged crime is incompetent as substantive evidence. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976), *reconsideration denied*, 293 N.C. 259, 243 S.E. 2d 143 (1977); *State v. Chapman*, 221 N.C. 157, 19 S.E. 2d 250 (1942). Since the defendant failed to get Officer McPhaul's proposed answer into the record for appellate review, any assertion to the contrary is not supported by the record.

In defendant's trial and sentencing, we find

No error.

Justice FRYE concurring in the result.

I agree with the Court's ultimate decision finding no error in defendant's trial and sentencing. I write only to express my concern with the Court's treatment of defendant's contention that it was plain error for the trial judge to permit the victim to testify, even in the absence of any objection, that she was not having sexual intercourse with anyone else during the time of the rape in question. The Court holds that admission of this evidence was not error. I am not convinced.

I believe that Rule 412 of the North Carolina Rules of Evidence, properly construed, makes this type of evidence irrelevant to any issue in this case and its admission improper if properly objected to. Under the circumstances of this case, however, the admission of this evidence was clearly not error of the magnitude required for application of the plain error rule so as to award defendant a new trial. *See 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).

Rule 412 of the North Carolina Rules of Evidence provides that with the exception of sexual behavior between the complainant and the defendant and three other exceptions not relevant to this case, "the sexual behavior of the complainant is irrelevant to any issue in the prosecution . . . ." N.C.G.S. § 8C-1, Rule 412(b) (1986). Sexual behavior is defined as "sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial." N.C.G.S. § 8C-1, Rule 412(a) (1986). While it may be argued that the testimony in question relates to a lack of sexual activity rather than sexual activity, I believe that at least one purpose of the rule is to remove from the prosecution of sex offense cases the question of the prosecutrix's sexual activity or lack thereof with persons other than the defendant. Once the complaining witness is permitted to testify, as here, that she was neither dating anyone on a regular basis nor having sexual intercourse with anyone during that time, the door is open for defendant to make an issue of her sexual behavior. This, in my opinion, is what Rule 412 attempts to prevent.

Chief Justice EXUM and Justice MITCHELL join in this concurring opinion.

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STATE OF NORTH CAROLINA v. JOHN LEE CLEMMONS

No. 159A86

(Filed 4 March 1987)

1. **Rape and Allied Offenses § 4.1; Criminal Law § 86.5— defendant's prior sexual misconduct—inadmissible to attack credibility—no prejudicial error**

There was no prejudice in a prosecution for first degree rape from the admission of evidence of defendant's prior alleged sexual misconduct where the court refused to admit the testimony under the common plan or scheme exception but permitted the evidence on the express ground that it showed a specific act of misconduct which could be used to attack defendant's credibility when he testified on his own behalf. The evidence was not admissible for that purpose because extrinsic evidence of sexual misconduct is not in any way probative of character for truthfulness or untruthfulness; however, given the evidence as a whole, there is no reasonable probability that the jury would not have convicted the defendant even if this evidence had not been admitted for any purpose. N.C.G.S. 8C-1, Rules 404(b), 608(b).

**2. Rape and Allied Offenses § 6— instruction that knife is a dangerous weapon—not plain error**

There was no plain error in a prosecution for first degree rape where the trial court instructed the jury that "a knife is a deadly weapon"; even assuming that the evidence did not establish the deadly nature of the knife as a matter of law, defendant did not object and there was no probable impact on the finding of guilt because the jury would have found on the evidence that the knife was a dangerous or deadly weapon or that the victim reasonably believed it to be such. N.C.G.S. 14-27.2(a)(2)(a).

APPEAL by defendant from a judgment entered by *Reid, J.*, at the 2 December 1985 Criminal Session of Superior Court, EDGECOMBE County. Heard in the Supreme Court 10 February 1987.

Defendant was charged with rape in the first degree. The jury found him guilty as charged, and the trial court entered the mandatory sentence of life imprisonment. N.C.G.S. 14-27.2 (1986); N.C.G.S. 14-1.1(2) (1986). Defendant appealed directly to this Court pursuant to N.C.G.S. 7A-27(a) (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.*

WHICHARD, Justice.

The State's evidence, in pertinent part, showed the following:

The victim first saw defendant about two weeks before the incident alleged when the victim's son "darted out" in front of a car driven by defendant. After defendant ascertained that the boy was not injured, he "started asking [the victim] if [she] was married." She told him she was. Defendant then "started asking if [the victim would] like to go out with him." The victim told defendant she was married and did not want to go out with him, but defendant nevertheless "pursued the issue" by asking her "over again." She then grabbed her son's hand and went home.

The victim next saw defendant the following Wednesday. Her neighbor's child came to tell her that "there was a man out there interested in buying a car." The victim was attempting to sell her brother's car, so she went out to talk to the man. When

she saw the man's car, she realized that he was the defendant. They talked about the car for another "couple of minutes," and defendant then asked "about coming over on Monday" to discuss the car. She told him he would have to come when her husband was there, and defendant said "something like 'Why don't you let me come over?' " She told him he would have to come when her husband was at home, and she then went inside because she "didn't feel comfortable."

The victim saw defendant again the following Monday standing on the porch at his place of employment. She had asked him his name and where he worked so her mother could talk to him further about the car. She showed her mother where defendant worked, and her mother later "went [by] to talk to him."

The victim next saw defendant on the occasion of the incident in question. She was at home with her two children around noon when she heard a knock at the door. When she asked who was there, a man answered that he "had a package for Devlin Dorsey." The victim had a son named Devlin Oyer who frequently received packages from his father, and the difference in the surnames did not occur to her. She opened the door slightly, and defendant "forced his way through." When she screamed, defendant grabbed her year-old daughter and told the victim that if she did not cooperate he would hurt the daughter. Defendant held a knife in his hand that "looked like a switch blade." He took the daughter into a bedroom, where the victim's other child was, and shut the door. When he returned to the living room, the knife was still in his hand. He told the victim they "were going to have some fun." He then pushed her down onto an easy chair, and she "slid down into a half-sitting half-lying position."

Defendant thereupon crouched over the victim, "took [her] robe apart," and "took off [her] panties." He still had the knife in his hand. He told her "it was going to be good" and proceeded to have intercourse with her. The victim stated: "He penetrated, he went inside me." Defendant then arose to go to the bathroom with the knife still in his hand.

When defendant returned, he told the victim "not to go to the police or . . . he would harm [her] daughter." He then told her he would see her again, and he left.

After defendant left, the victim called a friend and told her she had been raped. The friend called the police, and both the friend and the police came to the victim's home. The victim related the foregoing events to the police.

Two days later the victim was admitted to a hospital where she stayed for two weeks under the treatment of a psychiatrist. She was hospitalized because she "couldn't seem to handle things," "felt like [she] was going crazy," "felt like [she] was losing [her] mind." She was unable to take care of her children, her husband or herself.

On cross-examination the victim stated: "I was scared. He had a knife and he was twice the size of me. I don't take chances with my children's lives." She responded in the negative when asked: "Didn't you freely give this man sex?" She further testified that she could see the knife in defendant's hand "the whole time he was there," and that defendant had his hand pressed against her shoulder during the sexual union.

The victim's friend testified, corroborating the victim's testimony that the victim had called her following the incident and said that she had been raped. When she arrived at the victim's home the police were already there. She described the scene at the home as follows: "[T]he place was a wreck like there had been a struggle . . . . There was a lamp tipped over on the floor and things were thrown everywhere."

The victim's sister testified, corroborating the victim's testimony that defendant had been to the victim's home prior to the incident to talk about the car and had asked if he could "come over Monday . . . ." The neighbor's child testified, also corroborating the victim's testimony about defendant's prior visit.

A police officer testified that she saw the victim at the hospital on the date of the incident. She described the victim as "obviously traumatized." She stated: "She was shaking, she had been crying, she was very upset, she appeared to be confused and very frightened." The victim gave the officer a statement on that occasion which corroborated the victim's testimony at trial.

Soong Lee testified as "an expert medical doctor specializing in the field of psychiatry." He indicated that the victim had been brought to the emergency room on 25 June 1985, the day follow-

ing the incident, because "she had passed out." He described her condition upon that admittance as follows: "Recollection of that incident [*i.e.*, the alleged rape] [was] coming back to her mind over and over again and she was unable to function."

Dr. Lee subsequently admitted the victim to the hospital from 26 June through 11 July. His diagnosis was "post traumatic stress disorder." He again indicated that the victim was "having that recollection of the event coming back over and over again." The victim told him that she was "unable to sleep, . . . frightened, . . . afraid that something was going to happen to her." She was "re-experiencing what happened to her and . . . she was unable to function." She was withdrawn and uncommunicative.

On cross-examination defense counsel asked Dr. Lee if marital problems could cause post traumatic stress disorder. He responded: "No, it has to be more acute."

Defendant testified in his own behalf. He admitted that he "ha[d] sex" with the victim, but denied that he carried a knife or used force. He testified that the "sexual relationship [was] by consent" and that he returned to the victim's house on 24 June because she "told [him] to come back then." According to defendant, the sexual union was "both our ideas." Defendant denied taking the victim's daughter to the bedroom and stated that both the victim's children were in the room with them when they "had sex."

Finally, a police officer testified as a witness for defendant. He stated that at some time in June 1985 he had seen the victim at defendant's service station.

The jury returned a verdict of guilty of rape in the first degree. Defendant appeals and presents two arguments.

**[1]** First, defendant contends the trial court erred in allowing the State to impeach his testimony with evidence of prior alleged sexual misconduct which had no bearing on his credibility. This assignment of error is based upon the following sequence of events at trial:

The State sought to present a female witness to testify that about a year prior to the incident here defendant came to her apartment, made advances toward her, threw her across the bed,

got on top of her, and desisted only when she managed to kick a ringing phone off the hook. The prosecuting attorney represented to the court that this evidence was offered "to show an incident which is similar in nature and indicates an intent and a course of conduct on the part of the defendant." *See* N.C.G.S. 8C-1, Rule 404(b) (1986); *State v. McClain*, 240 N.C. 171, 174-76, 81 S.E. 2d 364, 366-68 (1954). The court "conclude[d] that the prejudicial effect of that testimony would outweigh any probative value," N.C.G.S. 8C-1, Rule 403 (1986), and therefore excluded it.

Subsequently, however, the court allowed the State to cross examine defendant about the incident. The prosecuting attorney asked defendant: "Didn't you go by there [*i.e.*, the female witness' apartment] to forcibly have sex with [her]?" Over objection and a motion for mistrial, which were respectively overruled and denied, defendant responded: "No." He then testified that he went to the witness' apartment to "[r]epair a window." The prosecuting attorney asked: "What happened when you went in?" Upon defendant's objection, the court then instructed the jury as follows:

> [T]his line of questioning is permitted only for the purpose of establishing, if it does, in fact, establish a prior motive or prior intent to commit a similar offense. It is not evidence of the defendant's guilt in this case and it shall not be taken by you as such evidence.

After counsel approached the bench, the court indicated that it was going to excuse the jury "to make some findings with regard to legal questions," but before excusing the jury it further instructed as follows:

> [T]he questions that [the prosecuting attorney] has asked the witness with regard to any prior act of misconduct with [the female witness] [are] not received for any other purpose other than attacking the credibility of this witness as a witness on his own behalf and it shall be considered by you only for that purpose if, in fact, . . . you find that it does establish some prior act of misconduct which will bear on the credibility of this witness . . . .

After hearing arguments of defense counsel in the absence of the jury, the court agreed to sustain defendant's objection "to the testimony of a prior act—of alleged prior act of misconduct . . .

because the Court . . . found that the prejudicial effect of that testimony outweighed its probative force and effect and therefore, did not permit . . . the State on direct evidence . . . to offer such evidence." The court then stated:

> However, when the defendant takes the stand and places his own credibility in question, then he subjects himself not only to questions about any prior convictions that he may have, but to cross examination as to any specific act of misconduct which the State in good faith may have information that he may be guilty of and it is . . . on that basis . . . that the Court will permit the State to cross examine him as to a specific act of misconduct which the State in good faith has a predicate to base this question upon . . . . So the reason that the Court sent the jury out was so that the record would be clear as to what the Court's ruling was based upon.

The jury then returned and the following occurred:

> Q. [PROSECUTING ATTORNEY]: Mr. Clemmons, I believe you said that you did go to the apartment of [the female witness]?
>
> A. (Nods assent)
>
> Q. When you went to the apartment, did you or did you not throw [the witness] onto the bed and attempt to get on top of her and . . . attempt to have a sexual relationship with her at that time?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> A. No, I didn't.
>
> Q. What happened in the room?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Sustained as to that.

The State argues that this evidence was admissible "to show an incident similar to the one charged and . . . not too remote in time to establish defendant's intent, plan, motive and cause of conduct." N.C.G.S. 8C-1, Rule 404(b); *see State v. Gordon*, 316 N.C.

497, 505, 342 S.E. 2d 509, 513 (1986) ("This Court has been quite 'liberal in admitting evidence of similar sex crimes' under the common plan or scheme exception."). The trial court, however, expressly refused to admit the evidence for that purpose, both in the State's case-in-chief and on cross-examination of the defendant, on the ground that the prejudicial effect would outweigh any probative value. Exclusion on that basis was within the court's sound discretion. N.C.G.S. 8C-1, Rule 403; *State v. Mason*, 315 N.C. 724, 731, 340 S.E. 2d 430, 434-35 (1986).

The court proceeded, however, to admit the evidence on the express ground that it showed a specific act of misconduct which could be used to attack defendant's credibility when he testified in his own behalf. Specific instances of the conduct of a witness, for the purpose of attacking the witness' credibility, may be inquired into on cross-examination of the witness only if they are "probative of truthfulness or untruthfulness." N.C.G.S. 8C-1, Rule 608(b) (1986). This Court has stated that "extrinsic evidence of sexual misconduct is not in any way probative of a witness' character for truthfulness or untruthfulness." *State v. Gordon*, 316 N.C. at 506, 342 S.E. 2d at 514. *See also State v. Morgan*, 315 N.C. 626, 635, 340 S.E. 2d 84, 90 (1986) ("evidence routinely disapproved as irrelevant to the question of a witness' general veracity (credibility) includes specific instances of conduct relating to 'sexual relationships or proclivities . . . .' "). The evidence in question thus was not admissible for the purpose for which the court allowed it.

Admission of this evidence on an improper ground does not, however, require a new trial. While defendant correctly argues that the trial was largely a credibility contest between him and the victim, our review of the evidence as a whole convinces us that, even absent this evidence, the jury would have believed the victim rather than defendant. Considering the general consistency between the victim's testimony and her pre-trial statements and conduct, the evidence that the victim's house was in disarray following what defendant contended was a consensual sexual union, and particularly the medical evidence of the victim's severe post-traumatic stress disorder for a lengthy period immediately following the incident, we conclude that there is no reasonable possibility that the jury would not have convicted defendant even if the evidence in question had not been admitted for any pur-

pose. Defendant thus has not sustained his burden of showing prejudice. N.C.G.S. 15A-1443(a) (1983). Moreover, we note that defendant answered the accusatory questions in the negative. *See State v. McClintick*, 315 N.C. 649, 660, 340 S.E. 2d 41, 48 (1986); *State v. Black*, 283 N.C. 344, 350, 196 S.E. 2d 225, 229 (1973). This assignment of error is overruled.

**[2]** Second, defendant contends the trial court erred by instructing the jury that "a knife is a deadly weapon." Defendant did not object to the instruction at trial and thus may not assign it as error on appeal. N.C.R. App. P. 10(b)(2). He urges us, however, to apply the "plain error" rule, *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), and award a new trial.

This Court recently stated: "The distinction between a weapon which is deadly or dangerous per se and one which may or may not be deadly or dangerous depending upon the circumstances is not one that lends itself to mechanical definition." *State v. Torain*, 316 N.C. 111, 121, 340 S.E. 2d 465, 471 (1986). It noted that the evidence in each case determines whether a weapon is properly characterized as lethal as a matter of law or whether its nature and manner of use merely raise a factual issue about its potential for producing death. *Id.* (quoting *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E. 2d 719, 726 (1981)).

The evidence as to the nature and manner of use of the weapon employed here came entirely from the victim. She testified only that the knife "was a black-handled silver blade, looked like a switch blade." She was unable to state the length of the blade, but she illustrated it to the jury by holding her hands apart. The record does not indicate the length thus shown, nor was the knife itself introduced into evidence. The victim testified that defendant had the knife in his hand throughout the incident and that he held it against her shoulder during the sexual union.

Conceding, without deciding, that this evidence did not establish the deadly nature of the knife as a matter of law, we nevertheless hold that the instruction did not rise to the level of "plain error." "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. at 661, 300 S.E. 2d at 378. "[E]ven when the 'plain error' rule

is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " *Id.* at 660-61, 300 S.E. 2d at 378.

To convict defendant of rape in the first degree, the jury had to find that he engaged in vaginal intercourse with the victim by force and against her will while he "[e]mploy[ed] or display[ed] a dangerous or deadly weapon or an article which the [victim] reasonably believe[d] to be a dangerous or deadly weapon." N.C.G.S. 14-27.2(a)(2)(a) (1986). In light of the record as a whole, especially the evidence as to the extreme traumatization of the victim, we believe the jury, had it been left to determine the nature of the weapon as a factual issue, would have found that the knife was a dangerous or deadly weapon or at least that the victim reasonably believed it to be such. This thus is not the "rare case" where the instructional error, if any, had a probable impact on the jury's finding of guilt so as to merit a new trial despite failure to object.

No error.

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IN THE MATTER OF: JOHN H. POTEAT v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA AND LEON GILLIAM & SONS, INC.

No. 514PA86

(Filed 4 March 1987)

**Master and Servant § 108— unemployment compensation—leaving work before termination date**

An employee who quits a job upon being informed that he will be terminated four days later, and who applies immediately for unemployment benefits, is disqualified for such benefits for the four-day period during which he could have continued to work on the ground that he is "unemployed because he left work voluntarily without good cause attributable to the employer." Nothing else appearing, however, he is not thereby disqualified subsequent to the date on which his employment would in any event have terminated.

ON discretionary review pursuant to N.C.G.S. 7A-31 from a decision of the Court of Appeals, 82 N.C. App. 138, 349 S.E. 2d 597 (1986), vacating judgment entered by *Walker (Hal H.), J.*, on

12 November 1985 in Superior Court, ALAMANCE County, and remanding for entry of an order remanding to the Employment Security Commission for an award of benefits. Heard in the Supreme Court 10 February 1987.

*North State Legal Services, Inc., by Carlene M. McNulty, for claimant-appellee.*

*T. S. Whitaker, Chief Counsel, and Thelma M. Hill, Staff Attorney, for the Employment Security Commission of North Carolina, appellant.*

WHICHARD, Justice.

The issue is whether an employee who quits a job upon being informed that he will be terminated four days later, and who applies immediately for unemployment benefits, is thereby disqualified for such benefits on the ground that he is "unemployed because he left work voluntarily without good cause attributable to the employer." N.C.G.S. 96-14(1). We hold that the employee is disqualified for the four-day period during which he could have continued to work. Nothing else appearing, however, he is not thereby disqualified subsequent to the date on which his employment would in any event have terminated. We thus affirm the holding of the Court of Appeals "that [N.C.]G.S. 96-14(1) does not bar claimant from receiving benefits" insofar as it applies to the period subsequent to the date on which claimant's employment would in any event have terminated. We reverse the holding, however, insofar as it applies to the period from the date claimant voluntarily quit through the date on which his employment would otherwise have terminated. As to the period after claimant's employment would in any event have terminated, for reasons hereinafter set forth we direct a remand to the Employment Security Commission for a determination as to whether claimant is disqualified for benefits on any statutory ground other than that he was "unemployed because he left work voluntarily without good cause attributable to the employer."

On Monday, 13 May 1985, claimant, a truck driver and mechanic employed by respondent-employer, was told by his supervisor that he needed to look for another job, but that he could work until the following Friday, 17 May 1985. Claimant left work at noon on 13 May 1985 and filed a claim for unemployment bene-

fits that afternoon. An adjudicator for the Employment Security Commission concluded that claimant had voluntarily quit without good cause attributable to the employer and was thus disqualified for benefits under N.C.G.S. 96-14(1), which provides:

> An individual shall be disqualified for benefits:
>
> (1) For the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs . . . if it is determined by the Commission that such individual is, *at the time such claim is filed*, unemployed because he left work voluntarily without good cause attributable to the employer.

N.C.G.S. 96-14(1) (1985) (emphasis supplied). Subsequent decisions by an appeals referee and by the Chief Deputy Commissioner reached the same conclusion. Claimant petitioned the Superior Court, Alamance County, for judicial review, and the Superior Court affirmed the Commission.

The Court of Appeals, however, vacated the judgment of the superior court. It recognized that N.C.G.S. 96-14(1) disqualifies a claimant for benefits when it is shown that he left work voluntarily *and* without good cause attributable to the employer, but held that the first prong of this test had not been met because claimant had not left work "voluntarily" as defined in *Bunn v. N.C. State University*, 70 N.C. App. 699, 321 S.E. 2d 32 (1984), *disc. rev. denied*, 313 N.C. 173, 326 S.E. 2d 31 (1985).

In *Bunn* the claimant was told she would be discharged because she was not qualified for her job. Like the claimant here, she ceased work before the effective date of her discharge. The court found that this departure was involuntary because it was motivated by the notice of discharge and, as such, it was not "entirely free, or spontaneous." *Bunn*, 70 N.C. App. at 702, 321 S.E. 2d at 34. The court concluded "that an individual's decision to leave work when informed of an imminent discharge or layoff is a consequence of the employer's decision to discharge and is not wholly voluntary." *Id.*, 321 S.E. 2d at 34.

Notice to the claimant in *Bunn* was exacerbated by the employer's description of the claimant's work as "pitiful." The Court of Appeals held that, even if the decision of the claimant there to leave work was "voluntary," the humiliation and embar-

rassment she suffered vitiated the second prong of the statutory test, *i.e.*, that claimant had quit without good cause attributable to the employer.

The reasoning in *Bunn* was predicated on its discrete facts. First, although the *Bunn* court held that the claimant's unemployment was "not wholly voluntary" because it was a response to a notice of discharge, it is evident that the offensive nature of the notice colored the court's determination as to the first prong of the test. Second, the court was influenced by the grounds for the claimant's discharge. It would be logically inconsistent, the court reasoned, to deny benefits because the claimant refused to continue at a job that was not "suitable" for her when benefits would *remain* available if she were already unemployed but refused an offer of an unsuitable job. *Id.* at 703, 321 S.E. 2d at 35. *See* N.C.G.S. 96-14(3).

The facts here are distinguishable from the singular circumstances in *Bunn*. The Commission's findings of fact, to which no exception is taken, include the following:

> 2. The claimant left this job under the following circumstances: About three (3) weeks before his last day of work, the employer had walked through the plant and said "he might let somebody go, he'd let somebody know to start with." Due to personal illness and court activities due to child support responsibilities of his, the claimant had missed some work. Because of his missing work and not being dependable for regular work, on his last day of work the employer told him that he could be looking for another job, but he could work until Friday, May 17, 1985. When his request for a layoff slip was denied, he worked until noon and left to look for another job, and also filed a claim for unemployment insurance benefits.
>
> 3. When the claimant left the job on Monday, May 13, 1985, continuing work was available for the claimant there until Friday, May 17, 1985.

Nothing in these findings suggests that notice of impending termination was so offensive as to embarrass or humiliate the claimant here, as it did the claimant in *Bunn*. Further, suitable work was available for claimant for the remainder of the week in which

he received the notice. Had he already been unemployed and receiving benefits, the refusal of available, suitable work would have rendered him disqualified for further benefits. N.C.G.S. 96-14(3). We thus do not find the reasons in *Bunn* persuasive when applied to the facts here.[1]

The facts of *Eason v. Gould, Inc.*, 66 N.C. App. 260, 311 S.E. 2d 372 (1984), *aff'd per curiam without precedential value*, 312 N.C. 618, 324 S.E. 2d 223 (1985), more closely parallel those here. In *Eason* the claimant was told she would be laid off in two weeks due to a "slow-down" at work. She left work immediately and filed for benefits. In interpreting the first prong of N.C.G.S. 96-14(1) (voluntary quit), the *Eason* court cited several Court of Appeals cases that it said "teach that an employee has not left his job voluntarily when events beyond the employee's control or the wishes of the employer cause the termination." *Id.* at 262, 311 S.E. 2d at 373. This characterization of voluntariness, unlike the less generally applicable definition in *Bunn* which focuses on the employee's state of mind, more appropriately focuses on the external factors motivating the employee's quit.

If an employee's quit is found to be voluntary, the second prong, the "good cause" element of the test under N.C.G.S. 96-14 (1), must also be addressed. This Court has defined "good cause" as "a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work." *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 376, 289 S.E. 2d 357, 359 (1982). Guided by a similar interpretation of the "good cause" prong derived from its assessment of prior Court of Appeals cases, the *Eason* court held that the claimant there was voluntarily unemployed without good cause attributable to the employer for the two-week period prior to the effective date of the layoff. Recent legislation has in effect ratified this interpretation. The General Assembly has amended N.C.G.S. 96-14(1) to provide that "[w]here an employer notifies an employee that such employee will be separated on some definite future date for lack

1. By thus distinguishing *Bunn*, we intend neither approval nor disapproval of its result. In such cases arising on and after 1 July 1985, the amended version of N.C.G.S. 96-14(1) will bar recovery for the period between the claimant's voluntary quit and the time the employment would in any event have terminated. *See* 1985 N.C. Sess. Laws ch. 552, sec. 12, eff. 1 July 1985.

of available work, the impending separation does not constitute good cause for quitting that employment . . . ." 1985 N.C. Sess. Laws ch. 552, sec. 12, eff. 1 July 1985. Because of its effective date, this provision is inapplicable here. We nevertheless find it instructive in ascertaining legislative intent.

Guided by this indication of legislative intent, and convinced that it represents sound public policy which accords with the spirit and intent of the Act,[2] we hold that claimant is disqualified for benefits for the four-day period during which he could have continued to work for respondent-employer. The decision of the Court of Appeals is thus reversed insofar as it mandates an award of benefits to claimant for that period.

As to the period after the date on which claimant's employment would in any event have terminated, however, we affirm the holding of the Court of Appeals that "[N.C.]G.S. 96-14(1) does not bar claimant from receiving benefits." While N.C.G.S. 96-14(1) sets "the time such claim is filed" as determinative in assessing disqualification thereunder, and the claim here was filed during the period when we have held claimant to be disqualified, we agree with the *Eason* court that "there is no provision preventing consideration of a claimant's application after the effective date of a termination." *Eason v. Gould, Inc.*, 66 N.C. App. at 263, 311 S.E. 2d at 374. "[T]he decisions are legion in which [courts] have refused to be bound by the letter, when it frustrates the patent purpose of the whole statute." *Cabell v. Markham*, 148 F. 2d 737, 739 (2d Cir. 1945) (Learned Hand). The express purpose of the Employment Security Law is to "benefit . . . persons unemployed through no fault of their own." N.C.G.S. 96-2 (1985). "[T]he statute must be construed so as to provide its benefits to one who becomes involuntarily unemployed . . . ." *In re Watson*, 273 N.C. 629, 633, 161 S.E. 2d 1, 6 (1968). "[S]ections of the act imposing disqualifications for its benefits should be strictly construed in favor of the claimant . . . ." *Id.* at 639, 161 S.E. 2d at 10.

Insofar as the findings before us establish, claimant here was, after 17 May 1985, involuntarily unemployed through no fault of

2. The Act provides that "unemployment reserves [are] to be used for the benefit of persons unemployed through no fault of their own." N.C.G.S. 96-2 (1985). With regard to the four-day period in which claimant could have continued to work, it cannot be said that he was "unemployed through no fault of [his] own."

his own. He thus was within the class the statute was designed to benefit, and to construe the statute literally so as to deny benefits solely by virtue of the time claimant filed his claim would be inconsistent with the spirit and intent of the Act. We thus hold that, nothing else appearing, claimant is entitled to benefits after 17 May 1985 when he was involuntarily unemployed through no fault of his own. The opinion of the Court of Appeals is affirmed insofar as it so holds.

For cases from other jurisdictions reaching the same result, see the following: *Johnston v. Florida Department of Commerce*, 340 So. 2d 1229, 1230 (Fla. Dist. Ct. App. 1976) ("In a case [in which an employee, faced with notice of discharge, has decided to leave before the effective termination date], the period of voluntary unemployment is that portion of the notice period (the notice period being the time, if any, between notice of discharge and actual discharge) during which the employee chooses not to work. The employee is ineligible to receive unemployment benefits during the notice period, for he could continue on the job if he wished. The period of involuntary unemployment begins with the date which the employer designated as the termination date when it gave the employee notice."); *McCammon v. Yellowstone Co., Inc.*, 100 Idaho 926, 928-29, 607 P. 2d 434, 436-37 (1980) ("If the purpose of the Act is to promote economic security and to provide benefits during periods of economic unemployment, such purpose is frustrated by a finding that, because an employee voluntarily left his employment prior to an effective firing date, that such leaving prevents the claimant from ever becoming eligible for benefits as of the date he became involuntarily unemployed. We do not so read the statutes and hereby declare that after an otherwise eligible employee has been fired but voluntarily terminates his employment prior to the effective firing date, his eligibility for receipt of unemployment benefits is not affected following the termination."); *Carlson v. Job Service North Dakota*, 391 N.W. 2d 643, 646-47 (N.D. 1986) ("Generally, an employee who quits instead of waiting for discharge should receive benefits from the date the discharge would have taken place, unless the employer creates good cause for leaving at an earlier date. . . . During [the five week period between claimant's notice and the effective date of her discharge], [claimant] was voluntarily unemployed without good cause and therefore, should

be paid compensation only for unemployment [beginning five weeks after the quit].").

We agree with the Commission, however, that the Court of Appeals incorrectly held that this determination mandates an award to claimant. The record indicates that there may be "an alternative basis in law" upon which a judgment favorable to the Commission might be supported, *viz*, "misconduct" (N.C.G.S. 96-14(2)) or "substantial fault" (N.C.G.S. 96-14(2A)) on the part of the claimant. The Commission thus is entitled to a remand for findings on these issues. *In re Cianfarra v. Dept. of Transportation*, 306 N.C. 737, 295 S.E. 2d 457 (1982) (vacating and remanding *per curiam* 56 N.C. App. 380, 289 S.E. 2d 100, in effect adopting the reasoning of the dissent therein). The decision of the Court of Appeals is thus reversed insofar as it mandates an award to claimant for the period subsequent to 17 May 1985 rather than remanding for a determination of whether claimant is disqualified under other provisions of the Employment Security Law.

In summary, the decision of the Court of Appeals is (a) reversed insofar as it holds that claimant is entitled to benefits for the period from 13 May 1985-17 May 1985, (b) affirmed insofar as it holds that claimant is not disqualified for benefits for the period subsequent to 17 May 1985 by virtue of the provisions of N.C.G.S. 96-14(1), and (c) reversed insofar as it mandates an award of benefits to claimant for the period subsequent to 17 May 1985. The cause is remanded to the Court of Appeals with instructions to remand to the Superior Court, Alamance County for further remand to the Employment Security Commission. The Commission shall, upon remand, enter appropriate findings and conclusions determining whether claimant is disqualified for benefits for the period subsequent to 17 May 1985 under provisions of the Employment Security Law other than N.C.G.S. 96-14(1). Unless the Commission finds claimant thus disqualified, it shall enter an appropriate award consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

STATE OF NORTH CAROLINA v. MAXWELL AVERY WRIGHT

No. 405A86

(Filed 4 March 1987)

1. **Criminal Law § 138.29— second degree murder—handcuffing as aggravating factor—sufficient evidence**

The trial court's finding as an aggravating factor for second degree murder that the victim was handcuffed with her hands behind her back when she was stabbed was supported by the evidence, notwithstanding the victim's body was found with the handcuffs only on her left wrist and with cuts on her right wrist, where both defendant in his statement to the police and a State's witness in her testimony clearly stated that defendant handcuffed the victim's hands behind her back when he abducted her from a parking lot; defendant made no mention in his account of subsequent events of releasing the victim's right hand before he killed her; there was no testimony that the cuts on the victim's wrists were defensive wounds; and as far as can be determined from the record, the cuts could have been acquired while the victim was still handcuffed.

2. **Criminal Law § 138.28— handcuffing of victim—element of kidnapping—use as aggravating factor for second degree murder**

The court's finding as an aggravating factor for second degree murder that the victim was handcuffed with her hands behind her back at the time she was stabbed was not improper on the ground that it was based upon evidence necessary to prove the restraint element of first degree kidnapping, for which defendant was contemporaneously convicted, since the evidence of the handcuffing was not necessary to prove the first degree kidnapping because all of the elements of that crime were present when the victim and another woman were removed from a parking lot by the use of a knife, and although defendant may have kept the knife concealed after handcuffing the victim, the women's fear of the knife rather than defendant's use of the handcuffs remained the compelling force behind their continued acquiescence in defendant's orders. Even if the fact that defendant handcuffed the victim was necessary to prove an element of first degree kidnapping, the finding of such an aggravating factor for second degree murder was not error since (1) the exclusion of N.C.G.S. 15A-1340.4(a)(1)(o) applies only to the use of prior convictions that could have been joined with the conviction for which defendant is being sentenced and not to the use of a fact needed to prove an element of a contemporaneous conviction; (2) the decision of *State v. Westmoreland*, 314 N.C. 442, 334 S.E. 2d 223, prohibits the use of a defendant's contemporaneous conviction of a joined offense, and the offense of kidnapping itself was not used as an aggravating factor in this case; and (3) the prohibition of N.C.G.S. 15A-1340.4(a)(1) against using the same evidence to prove both an element of the offense and a factor in aggravation does not extend to using evidence necessary to prove an element of a joined or joinable offense for which defendant was convicted.

APPEAL by defendant pursuant to N.C.R. App. P. 4(d) and N.C.G.S. § 15A-1444(a1) (1983) from a sentence of life imprisonment imposed by *Battle, J.*, on 10 February 1986, upon a plea of guilty to second-degree murder. Heard in the Supreme Court 11 February 1987.

*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.

Defendant contends that the trial court improperly aggravated his sentence for second-degree murder by finding an aggravating factor that was not supported by the evidence and that was necessary to prove an element of a joined offense. We disagree and find no error in defendant's sentencing.

On the evening of 24 August 1985, Sharon Lynn Stewart and her roommate, Carla Hammett, went to a movie in downtown Chapel Hill. As they were returning to Ms. Stewart's car, which was parked in the Morehead Planetarium parking lot, Ms. Hammett noticed someone following them. This person grabbed Ms. Stewart as she reached the car and told the two women not to scream and to get in the car. They did as he directed. Ms. Hammett then saw that the man had a knife. She described the knife as being about five or six inches long. The man told them to drive to the parking lot of Swain Hall. There he handcuffed Ms. Stewart's hands behind her back, took both young women's purses, forced Ms. Stewart out of the car, and told Ms. Hammett to drive around the block and then return for her friend. Ms. Hammett left and sought help.

The authorities were unable to discover any clue to Ms. Stewart's whereabouts, until her purse was found in a truck in Tennessee reportedly stolen by defendant. Traces of blood were found on the driver's side of the truck. Upon return to Orange County, defendant agreed to take the authorities to Ms. Stewart in return for the promise of the district attorney Carl Fox not to try him for first-degree murder. Defendant accordingly took the police to a landfill in Guilford County where they found Ms.

Stewart's body in a barrel that was, along with other construction debris, apparently going to be covered over with dirt by a bulldozer in a matter of days. Ms. Stewart's panties were missing, and her clothes were pulled partly off her left shoulder. It is unclear from the record whether her clothing could have been pulled off her shoulder when she was crammed into the barrel or whether someone necessarily pulled it down. The handcuffs were attached by one bracelet to her left wrist. She had four cuts on her right wrist. There was no testimony as to the nature of these cuts. The pathologist testified that Ms. Stewart had received several stab and cutting wounds "on the front of the chest and on the back of the chest, on the neck, and on the head." She had also received head injuries from blunt trauma. The autopsy disclosed no evidence of a sexual assault.

Defendant gave the officers a statement in which he admitted that he had killed Ms. Stewart. He described abducting both young women at knifepoint, handcuffing Ms. Stewart's hands behind her back, and releasing Ms. Hammett. According to his statement, he then drove Ms. Stewart in the truck out of Chapel Hill. She began to struggle as they left the town, and he stabbed her. He took her body out of the cab, rolled it in a piece of carpet, and placed it in the truck bed. He then looked for a place to leave it and found the landfill where the body was discovered. He placed the body in the barrel.

Ms. Hammett was unable to positively identify defendant as her assailant.

Defendant was indicted on charges of second-degree kidnapping of Ms. Hammett, first-degree kidnapping of Ms. Stewart, two counts of armed robbery, attempted first-degree rape, and second-degree murder. Battle, J., held a competency hearing on 10 February 1986. Upon being found competent, defendant pled guilty to all charges. Following a hearing to determine the existence of a factual basis for the pleas and a sentencing hearing, Judge Battle accepted the pleas and sentenced defendant. He imposed the presumptive sentences for all but the second-degree murder (fourteen years each for the armed robberies, six years for the attempted first-degree rape, nine years for the second-degree kidnapping, and twelve years for the first-degree kidnapping). For the murder, he found five mitigating factors and one non-statu-

tory aggravating factor, that the victim was handcuffed with her hands behind her back when she was stabbed. Judge Battle then found that the aggravating factor outweighed the factors in mitigation and sentenced defendant to life imprisonment. He directed that defendant's sentences be served consecutively.

Defendant appealed his life sentence to this Court. His motion to bypass the Court of Appeals on his other cases was allowed by this Court on 23 July 1986. However, since the record discloses that he entered unconditional pleas of guilty and received the presumptive sentences in these other cases, he has no right to appellate review of them. *See* N.C.G.S. § 15A-1444(a1) (1983). Defendant also petitioned this Court for a writ of certiorari to review the factual basis for his plea of guilty of attempted first-degree rape. This Court denied the petition on 18 November 1986. Accordingly, the only matters properly before this Court are those relating to his life sentence for second-degree murder. Concerning this sentence, defendant contends only that the trial judge erred in finding the non-statutory aggravating factor, thus allowing him to give defendant a sentence in excess of the presumptive term. Defendant gives two reasons.

**[1]** First, he argues that the aggravating factor is not supported by the evidence. His argument is based upon the fact that Ms. Stewart's body was found with the handcuffs only on her left wrist and cuts on her right wrist. Defendant argues that the presence of the cuts prove that Ms. Stewart's right wrist was free when she was stabbed. He further contends that the lack of any handcuff on her right wrist supports this conclusion.

We find no merit in this argument. Both defendant in his statement to the police and Ms. Hammett in her testimony clearly stated that defendant handcuffed Ms. Stewart's hands behind her back in the parking lot at Swain Hall. Defendant made no mention in his account of subsequent events of releasing Ms. Stewart's right hand before he killed her. There was no testimony that the cuts on her wrist were "defensive-type" wounds; as far as can be determined from the record, the cuts could have been acquired while Ms. Stewart was still handcuffed. The mere fact that handcuffs were found on Ms. Stewart's left wrist and not on her right does not necessarily indicate that defendant released her right hand before he killed her.

**[2]** Second, defendant argues that the factor was improperly found because it was based upon evidence necessary to prove the first-degree kidnapping, specifically, the element of restraint. We also find no merit in this contention, for two reasons.

First, we do not agree with defendant that the evidence that Ms. Stewart was handcuffed was necessary to prove the unlawful restraint and removal element of first-degree kidnapping as specified in the indictment in this case. *See* N.C.G.S. § 14-39 (1986). To prove this element, the State offered evidence that defendant forced Ms. Stewart without her consent to get in her car, take him and Ms. Hammett to the parking lot at Swain Hall, and get out of the car and into the truck defendant was driving. Defendant initially used a knife to force Ms. Stewart and Ms. Hammett to obey him. He argues that when he put the handcuffs on Ms. Stewart, he ceased using the knife to force her continued compliance and substituted the handcuffs in the knife's place. Defendant's argument is without merit. All of the elements of first-degree kidnapping were present when the women were removed from the Morehead Planetarium parking lot by the use of the knife. *See* N.C.G.S. § 14-39 (1986). Furthermore, it is clear from the record that although defendant may have kept the knife concealed after handcuffing Ms. Stewart, the young women's fear of the knife rather than the defendant's use of the handcuffs remained the compelling force behind their continued acquiescence in his orders.[1] The evidence of the handcuffing was not necessary to prove the first-degree kidnapping and therefore it was not error to use the handcuffing in aggravation of the murder conviction.

Second, even assuming, *arguendo*, that the fact that defendant handcuffed Ms. Stewart was necessary to prove an element of the first-degree kidnapping, we still find no error.

Defendant relies in part upon N.C.G.S. § 15A-1340.4(a)(1)(o) (1983), which requires the trial judge to consider as an aggravating factor in sentencing defendant any prior convictions

1. At oral argument, defendant appeared to argue that all three got out of Ms. Stewart's car in the parking lot at Swain Hall, that defendant placed the handcuffs on Ms. Stewart while they were out of the car, and that only then was defendant able to force the two women back into the car. However, the record clearly shows that defendant handcuffed Ms. Stewart while all three were in the car.

punishable by more than sixty days' confinement but specifically excepts "any crime that is joinable . . . with the crime or crimes for which the defendant is currently being sentenced." Defendant's reliance is misplaced. The exclusion found in N.C.G.S. § 15A-1340.4(a)(1)(o) applies only to the use of *prior* convictions that *could have been* joined with the conviction for which defendant is being sentenced. *State v. Westmoreland*, 314 N.C. 442, 449, 334 S.E. 2d 223, 227-28 (1985). It does not apply to the use of a fact needed to prove an element of a *contemporaneous* conviction. *See State v. Toomer*, 311 N.C. 183, 191-94, 316 S.E. 2d 66, 71-72 (1984).

Defendant also relies on this Court's decision in *State v. Westmoreland*, 314 N.C. 442, 334 S.E. 2d 223. This reliance is also misplaced. In *Westmoreland*, the Court reaffirmed, on different grounds, the rule set forth in *State v. Lattimore*, 310 N.C. 295, 311 S.E. 2d 876 (1984), that the trial judge may not use as an aggravating factor a defendant's contemporaneous conviction of a joined offense.[2] In the instant case, the trial judge did not use the fact that defendant kidnapped Ms. Stewart to aggravate his sentence for second-degree murder; he used the fact that her hands were handcuffed behind her back when she was stabbed. Although under proper circumstances, this fact could be used to prove the restraint element in a kidnapping, a finding of this fact is not the equivalent of a finding that a defendant committed a kidnapping (such as the contemporaneous conviction at issue in the instant case).

Continuing our assumption, *arguendo*, that the handcuffing was necessary to prove the restraint element of the kidnapping, we believe that the rule in *Westmoreland* and *Lattimore* would control in the instant case only if the prohibition in N.C.G.S. § 15A-1340.4(a)(1) (1983), against using the same evidence to prove both an element of the offense and a factor in aggravation, also extends to using evidence necessary to prove an element of a joined or joinable offense for which defendant was convicted. We have already decided that question in the negative.

2. *Lattimore* relied upon the same exclusion found in N.C.G.S. § 15A-1340.4 (a)(1)(o) that defendant relied upon here. *Lattimore*, 310 N.C. 295, 311 S.E. 2d 876. In *Westmoreland*, the Court concluded that this reliance was misplaced because this section applies to *prior*, not *contemporaneous* convictions, but held that the rule was nevertheless correct. *Westmoreland*, 314 N.C. 442, 449, 334 S.E. 2d 223, 227-28.

In *State v. Toomer*, 311 N.C. 183, 316 S.E. 2d 66, the defendant was convicted of first-degree burglary, first-degree sexual offense, and common law robbery. Relying on *Lattimore*, he argued that the trial judge improperly found as an aggravating factor in sentencing him for the burglary the fact that he was armed or used a deadly weapon at the time of the breaking and entering, because evidence of the use of a deadly weapon was necessary to prove an essential element of the first-degree sexual offense. This Court rejected defendant's argument and held that, since the possession of a weapon was not necessary to prove an essential element of the burglary itself, there was no error. *Id.* at 191-94, 316 S.E. 2d at 71-72. In the instant case, the fact that the victim's hands were handcuffed behind her back was not necessary to prove any element of the second-degree murder. Therefore, even if defendant's contention that the handcuffing was necessary to prove an element of the first-degree kidnapping was correct, there would still be no error. *See id.; see also State v. Coleman*, 80 N.C. App. 271, 341 S.E. 2d 750, *cert. denied*, 318 N.C. 285, 347 S.E. 2d 466 (1986).

For all the reasons stated above, we find no error in defendant's sentence for second-degree murder.

At oral argument, defendant orally requested this Court to reconsider its denial of defendant's petition for certiorari to review the factual basis for defendant's plea of guilty of attempted first-degree rape. This motion is denied.

No error.

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STATE OF NORTH CAROLINA v. FREDERICK DONALD CLARK

No. 127A85

(Filed 4 March 1987)

**1. Criminal Law § 86.8— impeachment of witness—details of larceny—exclusion as harmless error**

Defendant should have been permitted to cross-examine a State's witness concerning the details of a larceny for which he had been convicted to show the witness's character for untruthfulness, N.C.G.S. 8C-1, Rule 608(b). However, the exclusion of such evidence was not prejudicial error where defend-

ant was able effectively to impeach the witness through other testimony that he was a cocaine addict at the time of the murder in question and was so intoxicated by cocaine that he had to drink vodka to sleep, that he refused to help the victim after the shooting because he was running from the police, that he pleaded guilty to three larceny charges in 1976, and that he supported his $70 to $100 per day cocaine habit by playing cards, shooting dice and playing pool.

2. **Criminal Law § 89.8— concessions for testimony—exclusion not error**

The trial court did not err in sustaining the State's objections to defendant's attempts to establish that a State's witness was testifying in exchange for concessions in a pending trial in another county where there was other extensive testimony as to the concessions to defendant in the pending cases and the excluded testimony would have been merely cumulative.

3. **Criminal Law § 86.8— impeachment of witness—disposing of stolen goods—exclusion as harmless error**

The trial court erred in refusing to permit defendant to ask a State's witness on cross-examination whether he had disposed of stolen goods for a second State's witness since such testimony was relevant to the first witness's credibility. However, the exclusion of such testimony was not prejudicial error in light of other evidence about the witness's credibility, including his drug sales, his prior convictions, the terms of his current probation, and his motive to receive reward money in the present case.

4. **Constitutional Law § 30— third person's statement—denial of motion to compel disclosure**

The trial court's denial of defendant's motion to compel disclosure of a third person's statement to a police officer was not error under *Brady v. Maryland*, 373 U.S. 83, where the statement did not contain anything favorable to defendant.

5. **Jury § 6.3— question to prospective juror—reliance on circumstantial evidence—absence of eyewitnesses**

The trial court did not err in allowing the prosecutor to propound to prospective jurors a question which informed the jurors that the State would rely on circumstantial evidence and asked them whether a lack of eyewitnesses would cause them problems.

6. **Constitutional Law § 63— "death qualified" jury—constitutionality**

Defendant's constitutional rights were not violated when the trial court allowed a "death qualified" jury to pass on his guilt at the guilt-innocence phase of his first degree murder trial.

APPEAL by defendant from *Saunders, Judge*. Judgment entered 14 December 1984 in Superior Court, MECKLENBURG County. Heard in the Supreme Court 11 December 1986.

The defendant was tried for the first degree murder of Lester Norman, whose body was found in a vacant lot in Charlotte on 4 January 1984. The State presented the following evidence: Gary Crawford and James Porter testified that they saw the defendant twice on the night of 2 and 3 January at Porter's home. On the first occasion the defendant stated that he had robbed two white men at gunpoint. He showed Porter and Crawford a wallet, a watch and other jewelry he had taken from the two men. The defendant returned later that night and stated that he had committed another armed robbery against a lone male. He said he had shot at the victim but did not think he had hit him. He showed Crawford and Porter a wallet, gold chains and a wedding ring he had taken from the second victim. Inside the wallet Porter saw Lester Norman's driver's license.

During a search of the residence shared by Crawford and Ronnie Williams police discovered a chrome-colored .357 magnum, a watch and several gold chains which Crawford said he had obtained from the defendant. A gold wedding ring, identified by his sister as belonging to Lester Norman, was also traced to Crawford, who stated that he had gotten the ring from the defendant.

Darrell Givens testified that he was in the Wishbone liquor house in the early morning of 3 January 1984 when the defendant said that he had robbed and shot Lester Norman. Dr. Hobart Wood testified that Lester Norman died as a result of a gunshot wound. He testified the death could have occurred between 3:00 and 4:00 a.m. on 3 January 1984.

The defendant was convicted of first degree murder under the felony murder rule, N.C.G.S. § 14-17, and sentenced to life imprisonment. He appealed.

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

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

WEBB, Justice.

**[1]** By his first assignment of error the defendant argues that he was "denied his right to cross-examine the State's key witnesses in complete accordance with the rules of evidence." He first con-

tends that the trial court erred in denying him an opportunity to cross-examine Darrell Givens concerning the details of a larceny for which Mr. Givens was convicted.

The defendant propounded questions on cross-examination to Darrell Givens which, if he had been allowed to answer, would have shown that after Mr. Givens had left his employment with a fire extinguisher company he went to customers of the company and represented to them that he was there to inspect the fire extinguishers. When left alone he would steal money if any was in the room.

It appears that this testimony should have been admitted under N.C.G.S. § 8C-1, Rule 608(b) as probative of Givens' character for untruthfulness. *See State v. Morgan*, 315 N.C. 626, 340 S.E. 2d 84 (1986). Nevertheless, we do not believe that its exclusion was prejudicial error. Givens testified that he was currently in the custody of the North Carolina Department of Corrections pursuant to a larceny conviction, that at the time of the 3 January murder he was a cocaine addict and was so intoxicated by cocaine use that he had to drink vodka to sleep, that he refused to assist Lester Norman after the shooting because he was running from the police, that he had pleaded guilty to three larceny charges since 1976, and that he supported his $70 to $100 per day cocaine habit by playing cards, shooting dice and playing pool. The defendant was able to impeach the witness with such effectiveness through this testimony that we hold there is not "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial," as required by N.C.G.S. § 15A-1443(a). *See State v. Milby*, 302 N.C. 137, 273 S.E. 2d 716 (1981).

**[2]** The defendant also argues that the trial court erred in denying him an opportunity to bring out the biases and interests of Gary Crawford and James Porter on cross-examination. The trial court sustained the State's objections to the defendant's attempts to establish that Crawford was testifying in exchange for concessions in a pending trial in another county. Crawford testified that he and Ronnie Williams, who had at one time been a suspect in this case, were very close friends and that they had committed a break-in together, that he had lived at times with James Porter, a confessed drug dealer and purchaser of stolen property, and that

he had stolen Lester Norman's wedding ring from the defendant. Crawford also testified that he had been convicted but not yet sentenced for a cocaine charge and for the break-in committed with Ronnie Williams. He stated that the two cases had been consolidated for sentencing, reducing the total possible sentence he might be required to serve, and that a prayer for judgment had been entered in the cases to allow sentencing to occur after his testimony in the present case. The plea bargain in his cases also included an agreement by the State to dismiss three misdemeanor charges. Following Crawford's testimony his attorney in the breaking or entering case testified that although there was no agreement in that case involving Crawford's testimony in this case, both he and Crawford expected a lighter sentence to be imposed in return for his truthful testimony. In light of the extensive testimony as to concessions to Crawford in that case we hold that this testimony would have been merely cumulative. Its exclusion was not error.

**[3]** The defendant also argues that it was error not to allow him to ask James Porter on cross-examination whether he had disposed of stolen goods for Gary Crawford. He contends that this was relevant to show that Porter was biased in favor of Crawford. We agree with defendant that this testimony was relevant to Porter's credibility and should have been allowed. The defendant was allowed to explore Porter's drug sales, his prior convictions and the terms of his current probation. He also established Porter's motive to receive the reward money offered in the Lester Norman case and the fact that Crawford often socialized at Porter's house, at which he once resided. In light of this evidence about Porter's credibility we hold that there is not a reasonable possibility that the excluded testimony would have led to a different result. The defendant's first assignment of error is overruled.

**[4]** The appellant next assigns error to the denial of his motion to compel disclosure of exculpatory evidence in the State's possession. Prior to trial H. D. Jones, the officer in charge of investigating the case, was examined by the defendant's counsel as to whether there had been compliance with the defendant's request for disclosure. Mr. Jones testified that he had interviewed Sylvester McClure in regard to the case and that McClure had made a statement. The court examined in camera Mr. Jones'

notes of McClure's statement and sustained the State's objection to revealing this evidence. The court sealed McClure's statement, which was sent to this Court to determine whether it was error under *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215 (1963), to withhold this statement from the defendant. The Court in *Brady* held that it is a violation of a defendant's due process rights for the prosecution to withhold evidence favorable to the defendant after he has requested it.

We have examined McClure's statement as taken by Mr. Jones and it does not contain anything favorable to the defendant. This assignment of error is overruled.

**[5]** In his third assignment of error the defendant argues that the court erred in allowing the State to propound to several jurors a question substantially as follows:

> The State will be relying in this case on what's been called circumstantial evidence. That is a type of evidence accepted by the law. There are no witnesses who can say I saw the defendant Frederick Clark shoot Lester Norman. Circumstantial evidence is proof of a chain of events or chain of facts, and that's what we will be relying on in this case. Does the fact that there are no eyewitnesses cause you any problems?

On two occasions, the court sustained the defendant's objection to this question and instructed the jury on how to consider circumstantial evidence. On several occasions no objection was made to the question. We note that not all the State's evidence was circumstantial. Darrell Givens testified that he heard the defendant say he shot and robbed Lester Norman.

The defendant argues that the question (1) is improperly argumentative, asserting to the jury that none of the State's witnesses saw the crime, (2) is improperly hypothetical, asking the jurors to assume a state of the evidence and then proffer a guess as to his or her likely reaction, (3) improperly preconditions the jurors to believe, as a matter of fact, that there are no eyewitnesses, and (4) improperly "stakes the jurors out" and provides the prosecutor an unfair insight as to how they might vote.

There have been many cases dealing with this question raised by the appellant. *See State v. Adcock*, 310 N.C. 1, 310 S.E.

2d 587 (1983); *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981); *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980); *State v. Denny*, 294 N.C. 294, 240 S.E. 2d 437 (1978); *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), *vacated in part, Vinson v. North Carolina*, 428 U.S. 902, 49 L.Ed. 2d 1206 (1976); *State v. Jackson*, 284 N.C. 321, 200 S.E. 2d 626 (1973); *State v. Washington*, 283 N.C. 175, 195 S.E. 2d 534 (1973), *cert. denied*, 414 U.S. 1132, 38 L.Ed. 2d 757 (1974); *State v. Hedgepeth*, 66 N.C. App. 390, 310 S.E. 2d 920 (1984); *State v. Williams*, 41 N.C. App. 287, 254 S.E. 2d 649, *cert. denied*, 297 N.C. 699, 259 S.E. 2d 297 (1979); *State v. Hunt*, 37 N.C. App. 315, 246 S.E. 2d 159 (1978); *Re Will of Worrell*, 35 N.C. App. 278, 241 S.E. 2d 343, *cert. denied*, 295 N.C. 90, 244 S.E. 2d 263 (1978); and *State v. Wood*, 20 N.C. App. 267, 201 S.E. 2d 231 (1973). The rules regarding proper questions to ask prospective jurors as stated in the above cases were summarized in *Phillips* as follows:

> Counsel should not fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided. Counsel should not argue the case in any way while questioning the jurors. Counsel should not engage in efforts to indoctrinate, visit with or establish "rapport" with jurors. Jurors should not be asked what kind of verdict they would render under certain named circumstances.

300 N.C. at 682, 268 S.E. 2d at 455.

We hold that the question by the prosecuting attorney does not violate any of the rules enunciated in *Phillips*. It does not fish for answers to legal questions before the judge has instructed the jury. It merely informs the jurors that the State will rely on circumstantial evidence and asks them whether a lack of eyewitnesses could cause them problems. The prosecuting attorney was not arguing with the jury or attempting to establish "rapport" with them. The question was certainly not designed to ask what kind of verdict the jury would render under certain named circumstances. The question is not, as contended by the defendant, improperly argumentative. It does not incorporate within the question assumed facts. The question is not hypothetical. The State did rely to a great degree on circumstantial evidence. It does not improperly "precondition" the jurors to believe there

were no eyewitnesses. No eyewitness testified. This assignment of error is overruled.

**[6]** Finally, the defendant argues that his constitutional rights were violated when the trial court allowed a "death qualified" jury to pass on his guilt in the guilt or innocence phase of the trial. We considered and rejected this argument in *State v. Ladd*, 308 N.C. 272, 302 S.E. 2d 164 (1983). The United States Supreme Court recently reached the same conclusion in *Lockhart v. McCree*, 476 U.S. ---, 90 L.Ed. 2d 137 (1986). We decline to reconsider the issue here.

In the trial we find

No error.

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DOUGLAS E. OPSAHL AND WIFE, HILDEGARD M. OPSAHL v. PINEHURST INC., PURCELL CO., INC., AND PINEHURST RECEIVABLES ASSOCIATES, INC.

No. 432PA86

(Filed 4 March 1987)

ON discretionary review of the decision of the Court of Appeals, 81 N.C. App. 56, 344 S.E. 2d 68 (1986), affirming in part, vacating in part, judgment entered by *Albright, Judge*, on 13 May 1985 in Superior Court, MOORE County, and remanding the cause with instructions. Heard in the Supreme Court 9 February 1987.

*Thigpen & Evans, by John B. Evans, and Barringer, Allen & Pinnix, by Noel L. Allen and Miriam J. Baer, for plaintiff appellants.*

*Van Camp, Gill, Bryan, Webb & Thompson, P.A., by Douglas R. Gill, for defendant appellee Pinehurst, Inc.*

PER CURIAM.

Discretionary review improvidently allowed.

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

STATE OF NORTH CAROLINA v. JAMES A. BLACKMON

No. 61PA86

(Filed 4 March 1987)

WE granted the defendant's petition for discretionary review pursuant to N.C.G.S. 7A-31 on 2 July 1986 to review the unreported decision of the Court of Appeals (*Hedrick, C.J.*, with *Arnold, J.*, and *Webb, J.*, concurring). The Court of Appeals found no error in defendant's trial by *Winberry, J.* (sentence by *Phillips, J.*), in the Superior Court of PITT County, in which defendant was found guilty of assault with a deadly weapon inflicting serious injury and was sentenced to eight years imprisonment.

*Lacy H. Thornburg, Attorney General, by Richard L. Griffin, Assistant Attorney General, for the State.*

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

PER CURIAM.

Having carefully considered the opinion of the Court of Appeals, the records, briefs, and oral arguments in the case before us, we conclude that our order of 2 July 1986 allowing the defendant's petition for discretionary review was improvidently allowed.

Discretionary review improvidently allowed.

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

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

BRADSHAW v. ADMINISTRATIVE OFFICE OF THE COURTS

No. 699PA86.

Case below: 83 N.C. App. 237.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 4 March 1987.

BUCHANAN v. BUCHANAN

No. 737P86.

Case below: 83 N.C. App. 428.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 March 1987.

EAST CAROLINA OIL TRANSPORT v.
PETROLEM FUEL & TERMINAL CO.

No. 641P86.

Case below: 82 N.C. App. 746.

Motion by plaintiff for reconsideration of petition pursuant to Rule 27, N. C. Rules of Appellate Procedure, dismissed 3 February 1987.

FOUNTAIN v. FOUNTAIN

No. 740P86.

Case below: 83 N.C. App. 307.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 March 1987.

HAYES v. DIXON

No. 666P86.

Case below: 83 N.C. App. 52.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987. Notice of appeal by plaintiff pursuant to G.S. 7A-30 dismissed 3 February 1987.

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

HOFFMAN v. N.C. DEPT. OF MOTOR VEHICLES

No. 615P86.

Case below: 82 N.C. App. 761.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 3 February 1987.

IN RE BALLARD

No. 751P86.

Case below: 83 N.C. App. 540.

Petition by petitioner (Ard) for discretionary review pursuant to G.S. 7A-31 denied 3 February 1987. Motion by Guardian Ad Litem and Mecklenburg County to dismiss appeal for lack of substantial constitutional question allowed 3 February 1987.

NEWBER v. CITY OF WILMINGTON

No. 711A86.

Case below: 83 N.C. App. 327.

Motion by defendant to dismiss appeal for failure to show a substantial constitutional question allowed 3 February 1987. Motion by plaintiff to hear constitutional questions denied 3 February 1987.

STATE v. CALLAHAN

No. 743P86.

Case below: 83 N.C. App. 323.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 March 1987.

STATE v. LOMBARDO

No. 732P86.

Case below: 83 N.C. App. 344.

Petition by defendant (Dependable Insurance Company) for discretionary review pursuant to G.S. 7A-31 denied 4 March 1987.

STATE v. PERRY

No. 1P87.

Case below: 83 N.C. App. 543.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 26 February 1987.

STATE v. SIEGFRIED CORP.

No. 646P86.

Case below: 83 N.C. App. 678.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied and appeal dismissed 3 February 1987.

STATE v. SMITH

No. 691P86.

Case below: 83 N.C. App. 160.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 March 1987. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 March 1987.

STATE v. SPRINGER

No. 53P87.

Case below: 83 N.C. App. 657.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 March 1987.

STATE v. WALDEN

No. 684P86.

Case below: 83 N.C. App. 152.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 March 1987. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 March 1987.

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

STATE v. WHITE

No. 88A87.

Case below: 84 N.C. App. 111.

Petition by defendant for stay of execution of judgment of the Court of Appeals denied 2 March 1987.

STATE v. WILLIAMS

No. 32P87.

Case below: 83 N.C. App. 526.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied without prejudice to defendant's right to file a motion for appropriate relief in the superior court on the same basis 4 March 1987.

TOWN OF HAZELWOOD v. TOWN OF WAYNESVILLE

No. 43P87.

Case below: 83 N.C. App. 670.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 4 March 1987. Petition by defendant for writ of supersedeas of the judgment of the Court of Appeals allowed 4 March 1987.

PETITION TO REHEAR

AZZOLINO v. DINGFELDER

No. 718PA84.

Case below: 315 N.C. 103.

Petition by plaintiffs denied 3 February 1987.

STATE OF NORTH CAROLINA v. MICHAEL RAY QUESINBERRY

No. 407A85

(Filed 7 April 1987)

1. **Homicide § 21.5— first degree murder—evidence of intent to kill, premeditation, and proximate cause of death—sufficient**

There was sufficient evidence in a first degree murder prosecution to prove a specific intent to kill, premeditation and deliberation, and that defendant proximately caused the victim's death where defendant's statement indicated that he had been reflecting on his inability to provide for his family when he was inspired to pick up a hammer from the floor of his truck, enter the store, pick up a soft drink and ask the victim for cigarettes, and hit the victim over the head while his back was turned; a co-worker described defendant's absence of agitation when he returned to work following the murder; defendant deliberately disposed of the bloody hammer and the money; defendant confessed that he inflicted a second blow to the victim's head after the victim had been knocked to the floor; the pathologist described the injuries as ten distinct lacerations caused by more than one blow of a blunt object; and, while an emergency room physician initially determined that the cause of death was myocardial infarction, he stressed that this was a first impression and the pathologist testified that, even if the victim had had a heart attack at the last minute, the head injuries and ensuing trauma caused the attack.

2. **Criminal Law § 113.1; Homicide § 25— first degree murder—recapitulation of State's evidence—no prejudicial error**

The trial court did not commit prejudicial error in a prosecution for first degree murder by instructing the jury that the evidence for the State tended to show that the victim was struck ten times and sustained ten injuries to the head where a pathologist had testified that the victim's head had ten lacerations which were so separate that one blow could not have caused them all. The court's statement was factually accurate if arguably misleading, the court accurately recapitulated defendant's statement that he had hit the victim only twice, the jury was permitted to review defendant's statement during its deliberations, and defendant failed to object at trial.

3. **Jury § 7.11— first degree murder—challenges for cause—beliefs regarding death penalty—no abuse of discretion**

The trial court did not abuse its discretion in a first degree murder prosecution by seating a juror who expressed his belief that every murderer should receive the death sentence but assured the trial court that he could and would follow the court's instructions and remain open-minded regarding the appropriate sentence, or by excusing for cause a juror who expressed uncertainty about whether he could impose the death penalty.

4. **Criminal Law § 102.6— argument to jury—misstatement of evidence—no prejudice**

The trial judge in a prosecution for first degree murder was not required to act *ex mero motu* when the prosecutor argued that defendant "in his own

words" thought of killing the shopkeeper before he entered the store, but defendant had not testified and his statement contained no admission that he had in mind killing the shopkeeper before he entered the store. The jury had heard the statement read to it during the presentation of the State's case, it had heard more than once that it was to take its own recollection of the evidence, it had the text of defendant's statement in the jury room throughout its deliberations, and defendant failed to object when the prosecutor made the remarks.

**5. Criminal Law § 135.8— felony murder and premeditated murder—aggravating circumstances of robbery and pecuniary gain—error to submit both**

The trial court in a first degree murder prosecution arising from a robbery erred by submitting both the aggravating factor that the murder was committed while defendant was engaged in the commission of a robbery and the factor that the murder was committed for pecuniary gain where the jury had found defendant guilty based on both felony-murder and premeditation and deliberation. The robbery was the underlying felony for the felony-murder theory and, under the merger rule, could not be submitted as an aggravating circumstance for felony-murder; the submission of both factors on premeditated and deliberate murder was redundant because the facts of the case revealed that defendant murdered the shopkeeper for the single purpose of committing an armed robbery; the same evidence underlies proof of both factors; and the submission of both factors cannot be held harmless because the jury arrived at a sentence of death based upon two aggravating factors against several mitigating factors and it is impossible to determine the weight ascribed to each factor.

Justice MARTIN dissenting in part.

Justices MEYER and MITCHELL join in the dissenting opinion.

APPEAL of right pursuant to N.C.G.S. 7A-27(a) from a judgment imposing the sentence of death entered by *Helms, J.*, at the 12 June 1985 Criminal Session of Superior Court, RANDOLPH County. Heard in the Supreme Court 10 March 1987.

*Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.*

*Gordon Widenhouse for defendant-appellant.*

WHICHARD, Justice.

Evidence presented, in the light most favorable to the State, tended to show the following:

Van Buren Luther, age 71, was discovered lying on the floor of Luther's Grocery Store at 1:37 p.m. on 20 July 1984. The rescue squad arrived within minutes, by which time Mr. Luther was

walking carefully out of the door of the store, holding his head. He was covered with blood, but was no longer bleeding. An ambulance arrived at 2:09 p.m. and took him, intermittently unconscious and restless, to the hospital, where he died at 5:53 p.m.

Defendant was taken into custody and advised of his rights at around 4:30 p.m. the same day. At 7:00 p.m. defendant made a statement to an SBI agent confessing that he had inflicted blows to the victim's head with a hammer.

The jury found defendant guilty of robbery with a dangerous weapon and murder in the first degree on the bases of both felony murder and malice, premeditation, and deliberation. *See* N.C.G.S. 14-17 (1986). The jury found that mitigating circumstances were insufficient to outweigh aggravating circumstances and recommended a sentence of death.

GUILT PHASE

**[1]** Defendant raises six issues concerning the guilt-innocence phase of the trial. In three of these defendant contends that the trial court erred in failing to dismiss the charge of first degree murder because the evidence was insufficient to prove (1) a specific intent to kill, (2) premeditation and deliberation, and (3) that defendant proximately caused the victim's death. This Court has observed that while specific intent to kill is an essential element of first degree murder, it is also a necessary constituent of the elements of premeditation and deliberation. *State v. Propst*, 274 N.C. 62, 71, 161 S.E. 2d 560, 567 (1968). "Thus, proof of premeditation and deliberation is also proof of intent to kill." *State v. Jones*, 303 N.C. 500, 505, 279 S.E. 2d 835, 839 (1981). We therefore treat these contentions together.

Premeditation has been defined as "thought beforehand for some length of time, however short." *State v. Welch*, 316 N.C. 578, 589, 342 S.E. 2d 789, 796 (1986) (quoting *State v. Corn*, 303 N.C. 293, 297, 278 S.E. 2d 221, 223 (1981)). A killing is committed with deliberation if it is done in a " 'cool state of blood,' without legal provocation, and . . . to accomplish some unlawful purpose. (Citation omitted.) The intent to kill must arise from 'a fixed determination previously formed after weighing the matter.' " *Id.* at 589-590, 342 S.E. 2d at 796 (quoting *State v. Corn*, 303 N.C. 293, 297, 278 S.E. 2d 221, 223).

Because premeditation and deliberation relate to mental processes, they are rarely susceptible to proof by direct evidence. *State v. Gladden*, 315 N.C. 398, 430, 340 S.E. 2d 673, 693, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 166 (1986). This Court has identified a number of circumstances that may be considered in determining whether a killing was with premeditation and deliberation. Among these are (1) a lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) the dealing of lethal blows after the deceased has been felled and rendered helpless, (4) evidence that the killing was done in a brutal manner, and (5) the nature and number of the victim's wounds. *E.g.*, *State v. Gladden*, 315 N.C. at 430-31, 340 S.E. 2d at 693.

In this case there was both direct and circumstantial evidence before the trial court from which the jury could find the presence of premeditation and deliberation. Direct evidence consisted of defendant's statement, which indicated that defendant had left work around 1:00 p.m., had gone to his truck and smoked marijuana, then had driven to Luther's Grocery on his way home. Defendant said that he stopped to get a drink, but noticed there was no one else around.

> While sitting in the truck, I started thinking about how broke I was and the baby needing diapers and other things. I saw a hammer laying in the floorboard of the truck. I reached down and put the hammer in my back pocket. I went into the store and got me a Pepsi Cola and told the man I wanted a pack of cigarettes. The old man who was running the store turned to get the cigarettes. When the old man turned to get the cigarettes, I took the hammer from my pocket and hit him in the back of the head. The man fell on the floor. I hit the man one more time in the head. I got the money out from under a box in the back of the cash register. The money was in a zip-up purse. I took the money and the hammer and ran out to the truck and got in it.

Defendant's statement concluded by describing how he had thrown the hammer out of the truck window, hidden the money under a rock in a field, and returned to work some time after 2:00 p.m.

The statement alone reveals defendant's emotional state just prior to the attack. He had been reflecting on his inability to provide for his family when he was inspired to pick up a hammer lying on the floor of the truck. He pocketed it, entered the store, fetched a soft drink, then approached the victim, asked for cigarettes, and hit the victim over the head while his back was turned. The jury could reasonably have concluded that these actions resulted from deliberation—that they were not impulsive but governed by cool, reasoned thought.

Jason Coggins, defendant's co-worker, testified that defendant had left work around 1:30 p.m. because he said he had something he needed to do. When defendant returned approximately a half an hour later, Coggins noticed nothing unusual about defendant's conduct or demeanor. Coggins' testimony describing defendant's absence of agitation, along with defendant's deliberate disposal of the bloodied hammer and the money, similarly support the jury's finding of the deliberation element of murder in the first degree.

In addition, defendant's statement reveals the unprovoked and brutal nature of the assault upon the shopkeeper. Defendant confessed that he inflicted a second blow to the victim's head after the victim had already been knocked to the floor. If, as defendant contends, the first blow was the result of a premeditated and deliberate decision only to rob but not to kill, then the second blow provided sufficient evidence for the jury to find these essential elements for first degree murder. The brutality of the attack was also apparent from the testimony of the forensic pathologist who conducted an autopsy on the victim. He described the injuries to the victim's head as ten distinct lacerations, "the majority" of which reached to the skull. In his opinion these wounds had been caused by more than one blow of a blunt object.

For his contention that the evidence was insufficient to prove that his hammer blows proximately caused the victim's death, defendant relies upon the testimony of a hospital physician who arrived in the emergency room five to ten minutes before the official time of the victim's death and while cardio-pulmonary resuscitation was in progress. The physician initially determined that the probable cause of the victim's death was myocardial infarction. However, in his testimony the physician stressed that this

conclusion was a first impression and that it was not borne out by the autopsy.

The forensic pathologist who performed the autopsy testified that the victim had had severe heart disease, including severe occlusion of two of his three main coronary arteries. He noted an area of fibrosis, indicating that the victim had suffered a heart attack in the past, but he testified unequivocally that in his opinion the victim's death had been caused by blunt-force injuries to the head. If the victim had had a heart attack "at the last minute," the pathologist testified, the injuries to the head and the ensuing trauma had caused that attack.

A person is criminally responsible for a homicide if his act caused or directly contributed to the death of the victim. *State v. Brock*, 305 N.C. 532, 539, 290 S.E. 2d 566, 571 (1982); *State v. Atkinson*, 298 N.C. 673, 682, 259 S.E. 2d 858, 864 (1979), *overruled in part on other grounds, State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981). The testimony of the pathologist was definitive on the issue of proximate cause. The cause of death tentatively cited by the emergency room physician was, according to the physician's own testimony, not medically conclusive. Even if the jury had perceived that testimony as contradicting the findings of the forensic pathologist, such contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Brown*, 315 N.C. 40, 58, 337 S.E. 2d 808, 822 (1985), *cert. denied*, --- U.S. ---, 90 L.Ed. 2d 733 (1986); *State v. Powell*, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980).

In considering a motion to dismiss, the trial court must view all of the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference that may be drawn therefrom supporting the charges against the defendant. *State v. Penley*, 318 N.C. 30, 48, 347 S.E. 2d 783, 793 (1986). "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.' " *Id.*, 347 S.E. 2d at 794 (quoting *State v. Riddick*, 315 N.C. 749, 759, 340 S.E. 2d 55, 61 (1986)). If the trial court determines that "there is substantial evidence (a) of each essential element of the offense charged, . . . and (b) of defendant's being the perpetrator of the

offense," then the motion to dismiss is properly denied. *Id.*, 347 S.E. 2d at 793.

We conclude that there was substantial evidence before the jury that the victim's death was the proximate result of hammer blows to his head inflicted by defendant after premeditation and deliberation and with the specific intent to kill. The trial court thus did not err in denying defendant's motion to dismiss the charge of first degree murder on that basis.

**[2]** Defendant next contends that the trial court committed plain error by including the following statement in its instructions to the jury: "Now, the evidence for the State does tend to show that . . . Mr. Luther was struck a total of some ten times and sustained ten injuries to his head." Defendant notes that the only source of evidence at trial concerning how many times the victim was struck with the hammer was defendant's statement, which specifically described only two blows. Although the pathologist testified that in his opinion the victim's injuries were so separate that one blow could not have caused them all, he offered no opinion as to how many blows had caused the ten wounds, nor what object(s) had dealt the blows.

Strictly speaking, the trial court's statement was factually accurate, if arguably misleading. The pathologist's testimony that the victim's head had ten lacerations did not necessarily imply that defendant had struck all ten blows. It was possible, for instance, that the victim cut his head on the counter or floor when he first fell. Similarly, the trial court's instruction that the victim had been "struck" ten times did not necessarily imply that defendant's hammer had done the striking. Even if this was the jury's understanding, any inaccuracy was cured by prior and subsequent instructions and rulings. First, the trial court told the jury more than once to use its own recollection of the evidence rather than the court's summary. Second, the court accurately recapitulated defendant's statement that he had hit the victim only twice. Third, the jury was permitted to review defendant's statement during its deliberations. When, as here, the defendant fails to object to the alleged error at trial, the appellate court must be convinced that had the error been absent, the jury probably would have reached a different verdict. *State v. Stanton*, 319 N.C. 180, 188-89, 353 S.E. 2d 385, 390-91 (1987). *See State v. Black*,

308 N.C. 736, 740-41, 303 S.E. 2d 804, 806-07 (1983). We are convinced that the trial court's misstatement, if indeed it was one, was of no substantial consequence. *See State v. Jones*, 303 N.C. at 506-07, 279 S.E. 2d at 839.

**[3]** Defendant also assigns error to the trial court's treatment of challenges for cause of two potential jurors. One of these expressed his belief that every murderer should receive the death sentence; but upon assuring the trial court that he could and would follow the court's instructions and remain open-minded regarding the appropriate sentence, he was seated as a juror. The other potential juror expressed his uncertainty about whether he could impose the death penalty, even if he were instructed to do so by the court.

We note preliminarily that defendant exercised only six of the fourteen peremptory challenges permitted him under N.C.G.S. 15A-1217(a)(1). Because he did not exhaust his peremptory challenges as provided by N.C.G.S. 15A-1214(h), no prejudice has been shown as to the juror who remained on the panel. *State v. Avery*, 315 N.C. 1, 21, 337 S.E. 2d 786, 797 (1985).

The constitutional standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L.Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L.Ed. 2d 581, 589 (1980)). Both potential jurors were asked if they could put aside their prejudices concerning the death penalty and respond to the court's instructions. One juror said he could; the other responded equivocally. Under the *Adams-Witt* standard, the first was properly not excused for cause; the second was properly so excused. The trial court has "broad discretion 'to see that a competent, fair and impartial jury is empaneled.'" *State v. Avery*, 315 N.C. 1, 21, 337 S.E. 2d 786, 797 (quoting *State v. Johnson*, 298 N.C. 355, 362, 259 S.E. 2d 752, 757 (1979)). We find no abuse of that discretion here.

**[4]** In defendant's final assignment of error concerning the guilt phase of his trial, he complains that the prosecutor's closing argu-

ment was based upon facts not in evidence. The prosecutor argued in part:

> That at the store [defendant] thought of killing Mr. Luther, thought of robbing him there. I would argue that that was premeditation. . . . That the Defendant acted after premeditation, that he formed the intent to kill. Once again, in his own words, he thought of killing him before he went into the store.

"[I]n his own words" could refer only to defendant's statement, defendant avers, since he did not testify at the guilt phase of his trial. The statement contains no admission that he had killing the shopkeeper in mind before he entered the store.

Even if the jury had understood this portion of the prosecutor's argument to be a statement of fact and not argument, defendant was not prejudiced thereby. The jury had heard the statement read to it during presentation of the State's case, it heard—more than once—the trial court's charge that it was to take its own recollection of the evidence, and it had the text of defendant's statement in the jury room throughout its deliberations. We note defendant's failure to object when the prosecutor made these remarks, and hold that "in the absence of [that] objection, the statement did not amount to such gross impropriety as to require the trial judge to act *ex mero motu*, or to recall that the statement had been made and caution the jury to disregard it." *State v. Oliver*, 309 N.C. 326, 359, 307 S.E. 2d 304, 325-26 (1983).

SENTENCING PHASE

**[5]** The only aggravating circumstances submitted to and found by the jury in the sentencing phase of the trial were that the murder was committed while defendant was engaged in the commission of a robbery, N.C.G.S. 15A-2000(e)(5), and that the murder was committed for pecuniary gain, N.C.G.S. 15A-2000(e)(6). Defendant contends that submitting both factors violates due process and renders the capital sentence arbitrary and capricious. Under the particular facts of this case, we find defendant's contention that it was error to submit both factors meritorious.

The jury found defendant guilty of murder in the first degree based specifically upon both felony murder and premeditation and

deliberation. The basis for the conviction dictates differences in sentencing. Most notable among these is the application of the merger rule to a felony murder: when a murder is committed in the course of a felony and the perpetrator is convicted of murder in the first degree solely on that basis, "the underlying felony becomes a part of the murder charge to the extent of preventing a further prosecution of the defendant for, or a further sentence of the defendant for, commission of the underlying felony." *State v. Cherry*, 298 N.C. 86, 113, 257 S.E. 2d 551, 567 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 796 (1980); *State v. Silhan*, 302 N.C. 223, 262, 275 S.E. 2d 450, 477 (1981). It follows logically that the underlying felony should not be submitted as an aggravating circumstance at the sentencing phase of the trial. In *State v. Cherry*, this Court observed that a defendant convicted of a felony murder "will have one aggravating circumstance 'pending'" simply by virtue of the nature of the underlying felony. *Cherry*, 298 N.C. at 112, 275 S.E. 2d at 568. Because this "flaw in the statute" would result in the greater possibility that a felony-murder defendant would be sentenced to death than one convicted on the basis of premeditation and deliberation, we held that aggravating circumstances "concerning the underlying felony" could not be submitted as aggravating factors in sentencing. *Id.* at 113, 275 S.E. 2d at 568.

In *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981), the *Cherry* holding was refined for cases in which the aggravating circumstance "for pecuniary gain" was submitted to a jury sentencing a defendant convicted of a robbery-felony-murder. The Court asserted constitutional grounds for its refinement of *Cherry*, holding that the fifth amendment's protection against double jeopardy is not violated because the "pecuniary gain" aggravating factor was not an element of the underlying offense. "This circumstance examines the *motive* of the defendant rather than his *acts*. While his motive does not constitute an element of the offense, it is appropriate for it to be considered on the question of his sentence." *Id.* at 62, 274 S.E. 2d at 204 (emphases added).

The rationale articulated in *Oliver* for submitting the "pecuniary gain" aggravating factor for purposes of sentencing robber-murders has been consistently upheld in the context of a defendant's conviction of felony murder. *E.g., State v. Jackson*,

309 N.C. 26, 44, 305 S.E. 2d 703, 716 (1983); *State v. Taylor*, 304 N.C. 249, 288-89, 283 S.E. 2d 761, 785 (1981), *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456 (1983); *State v. Irwin*, 304 N.C. 93, 107, 282 S.E. 2d 439, 448 (1981). *See also State v. Williams*, 317 N.C. 474, 483-86, 346 S.E. 2d 405, 411-13 (1986) (in sentencing defendant convicted under robbery-felony-murder theory, use of pecuniary gain aggravating factor does not violate eighth amendment's proscription against cruel and unusual punishment); *State v. Oliver*, 309 N.C. at 351, 307 S.E. 2d at 321 (pecuniary gain factor not unconstitutionally vague). This authority clearly governs defendant's contention here insofar as it rests upon the felony murder basis for his conviction. The aggravating factor that the murder was committed in the course of a robbery drops out under the authority of *Cherry* and the pecuniary gain aggravating factor remains under the authority of *Oliver I* and its progeny.

To this point our case law has addressed the theoretical incompatibility of these two factors only in the context of felony murders. In that context, *Cherry* has permitted only the pecuniary gain factor actually to be submitted to the jury. Thus, if defendant's conviction had been based solely on felony murder, it would have been error to submit the aggravating circumstance that the murder was committed while defendant was engaged in the commission of a robbery. *Cherry*, 298 N.C. 86, 257 S.E. 2d 551.

The new question now before us—one of first impression in our jurisdiction—is whether these two factors, when submitted together for purposes of sentencing a defendant convicted of first degree murder on the basis of premeditation and deliberation, are redundant. We conclude that one plainly comprises the other. Although the pecuniary gain factor addresses motive specifically, the other cannot be perceived as conduct alone, for under the facts of this case the motive of pecuniary gain provided the impetus for the robbery itself. Admittedly, situations are conceivable in which an armed robber murders motivated by some impulse other than pecuniary gain, *e.g.*, where the robbery is committed to obtain something of purely reputational or sentimental, rather than pecuniary, value. The facts of this case, though, reveal that defendant murdered the shopkeeper for the single purpose of pecuniary gain by means of committing an armed robbery.

Not only is it illogical to divorce the motive from the act under the facts of this case, but the same evidence underlies proof of both factors. In *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), this Court held it improper to submit two aggravating factors supported by the same evidence when a defendant has been convicted of murder in the first degree on the basis of both felony murder and premeditation and deliberation. In *Goodman*, the aggravating circumstance that the "capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws," N.C.G.S. 15A-2000(e)(7), was supported by the same facts as those supporting the aggravating circumstances that the "capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." N.C.G.S. 15A-2000(e)(4). The Court wrote: "We think the submission of the two issues on the same evidence was improper. This amounted to an unnecessary duplication of the circumstances enumerated in the statute, resulting in an automatic cumulation of aggravating circumstances against the defendant." *Goodman*, 298 N.C. at 29, 257 S.E. 2d at 587.

*Goodman* is sound general authority that in the context of a robbery-murder it is neither appropriate nor equitable to submit a statutorily-enumerated aggravating factor that overlaps with another. It is apparent that, in the particular context of a premeditated and deliberate robbery-murder where evidence is presented that the robbery was attempted or effectuated for pecuniary gain, the submission of both the aggravating factors enumerated at N.C.G.S. 15A-2000(e)(5) and (6) is redundant and that one should be regarded as surplusage. We therefore hold that it was error to submit both of these aggravating factors to the jury.

Under the statutory sentencing scheme of Florida, the Supreme Court of that state came to the same conclusion:

> [H]ere, as in all robbery-murders, both subsections refer to the *same aspect* of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged. . . . [W]e believe that [defendant's] pecuniary motive

at the time of the murder constitutes only one factor which we must consider in this case.

*Provence v. State*, 337 So. 2d 783, 786 (Fla. 1976), *cert. denied*, 431 U.S. 969, 53 L.Ed. 2d 1065 (1977). *See also Cook v. State*, 369 So. 2d 1251, 1256 (Ala. 1978) ("[W]e do not think it appropriate to apply this aggravating circumstance [pecuniary gain] to situations already condemned under subsection 4 [committed in the course of a robbery] which by definition involve an attempt at pecuniary gain. Thus, to avoid repetition, subsection 6 [pecuniary gain] should not be applied to a robbery.").[1]

When there is "a *reasonable possibility* that the erroneous submission of an aggravating circumstance tipped the scales in favor of the jury finding that the aggravating circumstances were 'sufficiently substantial' to justify imposition of the death penalty," the test for prejudicial error has been met. *State v. Irwin*, 304 N.C. at 107, 282 S.E. 2d at 449. Because the jury arrived at a sentence of death based upon weighing only two aggravating factors against several mitigating factors and because it is impossible now to determine the amount of weight ascribed to each factor, we cannot hold the error of submitting both redundant aggravating factors harmless. Defendant is accordingly entitled to a new sentencing hearing pursuant to N.C.G.S. 15A-2000(d)(3).

The need to address defendant's remaining assignments of error concerning the sentencing phase of his trial is obviated by our order for a new hearing on sentencing.

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1. In 1981 the Alabama legislature amended the sentencing statute of that state to specifically provide for "double-counting": "The fact that a particular capital offense . . . necessarily includes one or more aggravating circumstances . . . shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence." Ala. Code Sec. 13A-5-50 (1982 & Supp. 1986).

We note that in this jurisdiction the General Assembly has prohibited such redundancy under the Fair Sentencing Act: "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." N.C.G.S. 15A-1340.4(a)(1)(p) (1983). Statutory provisions governing capital punishment, N.C.G.S. 15A-2000, antedate those governing other felonies and have not been amended either to similarly prohibit or to condone the "double-counting" of aggravating factors. The "double-counting" is prohibited, however, by this Court's decision in *Goodman*, when the submission of the two issues depends on the same evidence. *Goodman*, 298 N.C. at 29, 257 S.E. 2d at 587.

Guilt phase: no error.

Sentencing phase: new hearing.

Justice MARTIN dissenting in part.

I dissent from the holding of the majority awarding the defendant a new sentencing hearing. Otherwise, I concur in the majority opinion.

The majority finds that the trial court erred in submitting as aggravating circumstances that the murder occurred while defendant was committing a robbery and that the murder was committed for pecuniary gain. Believing as I do that there is no legislative impediment to submitting both aggravating circumstances in this case, I disagree.

The majority candidly concedes that N.C.G.S. § 15A-2000, our capital sentencing act, does not prohibit the use of both circumstances in a sentencing hearing based upon premeditated and deliberate murder. Nevertheless, the majority proceeds to bar the use of both of these circumstances in such sentencing hearings. In doing so, the majority misperceives the nature of and reason for the aggravating circumstance that the murder was committed in the commission of a robbery. It is the intent of the legislature that jurors should be allowed to consider whether premeditated and deliberate murders committed in the commission of a robbery should be punished more severely than other premeditated and deliberate murders. That the defendant is seeking pecuniary gain is not the only fact that makes robbery an aggravating circumstance. Robbery involves an assault, a taking of the property of another by violence or by putting the victim in fear. *State v. Moore*, 279 N.C. 455, 183 S.E. 2d 546 (1971). Armed robbery additionally involves the use of a deadly weapon endangering the life of the victim. So the crime of robbery involves more than seeking pecuniary gain; it is assaultive conduct that may, and often does, endanger the lives of persons other than the murder victim. It is extremely relevant to the purposes of sentencing. It is the *actions* of defendant that are being considered by the jury with respect to this aggravating circumstance.

In contrast, when the jury considers the aggravating circumstance of "pecuniary gain," it is evaluating the *motive* or

reason why the murder was committed. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). Rather than being concerned with the actions of the defendant, here the jury is considering the *mental* state of defendant. The legislature has said that a jury should be allowed to consider for the purposes of sentencing the circumstance that the defendant committed the murder for the purpose of pecuniary gain.

The two aggravating circumstances are not subsumed one into the other. By way of illustration, the aggravating circumstance of the murder being committed in the commission of a felony, N.C.G.S. § 15A-2000(e)(5), includes flight from an attempt to commit robbery. In such case the motive would be escape rather than pecuniary gain.

This Court has already held in a strong line of cases that it is proper to submit the "pecuniary gain" aggravating circumstance in cases of murder in the first degree based on felony murder with robbery as the underlying felony. *Oliver*, 309 N.C. 326, 307 S.E. 2d 304; *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456 (1983); *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981); *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 796 (1980). This does not violate the eighth amendment to the United States Constitution. *State v. Williams*, 317 N.C. 474, 346 S.E. 2d 405 (1986).[1]

Here Quesinberry was not sentenced for felony murder but for murder based upon premeditation and deliberation. Of course, robbery is not an essential element of premeditated and deliberate murder. The contentions of the defendant are even weaker where, as here, the robbery is not essential to the state's case. The General Assembly has mandated that where there is evidence to support the aggravating circumstances, as here, the jury should be allowed to consider both the actions of the defendant (actus reus) (the killing occurred during the commission of a robbery) and the mental state or motive of the defendant (mens rea)

1. In *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985), this Court upheld a sentencing hearing where both aggravating circumstances at issue here were submitted to the jury, although the Court's opinion does not address the issue.

(the killing was for the purpose of pecuniary gain). Because one aggravating circumstance focuses on conduct and the other on mental state, the two are by no means redundant and it was not error to submit both in this case. This Court should find no error in the sentencing phase and thereupon determine the issue of proportionality.

I am authorized to state that Justices MEYER and MITCHELL join in this dissenting opinion.

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ALVIS T. WEAVER, EMPLOYEE, PLAINTIFF v. SWEDISH IMPORTS MAINTENANCE, INC., EMPLOYER, RELIANCE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 363A86

(Filed 7 April 1987)

**1. Master and Servant § 77.1— workers' compensation—change from temporary total to permanent total disability—award for change of condition**

Claimant was entitled to a modification of award for change of condition pursuant to N.C.G.S. § 97-47 because of a change of his condition from temporary total disability to permanent and total disability where claimant was initially awarded compensation for temporary total disability as a result of a 12 April 1979 heart attack at work; claimant suffered three subsequent heart attacks and has been permanently and totally disabled since 1 June 1981; and the Industrial Commission found that claimant's total incapacity to earn wages was caused by a combination of the cumulative damage to the heart muscle resulting from his initial compensable heart attack and his three subsequent heart attacks. Claimant was not required to establish a causal relationship between the initial compensable heart attack and the subsequent heart attacks in order to receive an award modification for change of condition.

**2. Master and Servant § 69— workers' compensation—total disability from compensable and noncompensable heart attacks—apportionment of award**

Where claimant was permanently and totally disabled because of damage to his heart muscle resulting from the combined effects of a compensable heart attack, three subsequent heart attacks, and the continued underlying coronary occlusions that cause angina, and the heart attacks and other infirmities suffered by claimant are not included in the schedule set out in N.C.G.S. § 97-31, claimant is entitled to compensation under the total incapacity statute, N.C.G.S. § 97-29, rather than under the partial incapacity statute, N.C.G.S. § 97-30. However, since claimant's permanent and total disability was only partially a result of the initial compensable heart attack, the award must be

apportioned to reflect the extent to which claimant's permanent total disability was caused by the compensable heart attack.

Justice MEYER dissenting.

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 80 N.C. App. 432, 343 S.E. 2d 205 (1986), affirming the opinion and award of the Industrial Commission filed on 26 March 1985, which reversed the opinion and award of Deputy Commissioner Elizabeth McCrodden filed on 28 July 1984.

*E. C. Harris, for plaintiff-appellee.*

*Newsom, Graham, Hedrick, Bryson & Kennon, by William P. Daniell, for defendant-appellants.*

FRYE, Justice.

In this workers' compensation case we must determine whether the Court of Appeals correctly affirmed the Industrial Commission's decision that: (1) claimant had suffered a change in condition entitling him to recover pursuant to N.C.G.S. § 97-47, and (2) claimant was entitled to compensation for permanent partial disability pursuant to N.C.G.S. § 97-30. For the reasons stated herein, we find that: (1) claimant is entitled to an award for change in condition pursuant to N.C.G.S. § 97-47, (2) claimant is entitled to compensation under N.C.G.S. § 97-29 rather than N.C.G.S. § 97-30 and (3) the Industrial Commission's findings of fact are insufficient to determine the percentage of disability compensable under N.C.G.S. § 97-29.

On 12 April 1979, claimant suffered a compensable myocardial infarction ("heart attack") at work while attempting to replace a wheel on an automobile. During claimant's hospitalization following the 12 April 1979 heart attack, he suffered a second heart attack. Compensation was awarded claimant for temporary total disability pursuant to N.C.G.S. § 97-29 from 13 April 1979 to 15 July 1979. The award was upheld by the Court of Appeals. *Weaver v. Swedish Imports Maintenance, Inc.*, 61 N.C. App. 662, 301 S.E. 2d 736 (1983). Nine months after his 12 April 1979 heart attack, claimant began to experience angina episodes, and in August 1980, while walking in a flea market, he suffered another heart attack. After a period of recovery, claimant returned to

work. Then, in June 1981, while sleeping at home, claimant suffered another heart attack. Claimant has not returned to work since the June 1981 attack and is now totally disabled as a result of the cumulative damage to the heart muscle resulting from the four heart attacks and the continued underlying coronary artery disease which existed prior to 12 April 1979. The last payment pursuant to the initial award of compensation (under N.C.G.S. § 97-29) was made on or about 13 September 1983, several months after certification of the opinion of the Court of Appeals affirming the award.

On 22 September 1983 claimant filed a petition alleging that subsequent to the initial heart attack in April 1979 he had suffered a change of condition and that he had been totally disabled since 1 June 1981. The Industrial Commission, after reviewing the evidence at a hearing held before a deputy commissioner, concluded that claimant had been permanently and totally disabled since 1 June 1981, partially as a result of his compensable heart attack on 12 April 1979, and that claimant was entitled to benefits for permanent partial disability under N.C.G.S. § 97-30. Chairman Stephenson dissented on grounds that there was no expert medical testimony that the original heart attack "significantly contributed"[1] to claimant's present disability or that the original heart attack contributed to the subsequent attacks. Defendants gave notice of appeal to the Court of Appeals which affirmed in a split decision.

1. Chairman Stephenson's dissenting opinion suggests that *Rutledge v. Tultex*, 308 N.C. 85, 301 S.E. 2d 359 (1983), if applicable in this case, requires claimant to show that his original compensable injury "significantly contributed to" claimant's present disability. The "significant contribution" test articulated by this Court in *Rutledge* does not apply to the case *sub judice*. The issue in *Rutledge* was whether chronic obstructive lung disease (the sole cause of claimant's disability) was an occupational disease. This Court held that the chronic obstructive lung disease was an occupational disease where the claimant's work-related exposure to cotton dust "significantly contributed" to the disease's development. The instant case does not involve a question of whether the disability-causing injury was work related. Claimant's petition for a modification of award in this case is based on his initial compensable heart attack and neither party contends here that this initial heart attack was not work related. Neither is there any evidence or claim in this case that the subsequent heart attacks were causally related to the first heart attack so as to make the subsequent attacks themselves compensable.

I.

**[1]** We must first decide whether claimant is entitled to a modification of award on grounds of a change of condition pursuant to N.C.G.S. § 97-47. The Industrial Commission concluded in an opinion affirmed by the Court of Appeals that claimant was entitled to a modification of award because of a change in his condition from "temporary total disability" to permanent partial disability. In support of its conclusion, the Commission made, *inter alia*, the following finding of fact.

> 9. Plaintiff's total incapacity to earn wages was caused by a combination of the cumulative damage to the heart muscle resulting from his initial compensable heart attack, his three subsequent attacks and the continued underlying coronary occlusions that also cause angina.

It is well settled in North Carolina that, except as to questions of jurisdiction, the findings of fact of the Industrial Commission are conclusive upon appeal if supported by competent evidence. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981). Finding of fact number 9 was clearly supported by competent evidence. Mr. Weaver's present physician, Dr. Hindman, a recognized medical expert certified in internal medicine and cardiovascular diseases, testified that in May of 1983 Mr. Weaver was a poor surgical candidate because of "moderately severe damage to the heart muscle, and cumulative damage from the three previous heart attacks . . . ." According to Hindman, no effective therapy existed in 1984 to "restore the significant damage done to [Weaver's] heart muscle in the three heart attacks."

Dr. Hindman testified further that it is very clear that there has been a change in Mr. Weaver's cardiac condition since July of 1979. Hindman stated that he "would classify the change in [Weaver's] condition as being substantial in that he has had two subsequent heart attacks and a significant amount of damage *added to* the damage from his first heart attack." (Emphasis added.)

In response to questioning by defendants' counsel, Dr. Hindman indicated that Weaver actually suffered four heart attacks. He explained that since the heart muscle does not regenerate

itself, the damage to Mr. Weaver's heart caused by the heart attacks was cumulative. According to Dr. Hindman, the "results of the damage occurring from those heart attacks is that [Mr. Weaver's] left ventricle is no longer able to pump blood as efficiently as it could prior to the date the damage occurred." Dr. Hindman then gave the following testimony in conclusion:

> It is my opinion that Mr. Weaver's present disability is a combination of the cumulative damage of the heart muscle and the continued underlying coronary occlusions that still cause him angina.

Whether the facts as found by the Commission amount to a change of condition pursuant to N.C.G.S. § 97-47, however, is a question of law and thus properly reviewable by this Court. *Pratt v. Upholstery Co.*, 252 N.C. 716, 115 S.E. 2d 27 (1960). The statute, in pertinent part, provides as follows:

> Change of condition; modification of award.
>
> Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded . . . . No such review shall affect such award as regards any moneys paid but no such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article, except that in cases in which only medical or other treatment bills are paid, no such review shall be made after 12 months from the date of the last payment of bills for medical or other treatment, paid pursuant to this Article.

N.C.G.S. § 97-47 (1985).

The Industrial Commission's authority under N.C.G.S. § 97-47 is limited to the review of prior awards; thus the statute is inapplicable unless there has been a previous final award. *Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971). A final award was issued by the Commission in this case and affirmed by the Court of Appeals. *Weaver v. Swedish Imports Maintenance, Inc.*, 61 N.C. App. 662, 301 S.E. 2d 736.

A change of condition " 'refers to conditions different from those existent when the award was made' . . . [citations omit-

ted]." *Pratt v. Upholstery Co.*, 252 N.C. 716, 722, 115 S.E. 2d 27, 33-34. For example, a change in the degree of disability may constitute a change of condition. *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 296 S.E. 2d 456 (1982) (following a back operation, claimant's permanent partial disability changed from thirty percent to fifty percent). Similarly, an improvement in earning ability may be a change of condition as contemplated by the statute, *Smith v. Swift & Co.*, 212 N.C. 608, 194 S.E. 106 (1937)[2] (claimant was granted an award for permanent partial disability, and thereafter obtained employment and received a salary almost equal to salary before injury). *See also Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 345 S.E. 2d 374 (1986). Also, this Court has stated that

> 'Where the harmful consequences of an injury are unknown when the amount of compensation to be paid has been determined by agreement but subsequently develops, the amount of compensation to which the employee is entitled can be determined within the statutory period for reopening. It is a "change of condition" as the term is used in the statute.' *State v. Red Cross*, 245 N.C. 116, 95 S.E. 2d 559 (1956).

*Watkins v. Motor Lines*, 279 N.C. 132, 138, 181 S.E. 2d 588, 592-93.

As a result of the disability suffered in the 12 April 1979 heart attack, claimant was initially awarded compensation for temporary total disability from 13 April 1979 to 15 July 1979. After apparent recovery, claimant returned to work. In August 1980, claimant suffered another heart attack while walking through a flea market. Again, claimant returned to work. Then on 1 June 1981, while sleeping at home, claimant suffered yet another heart attack. On 22 September 1983 claimant applied to the Industrial Commission for a modification of award based on a change in condition. Thus the claimant's application for review was made within two years of the last payment pursuant to the initial award on 13 September 1983 as required by N.C.G.S. § 97-47. The Industrial Commission found him totally and permanently disabled. Therefore, claimant's condition changed from temporary total disability on 13 April 1979 to total and perma-

2. This case was decided under § 46 of the North Carolina Workmen's Compensation Act (N.C. Code 8081 [bbb] (1935)), a predecessor to N.C.G.S. § 97-47.

nent disability following the 1 June 1981 heart attack. We find that this is a change in condition within the meaning of N.C.G.S. § 97-47.[3] Since claimant here suffered a change in condition and made a timely request for a modification of award under N.C.G.S. § 97-47, we agree with the decision of the Court of Appeals that claimant is entitled to a modification of award for a change in condition.

II.

[2] Having determined that claimant suffered a change in condition under N.C.G.S. § 97-47 from temporary total disability to total and permanent disability, we next consider whether the Industrial Commission properly awarded claimant compensation pursuant to the partial incapacity statute, N.C.G.S. § 97-30. The statute, in pertinent part, provides as follows:

> Partial Incapacity—Except as otherwise provided in G.S. 97-31, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 a week, and in no case shall the period covered by such compensation be greater than 300 weeks from the date of injury . . . .

N.C.G.S. § 97-30 (1985).

In *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458, an occupational disease case, the Industrial Commission

3. Defendants contend that claimant may not receive an award modification for a change in condition unless he establishes a causal relationship between the initial compensable heart attack and the subsequent heart attacks. We agree however with the Court of Appeals' rejection of this contention. *Weaver v. Swedish Imports Maintenance, Inc.*, 80 N.C. App. 432, 343 S.E. 2d 205. Claimant in the instant case is not seeking compensation for the subsequent heart attacks. Instead he is seeking compensation for disability suffered as a result of his initial compensable heart attack. Thus claimant is not required to establish a causal relationship between the initial and subsequent heart attacks.

awarded claimant fifty-five percent partial disability under N.C.G.S. § 97-30. This Court held that:

> The findings of the Commission are supported by competent evidence and are therefore conclusive. They establish the necessary causal relationship of only 55 percent of [claimant's] inability to work and earn wages. This was the extent of her disability *resulting from* an occupational disease. The incapacity for work resulting from the occupational disease is therefore partial and compensation should be awarded pursuant to G.S. 97-30. The remaining 45 percent of her incapacity is not the responsibility of nor a compensation obligation of her employer under our Workers' Compensation Act which compels industry 'to take care of its own wreckage.'

*Id.* at 14, 282 S.E. 2d at 467-68 (citations omitted).

In another occupational disease case, *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981), the Industrial Commission found that the claimant's permanent disability was caused by both byssinosis resulting from exposure to cotton dust during the course of employment and asthma. The claimant was awarded full benefits for permanent partial disability pursuant to N.C.G.S. § 97-30. This Court, however, remanded the case for determination of the percentage of the claimant's disability which was due to her occupational disease. The holdings in the much debated *Morrison* and *Hansel* cases were clearly explained in *Rutledge v. Tultex*, 308 N.C. 85, 301 S.E. 2d 359 (1983). The majority and dissenting opinions in *Rutledge* agreed that:

> [B]oth *Morrison* and *Hansel* hold that when byssinosis is the occupational disease in question and causes a worker to be partially physically disabled, and other infirmities, acting independently of and not aggravated by the byssinosis, also cause the worker to be partially physically disabled, the worker is entitled to compensation for so much of the incapacity for work as is related to the physical disability caused by the occupational disease.

*Id.* at 121, 301 S.E. 2d at 381.

This Court, in *Rutledge*, held that where claimant's work-related exposure to cotton dust significantly contributed to her chronic obstructive lung disease, that disease was an occupational

disease within the meaning of the applicable provision of our Workers' Compensation Act and claimant was therefore entitled to compensation for total disability caused thereby. This result was possible notwithstanding the fact that the inhalation of cigarette smoke may have also significantly contributed to the development of the disease. Likewise, in *Peoples v. Cone Mills*, 316 N.C. 426, 342 S.E. 2d 798 (1986), we held that a claimant was entitled to compensation for total disability where the occupational disease, when combined with claimant's age, education and work experience, resulted in claimant's total inability to work. Plaintiff was awarded compensation under the total incapacity statute, N.C.G.S. § 97-29, which provides in pertinent part as follows:

> Compensation rates for total incapacity.
>
> Except as hereinafter otherwise provided, where the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employee during such total disability a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of his average weekly wages, but not more than the amount established annually to be effective October 1 as provided herein, nor less than thirty dollars ($30.00) per week.

N.C.G.S. § 97-29 (1985).

The Court in *Peoples* reasoned that the fact:

> [t]hat plaintiff can perform only sedentary work does not in itself preclude the Commission from making an award for total disability if it finds upon supporting evidence that plaintiff because of other preexisting limitations is not qualified to perform the kind of sedentary jobs that might be available in the marketplace. If preexisting conditions such as the employee's age, education and work experience are such that an injury causes the employee a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the actual incapacity he or she suffers, and not for the degree of disability which would be suffered by someone younger or who possesses superior education or work experience. *Little v. Food Service*, 295 N.C. 527, 532, 246 S.E. 2d 743, 746 (1978).

*Peoples v. Cone Mills*, 316 N.C. 426, 441, 342 S.E. 2d 798, 808.

The facts of the instant case do not fit neatly into the factual situations of any of the above referenced cases, all of which involve occupational diseases. Our research has disclosed no appellate decision in this state similar to the case *sub judice* where the claim for benefits is based on claimant's total disability resulting from the combination of a compensable primary injury and subsequent injuries not caused, accelerated or aggravated by the primary injury. Accordingly, we must determine whether claimant is entitled to compensation under N.C.G.S. § 97-30, the partial incapacity statute or under N.C.G.S. § 97-29, the total incapacity statute.

The Court of Appeals held that the "[Industrial] Commission's conclusion that the claimant was totally and permanently disabled 'partially as a result' of his compensable injury supports an award for permanent partial disability pursuant to N.C.G.S. 97-30."

We believe, however, that N.C.G.S. § 97-30 was intended by the legislature to apply only in those situations where claimant's incapacity is partial. Thus, we cannot agree with the Court of Appeals' decision that claimant's total incapacity for work is compensable under the partial incapacity statute, N.C.G.S. § 97-30. Instead, we find that claimant's condition of total incapacity is compensable under the total incapacity statute, N.C.G.S. § 97-29.

This Court, in *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978), addressed the question of the applicability of N.C.G.S. § 97-29 and N.C.G.S. § 97-30. Like the Court in *Little*:

> We think it appropriate to emphasize again that the criterion for compensation in cases covered by G.S. 97-29 or -30 is the extent of the claimant's 'incapacity for work. . . .'
>
> [Thus] the ultimate question [is]: To what extent is plaintiff now able to earn, in the same or any other employment, the wages she was receiving at the time of her injury? If she is unable to work and earn *any* wages, she is totally disabled. G.S. 97-2(9). In that event, unless all her injuries are included in the schedule set out in G.S. 97-31, she is entitled to an award for permanent total disability under G.S. 97-29.

> If she is able to work and earn *some* wages, but less than she was receiving at the time of her injury, she is partially disabled. G.S. 97-2(9). In that event she is entitled to an award under G.S. 97-31 for such of her injuries as are listed in that section, and to an additional award under G.S. 97-30 for the impairment of wage earning capacity which is caused by any injuries *not listed* in the schedule in G.S. 97-31.

*Id.* at 533, 246 S.E. 2d at 747.

The Commission in the instant case found as a fact that the claimant was unable to earn any wages because of damage to his heart muscle resulting from the combined effects of four heart attacks and the continued underlying coronary occlusions that cause angina.[4] Thus claimant's disability is total, not partial. The heart attacks and other infirmities suffered by claimant are not included in the schedule set out in N.C.G.S. § 97-31. Since claimant is totally disabled as a result of injuries not included in the N.C.G.S. § 97-31 schedule, claimant is entitled to an award for total disability under N.C.G.S. § 97-29. *See Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743.

This Court however has repeatedly emphasized that the Workers' Compensation Act was never intended to be a general accident and health insurance policy. The primary purpose of the Workers' Compensation Act is to "compel industry to take care of its own wreckage." *Barber v. Minges*, 223 N.C. 213, 216, 25 S.E. 2d 837, 839 (1943). *See also Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458. While N.C.G.S. § 97-29 makes no express provision for apportionment of an award, there is nothing in the Act which prohibits the apportionment of an award where, as here, only a portion of claimant's total disability is caused or contributed to by the compensable injury. Here it is clear that claimant's permanent and total disability was only partially a result of the initial compensable heart attack. We therefore hold that the award must be apportioned to reflect the extent to which claim-

4. Finding of Fact Number 9 provides that:

"Plaintiff's total incapacity to earn wages was caused by a combination of the cumulative damage to the heart muscle resulting from his initial compensable heart attack, his three subsequent attacks and the continued underlying coronary occlusions that also cause angina."

ant's permanent total disability was caused by the compensable heart attack.

The Commission must first determine the amount of weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of claimant's average weekly wages in accordance with the requirements set forth in N.C.G.S. § 97-29. Claimant should then be awarded only that portion of this amount which is equal to the percentage of the permanent total disability caused by the work-related heart attack. Since the Industrial Commission did not determine the extent to which the claimant's permanent and total disability was caused by the compensable heart attack of 12 April 1979, it is impossible to determine the portion of claimant's total disability which is properly compensable under N.C.G.S. § 97-29.

We therefore remand the case to the Court of Appeals for further remand to the Industrial Commission to determine the extent to which claimant's permanent and total disability resulted from the compensable heart attack on 12 April 1979 and to issue its award accordingly.

Affirmed in part; reversed in part; and remanded.

Justice MEYER dissenting.

As I understand the law governing the factual situation before us, in order for the plaintiff to recover compensation for a change of condition, the plaintiff has the burden of showing that the subsequent heart attacks which resulted in total disability were the direct and natural result of the original heart attack. Professor Larson, in his treatise on workers' compensation law, states:

> The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is *the direct and natural result of the compensable primary injury.*

1 A. Larson, *The Law of Workmen's Compensation* § 13.11, at 3-348.91 (1976) (emphasis added). In discussing the range of compensable consequences flowing from a primary compensable injury, Professor Larson says this:

> The issue in all of these cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications. . . . [D]enials of compensation in this category have invariably been the result of a conclusion that the requisite medical causal connection did not exist.

1 A. Larson, *Workmen's Compensation Law* § 13.11(a), at 3-358 to 3-359 (1976) (footnotes omitted). *See Starr v. Paper Company*, 8 N.C. App. 604, 175 S.E. 2d 342, *cert. denied*, 277 N.C. 112 (1970). In the case at bar, the plaintiff has the burden of showing that the June 1981 myocardial infarction which changed the condition from partial to total disability was the direct and natural result of the first compensable attack. It is insufficient for the plaintiff to merely show that the damage from the first myocardial infarction, when coupled with the damage from the subsequent infarctions, contributed in some measure to his present disability. As noted by Deputy Commissioner McCrodden in her opinion and award, Chairman Stephenson in his dissenting opinion to the Commission's award, and Judge John Martin in his dissenting opinion in the Court of Appeals, the evidence in this case totally fails to satisfy this requirement.

Following the primary compensable heart attack on 12 April 1979, the plaintiff was hospitalized until 2 May 1979. The plaintiff returned to full-time work on 15 July 1979 and performed his normal duties for a period of nine months without any symptoms of heart difficulty. In August of 1980, the plaintiff suffered another myocardial infarction while he was walking through a flea market during his leisure time. Following a period of recuperation, the plaintiff was able to return to work. The plaintiff suffered an additional myocardial infarction in June of 1981 while he was sleeping at home, and since that date, he has been unable to work.

Dr. Hindman, a cardiologist who treated the plaintiff, testified at the hearing on 13 April 1984 as a medical expert. He stated that the plaintiff had a history of high blood pressure for three years prior to the original myocardial infarction which occurred on 12 April 1979. Dr. Hindman defined a myocardial infarction as being a death of heart muscle resulting from an interruption of the blood flow to the heart muscle. Dr. Hindman further testified that, in his opinion, the plaintiff was suffering

from advanced coronary artery disease and that this disease existed prior to the plaintiff's initial myocardial infarction on 12 April 1979. Dr. Hindman stated that coronary artery disease is a progressive illness and can progress very rapidly. Dr. Hindman said that the plaintiff's coronary artery disease was so advanced that in May of 1983 one of his coronary arteries was 100% blocked, while the other two were 75% to 95% blocked. The plaintiff suffered from angina, which resulted from occlusions or blockages of his coronary arteries. It is important to note that Dr. Hindman did *not* testify that the myocardial infarctions that occurred in August of 1980 and June of 1981 were the direct and natural result of the first myocardial infarction. To the contrary, Dr. Hindman made it clear that the second and third myocardial infarctions were the result of the continued progression of the plaintiff's coronary artery disease.

The damage to the plaintiff's heart muscle which resulted from the myocardial infarction on 12 April 1979 did not prevent the plaintiff from returning to his regular job. According to Dr. Hindman, this fact indicated that the plaintiff's heart muscle was continuing to receive an adequate blood flow following the first myocardial infarction. Dr. Hindman noted that the ability of the plaintiff's heart to pump blood to his body had been affected by the first myocardial infarction, but the plaintiff's heart was still strong enough to enable the plaintiff to perform his normal job without any coronary symptoms.

Of some twelve pages of summary of the medical evidence in the record before this Court, the majority has chosen to anchor its opinion on a one-sentence quotation from that summary. That one sentence is as follows:

> It is my opinion that Mr. Weaver's present disability is a combination of the cumulative damage of the heart muscle and the continued underlying coronary occlusions that still cause him angina.

On the basis of this one sentence, the majority concludes that "[f]inding of fact number 9 was clearly supported by competent evidence." I do not agree with that conclusion. Finding of fact number 9 was as follows:

> 9. Plaintiff's total incapacity to earn wages was caused by a combination of the cumulative damage to the heart mus-

> cle resulting from his initial compensable heart attack, his three subsequent attacks and the continued underlying coronary occlusions that also cause angina.

Neither the quoted testimony nor the finding of fact even address the question of whether the subsequent attacks which produced the changed condition were the direct and natural result of the first compensable heart attack. From any fair reading of the entire medical testimony, one would have to conclude that the second and third heart attacks resulted solely from the continued progression of the claimant's coronary artery disease and were in no way triggered by, caused by, or the direct and natural result of his first attack.

It is my position that, during the course of the hearing, the claimant failed to elicit any testimony from Dr. Hindman which demonstrated that his change of condition was the direct and natural result of the original compensable heart attack. On the contrary, he testified that the two subsequent myocardial infarctions were caused by progressive coronary artery disease that predated the original compensable attack. Because the claimant failed to establish a causal relationship between the compensable injury and the subsequent myocardial infarctions, he has failed to show a compensable change of the condition under N.C.G.S. § 97-47.

I also agree with the Commissioner (then Chairman) Stephenson of the Industrial Commission, who dissented from the Commission's order, and with Judge Martin, who dissented from the opinion of the Court of Appeals, that the Commission and the majority of the panel below has applied, without saying as much, the "significant contribution" test recently adopted by this Court in the occupational disease field. In effect, the majority has held that if this claimant's permanent total disability is significantly contributed to by his first compensable heart attack, he is entitled to compensation for that percentage of his disability contributed by the first attack. In my view, this is a totally inappropriate test in cases where the permanent total disability results from a series of heart attacks, only the first of which is work related.

Under the majority opinion, as I understand it, if a worker suffers *any* heart attack during the course and scope of his employment, he will receive compensation for a change of condi-

tion resulting from a second, further disabling heart attack, regardless of where that heart attack occurs and regardless of the cause or extent of the second heart attack or its contribution to the plaintiff's disability. In a case like the one before us now, the result would be no different if the heart attack which eventually totally disabled the claimant occurred while he was scaling the Matterhorn or in bed with a paramour, so long as a physician testifies that the total disability results from a "combination" of the series of attacks and any other possible underlying conditions that might be preexisting. This assessment of the impact of the decision of the majority is hardly an overstatement.

It should also be noted that a change of condition, particularly where it arises from a heart attack, may not readily manifest itself. Here, the change occurred within approximately two years of the original attack. However, if, in a given case, there should be an award for the maximum period of 300 weeks for permanent partial disability arising from a work-related heart attack, because the claimant has two years after the last payment within which to file for a change of condition, an increase of compensation could conceivably be awarded as late as seven years after the employee last worked for the employer who experiences the cost.

I believe it is inappropriate for an appellate court to fashion new rules, particularly in such areas of the Workers' Compensation Act as this, which involve public policy decisions best determined by the legislature. I vote to reverse the Court of Appeals and vacate the Commission's award.

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STATE OF NORTH CAROLINA v. BOBBY ALLEN RAINES

No. 427PA86

(Filed 7 April 1987)

**1. Rape and Allied Offenses § 1— custodial sexual offense—voluntary patient in private hospital**

As used in the custodial sexual offense statute, N.C.G.S. § 14-27.7, the word "custody" applies to voluntary patients in private hospitals.

**2. Rape and Allied Offenses § 5— custodial sexual offenses—sufficiency of evidence**

The State's evidence was sufficient to support defendant's convictions for engaging in vaginal intercourse with a person over whom defendant's employer had assumed custody and engaging in a sexual act with a person over whom defendant's employer had assumed custody where it tended to show that the female victim was a patient at a private hospital, defendant was employed as a charge nurse at the hospital, and defendant committed the sex acts alleged.

**3. Rape and Allied Offenses § 6— custodial sexual offense—instruction—housing of hospital patient as custody**

In a prosecution for engaging in vaginal intercourse and another sexual act with a person over whom defendant's employer had assumed custody, the trial court's instruction that "a medical hospital's housing of a patient would be custody" correctly stated a matter of law and did not remove the jury's duty to find the fact of custody.

**4. Criminal Law § 26.5— acquittal of rape and sexual offense—conviction of custodial sexual offenses—no double jeopardy**

Where defendant was acquitted of second degree rape and his conviction of second degree sexual offense was reversed on appeal for lack of evidence of force, the subsequent conviction of defendant for offenses of engaging in vaginal intercourse and another sexual act with a person over whom defendant's employer had assumed custody based on the same incidents did not violate the double jeopardy provisions of the fifth amendment to the U. S. Constitution and Art. I, § 19 of the N. C. Constitution since custodial sexual offense requires proof of custody which second degree rape and second degree sexual offense do not require, and both second degree rape and second degree sexual offense require proof of an act of force which custodial sexual offense does not require.

**5. Criminal Law § 138.27— aggravating factor—position of trust or confidence—same evidence for two factors**

The trial court erred in finding as an aggravating factor for custodial sexual offense that "defendant took advantage of a position of trust or confidence to commit the offense" since the evidence that proved the aggravating factor was necessary to prove the custodial element of the offense, and the finding of the aggravating factor was proscribed by N.C.G.S. § 15A-1340.4(a).

Justice MARTIN dissenting.

Justices FRYE and WEBB join in this dissenting opinion.

ON discretionary review of a decision of the Court of Appeals, 81 N.C. App. 299, 344 S.E. 2d 138 (1986), which found no error in defendant's trial, which resulted in convictions for (1) engaging in vaginal intercourse with a person over whom defendant's employer had assumed custody, and (2) engaging in a sexual

act with a person over whom defendant's employer had assumed custody, both acts being found to violate N.C.G.S. 14-27.7. Judgment was entered by *Lamm, J.*, at the 8 July 1985 Regular Criminal Term of Superior Court, BUNCOMBE County. Heard in the Supreme Court 9 February 1987.

*Lacy H. Thornburg, Attorney General, by Elisha H. Bunting, Jr., Assistant Attorney General, for the State.*

*Elmore & Powell, P.A., by Bruce A. Elmore, Sr. and Stephen P. Lindsay, for defendant-appellant.*

WHICHARD, Justice.

The State's evidence, in pertinent part, showed the following:

The victim suffered from migraine headaches so severe that "sometimes [she] would pass out, or most of the time [she] would be extremely . . . nauseated." On the morning of 13 July 1983 the victim went to the emergency room at St. Joseph's Hospital, a private hospital in Asheville, complaining of a migraine headache. She was placed in intensive care later that day when she experienced severe nausea and vomiting. She described her condition as "still vomiting severely and just too weak to move." She was "hooked up" to both "an IV" and a heart monitor.

The victim's husband visited her during the 7:00 p.m. visiting hour. She was vomiting severely at the time. Defendant, a charge nurse employed by the hospital in its intensive care unit, entered the room, administered a shot to the victim and told her it "would take care of [her] vomiting in about 10 minutes."

The victim's husband then left, and the next person the victim saw was defendant. Defendant gave her a back rub and left, but subsequently returned and gave her "an injection in [her] IV" which caused a burning sensation. Approximately ten minutes later defendant returned, inserted his hand into the victim's vagina, and "started pushing harder and harder." He tried to insert his penis "but it didn't go." He "began to rock back and forth" and in a few minutes ejaculated on the victim.

Defendant later returned and administered another injection in the victim's "IV." The victim felt the same burning sensation as before. Defendant left, returned a few minutes later, pulled the

victim to the side of the bed, and "inserted his penis." The victim testified: "[T]his time it did go." Defendant "began to rock back and forth again" but was interrupted and left when someone called for him. He subsequently returned and sexually assaulted the victim again. She testified: "He inserted his penis into the vagina and rocked back and forth again for a while."

Visual and microscopic examinations of the victim's nightgown and bedsheets revealed the presence of semen and spermatozoa. An SBI chemist examined the semen. He also examined blood samples from defendant, the victim's husband, and a respiratory therapist who had monitored the victim's oxygen on the night in question. The chemist testified that neither the victim's husband nor the therapist could have contributed the semen found on the victim's nightgown, but that defendant could have.

Defendant testified, denying any sexual contact with the victim. He stated: "I at no time touched [the victim] in any way that was improper or unprofessional." Other hospital personnel testified that they observed nothing unusual in or about the intensive care unit that night, and that nothing unusual was reported to them.

The jury returned verdicts of guilty of (1) engaging in vaginal intercourse with a person over whom defendant's employer had assumed custody, and (2) engaging in a sexual act with a person over whom defendant's employer had assumed custody. N.C.G.S. 14-27.7 (1986). Defendant appealed from judgments of imprisonment for four years on each count. The Court of Appeals found no error in the trial, but remanded for resentencing. This Court allowed discretionary review on 12 August 1986.

**[1]** First, defendant contends the trial court erred in denying his motions to dismiss and to set aside the verdict. He argues that the State failed to prove that his employer, St. Joseph's Hospital, had custody of the victim. We disagree.

The statute under which defendant was convicted provides:

> [I]f a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the

> defendant is guilty of a Class G felony. Consent is not a defense to a charge under this section.

N.C.G.S. 14-27.7 (1986). Defendant contends that the custodial relationship, which is an element of the offense created by this statute, cannot exist between a private hospital and its patient because the patient voluntarily submits to the hospital's care and control and thus can leave or refuse treatment at any time. Defendant would limit the meaning of the word "custody," as used in the statute, to legal control or restraint.

We do not believe the General Assembly intended such a narrow construction. Words in a statute generally must be construed in accordance with their common and ordinary meaning, unless a different meaning is apparent or clearly indicated by the context. *State v. Koberlein*, 309 N.C. 601, 605, 308 S.E. 2d 442, 445 (1983). The ordinary meaning of the word "custody" is not limited to legal control or restraint. The word's definitions include an aspect of care, preservation, and protection as well. *See* Burton, Legal Thesaurus 131 (1980) ("care, charge, control"); Black's Law Dictionary 347 (5th ed. 1979) (the "care and control of a thing or person"); Webster's New International Dictionary (3d ed. unabridged 1964) (the "act or duty of guarding and preserving"). Voluntary patients in a private hospital place themselves in the care, charge, and control of the institution. The normal role of the hospital is to guard, preserve, and restore the health of patients who are in its care, charge or control. We thus conclude that the ordinary meaning of the word "custody," in the context in which it is used here, applies to voluntary patients in a private hospital.

As further indication of legislative intent, we note that the statute expressly applies to "*any*" private institutions. Because patients in private institutions generally are voluntary admittees, the General Assembly must have intended—by the express, unlimited inclusion of such institutions—to extend the protection of the statute to those patients.

Further, the purpose of the statute—prevention of sexual abuse by institutional personnel of persons in an institution's care—is no less applicable, nor is such abuse of a position of trust less reprehensible, in a private hospital-voluntary patient context than otherwise. While voluntary patients in private hospitals may have the legal power to terminate their stay, in reality their

physical freedom is normally restricted by the condition that motivated their admission. Such restraint is not dissimilar from that imposed on a penal institution inmate or an involuntarily committed patient. As stated by the Court of Appeals:

> [V]oluntary patients need the protection that the statute provides no less than committed patients; for . . . while they remain as patients of a hospital they are as vulnerable as committed patients to abuse by employees who have ready access to their quarters and supply them with food, drink, medication, assistance, and other necessary care.

*State v. Raines*, 81 N.C. App. at 302, 344 S.E. 2d at 140.

In adopting this construction we are not unmindful that "criminal statutes are to be strictly construed against the State." *State v. Glidden*, 317 N.C. 557, 561, 346 S.E. 2d 470, 472 (1986). However,

> [t]he object in construing penal, as well as other statutes, is to ascertain the legislative intent. . . . The words must not be narrowed to the exclusion of what the legislature intended to embrace. . . . When the words . . . include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and object of the legislature. The rule of strict construction is not violated by permitting the words of [a] statute to have their full meaning, or the more extended of two meanings, . . . but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.

*United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 395-96, 18 L.Ed. 830, 832-33 (1868).

> The canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

*United States v. Brown*, 333 U.S. 18, 25-26, 92 L.Ed. 442, 448 (1948).

We conclude that to construe the word "custody," as used in N.C.G.S. 14-27.7, to apply to voluntary patients in a private hospital gives the word its "fair meaning in accord with the manifest intent of the lawmakers." *Id.* We thus reject defendant's contention.

**[2]** On a motion to dismiss for insufficiency of the evidence, the question for the trial court is whether there is substantial evidence of each element of the crime charged and of the defendant's perpetration of such crime. *State v. Young*, 312 N.C. 669, 680, 325 S.E. 2d 181, 188 (1985). The court must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *Id.* Here the State presented uncontroverted evidence that the female victim was a patient at St. Joseph's Hospital at the time of the incidents alleged. She thus was in the hospital's "custody" within the meaning and intent of that word as used in N.C.G.S. 14-27.7. There was also substantial evidence that defendant was an employee of the hospital and that he committed the sex acts alleged. The motions to dismiss and to set aside the verdict thus were properly denied. This assignment of error is overruled.

**[3]** Second, defendant contends the trial court erred in instructing the jury that "[a] medical hospital's housing of a patient would be custody." He argues that this instruction impermissibly relieved the State of its burden of proving beyond a reasonable doubt an essential element of the crime, *viz*, custody. *See In re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368 (1970); *State v. Torain*, 316 N.C. 111, 112-23, 340 S.E. 2d 465, 468-72, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 77 (1986).

While the presence or absence of custody is a question of fact, whether the hospital-patient relationship constitutes custody within the meaning and intent of N.C.G.S. 14-27.7 is one of law. We have held above that the legal conclusion stated in the instruction is correct. No presumption is created when the trial court fulfills its duty of declaring a matter of law. *State v. Torain*, 316 N.C. at 123, 340 S.E. 2d at 472. "Presumptions may potentially arise only as to certain 'elemental' questions of fact and have

no applicability to the trial court's resolution of questions of law." *Id.* This assignment of error is thus overruled.

**[4]** Third, defendant contends that his conviction violates the double jeopardy provisions of the fifth amendment to the United States Constitution and Article I, Section 19, of the North Carolina Constitution. *See State v. Revelle*, 301 N.C. 153, 162, 270 S.E. 2d 476, 481 (1980); *State v. Birckhead*, 256 N.C. 494, 496-97, 124 S.E. 2d 838, 841 (1962) (double jeopardy principle regarded as integral part of "law of the land" clause of state constitution). He argues that he had been tried previously for second-degree rape (N.C.G.S. 14-27.3) and second-degree sexual offense (N.C.G.S. 14-27.5) based on the incidents alleged in the indictment here. He was acquitted of second-degree rape but convicted of second-degree sexual offense. The Court of Appeals reversed the conviction, however, on the ground that there was no evidence of the essential element of force. *State v. Raines*, 72 N.C. App. 300, 324 S.E. 2d 279 (1985).

> Traditionally, the United States Supreme Court has applied what has been referred to as the *Blockburger* test in analyzing multiple offenses for double jeopardy purposes. The opinion in *Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 309 (1932), stated:
>
> > The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.
>
> If what purports to be two offenses actually is one under the *Blockburger* test, double jeopardy prohibits successive prosecutions, *Brown v. Ohio*, 432 U.S. 161, 53 L.Ed. 2d 187 (1977); *Harris v. Oklahoma*, 433 U.S. 682, 53 L.Ed. 2d 1054 (1977); *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed. 2d 228 (1980) . . . .

*State v. Gardner*, 315 N.C. 444, 454, 340 S.E. 2d 701, 708-09 (1986). Second-degree rape and second-degree sexual offense require an act by force and against the will of another person. N.C.G.S. 14-27.3, -27.5 (1986). Custodial sexual offense does not. N.C.G.S.

14-27.7 (1986). Custodial sexual offense requires that the perpetrator, or the perpetrator's principal or employer, have custody of the victim. *Id.* Second-degree rape and second-degree sexual offense do not. N.C.G.S. 14-27.3, -27.5 (1986). Custodial sexual offense thus requires proof of a fact which second-degree rape and second-degree sexual offense do not, and both second-degree rape and second-degree sexual offense require proof of a fact which custodial sexual offense does not. Double jeopardy considerations thus are not implicated.

Defendant argues that the trial court's instruction that "[a] medical hospital's housing of a patient would be custody" removes custody as an element of the custodial sexual offense, and thereby invokes double jeopardy principles. The argument is without merit. As held above, this instruction stated a matter of law; it did not remove the jury's duty to find the *fact* of custody. This assignment of error is overruled.

**[5]** Finally, the State, as appellee, argues pursuant to N.C.R. App. P. 16(a) that the Court of Appeals erred in remanding the case for resentencing. The trial court found as an aggravating factor that "[t]he defendant took advantage of a position of trust or confidence to commit the offense." *See* N.C.G.S. 15A-1340.4(a)(1)(n) (1983). We agree that this was error. "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . ." N.C.G.S. 15A-1340.4(a) (1983). Under the facts here a showing of a relationship of trust and confidence was needed to prove the custodial element of the offense. The evidence that proved the aggravating factor thus was necessary to prove the custodial element of the offense, and the finding of the aggravating factor was proscribed by N.C.G.S. 15A-1340.4(a) (1983).

For the foregoing reasons, the decision of the Court of Appeals is affirmed. The case is remanded to that Court for further remand to the trial court for sentencing of the defendant not inconsistent with this opinion.

Affirmed.

Justice MARTIN dissenting.

I.

The majority today decides that a voluntary patient in a private hospital is in the "custody" of the hospital within the meaning of N.C.G.S. § 14-27.7. I cannot follow the majority in its tortured path to this conclusion and therefore dissent.

As the majority states, custody involves the control of a person. As the evidence in this case amply shows, St. Joseph's Hospital did not have control of the female prosecuting witness, either in law or in fact.

Q. Now, are you saying that you're familiar with the admission policies of St. Joseph's Hospital?

A. Yes, sir.

Q. Now, is a patient admitted, I believe you said by—only if a doctor recommends the patient?

A. That's right.

Q. When they go in a hospital, are they free to leave anytime they want to?

A. Yes, they are.

Q. Can they leave even against the doctor's orders or the nurse's orders?

A. Yes, when a patient comes in he signs a consent for treatment, and any unusual treatment has to have a separate consent, and a patient can leave anytime he wants to or refuse any treatment.

Q. Can he refuse medicines if he wants to?

A. Yes.

Q. Can he get up and walk out without any reason at all?

A. If you want to do that.

Q. Do you all have any control over them at all unless he wants it? Do you exercise any control—

A. We don't physically keep anyone in, no.

Q. And you do nothing against his will, the patient's will, or her will?

A. No. No.

Q. Now, you do have—One section of your hospital—Let's see, what floor is the intensive care unit on?

A. It's on the 10th floor, the top floor.

Q. Is that the only thing on that floor, or are there other things on that floor?

A. Coronary care is up there and the stepdown unit is up there.

Q. You do have one unit on one floor called *Kingdom Hall*, don't you?

A. Yes, sir, on the 5th floor.

Q. What kind of hall is that?

A. That's a fourteen-bed psychiatric unit.

Q. And that has nothing to do with the intensive care unit?

A. No, sir, not at all.

Q. It's a different—You do have some patients there that the hospital takes custody over?

A. Within the last—well, just within this calendar year we have started taking some committed patients, but that's all.

Q. Was [prosecuting witness] a committed patient?

A. No, sir, we did not have any committed patients until this year.

Q. Even *Kingdom Hall* didn't have any?

A. No, they did not.

Q. You just took patients who were having problems who wanted to come in voluntarily?

A. Yes, they were all voluntary admissions.

Q. Now, did you attempt in any way to require [prosecuting witness] or anybody else to do anything against their will?

A. No, sir.

Q. Did you at any time restrain [prosecuting witness] from leaving that hospital?

A. No, sir.

Q. She could have gotten up and walked out anytime she chose?

A. Yes, sir, a patient can do that, except the committed ones.

. . . .

Q. And when she was in intensive care, was the hospital responsible for her care?

. . . .

A. Just the same as we're responsible for any patient's care.

. . . .

Q. Now, Mr. Brown asked you, I believe, if you didn't take charge of the care of this patient, [prosecuting witness], and I'll ask you if you didn't confine that just to her medical care?

A. Yes, sir.

Q. And even for medical care, she could either approve or disapprove of any procedure, is that right?

A. Yes, sir, that's right.

Q. And she could refuse any procedure or any medication?

A. That's right. Any patient can do that.

Q. And her will would prevail, rather than your will?

A. Yes, sir.

The prosecuting witness testified:

Q. What did the nurses do there in your room?

A. They wanted to give me a bath.

Q. Did you let them give you a bath at that time?

A. No, I did not.

. . . .

Q. You saw no other nurse?

A. I saw one when I was trying to leave the hospital, but I couldn't tell you who she was.

As the foregoing evidence demonstrates, assuming the majority is correct in extending the meaning of "custody," the record does not contain any evidence to support a jury finding that this victim was in custody at the time of the alleged events. The motion to dismiss should have been allowed on a factual basis.

Further, I do not agree that, as a matter of law, custody within the meaning of the statute includes a person who is a voluntary patient in a hospital, public or private. The majority opinion does not contain all the relevant parts of the statute. The entire statute follows:

> If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, or if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class G felony. Consent is not a defense to a charge under this section.

N.C.G.S. § 14-27.7 (1986). In determining the legislative intent with respect to the statute, it is noted that the statute opens with the reference to parent-child relationships and then proceeds to alternative custody positions. Thus it appears that the legislature first intended to protect children from those occupying a parental relationship and also other persons in similar custodial relationships. As the legislature did not define "custody" as used in the statute, statutory interpretation would lead one to the conclusion that the legislature intended "custody" to be of the same nature as the parent-child relationship. *See State v. Fenner*, 263 N.C.

694, 140 S.E. 2d 349 (1965). A voluntary patient in a private hospital certainly does not occupy a position in any way similar to that of a child with respect to its parent. As the evidence in this case shows, such patient is free to leave the hospital at any time regardless of the desires of the attending physician or the hospital; the patient can refuse any medical procedure or treatment; the patient can refuse the "care" of the hospital (here the victim would not allow the nurses to give her a bath); the patient can exercise her own free will.

Of course, criminal statutes must be strictly construed against the state. *State v. Ross*, 272 N.C. 67, 157 S.E. 2d 712 (1967). Criminal statutes must be liberally construed in favor of a defendant, with all conflicts resolved in favor of defendant. *State v. Pinyatello*, 272 N.C. 312, 158 S.E. 2d 596 (1968); *State v. Scoggin*, 236 N.C. 1, 72 S.E. 2d 97 (1952). Ordinary words in a statute are given their ordinary meaning. All of the majority's definitions of custody involve some aspect of control; this appears to be true in *all* definitions of custody—the institution must have control, either actual or legal, over the person. "Custodial" is defined in Webster's Ninth New Collegiate Dictionary at 318 as "marked by or given to watching and protecting rather than seeking to cure." This definition argues strongly that voluntary patients in hospitals are not in "custody." The statement in the majority's opinion that voluntary patients in a private hospital place themselves in the "care, charge, and control" of the hospital is unsupported by any citation of authority and is contrary to all the evidence in this case. The evidence set forth above clearly shows that the prosecuting witness in this case had control of whether she would remain in the hospital, whether she would submit to treatment by the physicians and hospital, and whether she would submit to the care of the hospital. In truth, the evidence discloses that the hospital offered its services to her, even recommended certain medical treatment and care, but the patient had control of the decision of whether to submit to the care, treatment, and hospitalization itself. This is not "custody" as used in the statute.

It is true, of course, that voluntary patients in hospitals must be protected from sexual assaults. They are provided that protection by N.C.G.S. §§ 14-27.2 to .6, -33(a), (b)(1)-(3), -39, and numerous other statutes. Such patients are not left unprotected by construing this statute against the state.

The decisions of this Court and other jurisdictions support the conclusion that the victim in this case was not in custody. In *Wilkes v. Slaughter*, 10 N.C. 211 (1824), this Court held that "custody implies physical force sufficient to restrain the prisoner from going at large . . . ." *Id.* at 216, *overruled on other grounds, Currie v. Worthy*, 47 N.C. 104 (1854).

Voluntary hospital patients are not in "custody" for Miranda purposes. *State v. Lapp*, 202 Mont. 327, 658 P. 2d 400 (1983); *People v. Brice*, 239 Cal. App. 2d 181, 48 Cal. Rptr. 562 (1966). The test applied in these cases was whether the hospital patient had been deprived of his freedom in any significant way. In *Brice* the court rejected the argument that where a patient was bedridden it was tantamount to being in custody.

In *State v. Jackson*, 80 Ariz. 82, 292 P. 2d 1075 (1956), the Arizona court, in interpreting "custody" as used in a criminal statute where "custody" was an essential element of the crime, held that in order to be in "custody" the person must be under the control of and subject to the orders of another person. The Arizona court relied upon *People v. Drake*, 162 Cal. 248, 121 P. 1006 (1912), holding that custody implied being under the control of another, in some restraint so that the person is not free to come and go or otherwise act as he pleases.

I conclude that the motion to dismiss should have been granted both because there was insufficient evidence to support a jury finding that the victim was in custody of the hospital and that as a matter of law "custody" as used in the statute does not include a voluntary patient in a private hospital.

II.

I also dissent from the holding of the majority finding no error in the jury charge of the trial judge. In pertinent part, the trial judge charged the jury: "Second, that St. Joseph's Hospital had custody of [prosecuting witness]. Custody is the care, keeping or control of one person by another. A medical hospital's housing of a patient would be custody," and with respect to the sexual offense charge: "Second, the State must prove beyond a reasonable doubt that St. Joseph's Hospital had custody of [prosecuting witness]. Custody is the care, keeping or control of one person by

another. A medical hospital's housing of a patient would be custody."

The elements of this offense are:

1. The defendant had vaginal intercourse (or committed a sexual act) with the victim;

2. The victim was then in the custody of (name institution);

3. The defendant was an agent of the institution.

N.C.P.I.—Crim. 207.70 (1986). The pattern jury instructions contain a footnote: "It [N.C.G.S. § 14-27.7] appears to be intended to make criminal all sexual activity of persons having legal custody, such as guardians, jailers or employees of mental institutions, with their wards."

The state has the burden to prove beyond a reasonable doubt as an element of the offense that the victim was in the custody of an institution at the time of the offense. *See Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508 (1975); *In re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368 (1970); *State v. Patterson*, 297 N.C. 247, 254 S.E. 2d 604 (1979).

The trial judge's instructions went beyond even the majority's notion of the meaning of custody, telling the jury that *housing* of the victim by the hospital would be custody. In its final mandate to the jury, the trial court only required the jury to find that St. Joseph's Hospital was "housing" the victim as a patient in order to find that she was in the custody of the hospital. In so doing, the trial court erred. At the very least, under the majority's definition of custody, the jury would have to find that the victim was in the care, charge, and control of the hospital at the time in question. By failing to so do, the trial court improperly relieved the state of a part of its burden of proof, and defendant is entitled at least to a new trial. *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508. Failure to properly charge upon an essential feature of the case requires a new trial. *State v. Ward*, 300 N.C. 150, 266 S.E. 2d 581 (1980).

On the first issue the defendant is entitled to a dismissal of the charges. At the very least he is entitled to a new trial for the erroneous jury instruction.

Justices FRYE and WEBB join in this dissenting opinion.

LILLARD THEODORE CROW, JR. AND JEAN EDWARDS CROW, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED v. CITICORP ACCEPTANCE CO., INC., A DELAWARE CORPORATION, AND CITICORP PERSON TO PERSON FINANCIAL CENTER, INC., A NORTH CAROLINA CORPORATION

No. 200PA86

(Filed 7 April 1987)

**1. Rules of Civil Procedure § 23— class actions—class defined**

A class exists under N.C.G.S. § 1A-1, Rule 23 when each of the members has an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members. Statements in cases holding or implying that the community of interest standard of former N.C.G.S. § 1-70 applies under N.C.G.S. § 1A-1, Rule 23(a) are disapproved.

**2. Rules of Civil Procedure § 23— class action—allegations sufficient**

Plaintiff sufficiently alleged the existence of a "class" under N.C.G.S. § 1A-1, Rule 23(a) where their alleged class was comprised of themselves and unnamed others who are current residents of North Carolina; who have purchased new mobile or manufactured homes in North Carolina, financing at least $3,000 through retail installment sales contracts entered into after 1 April 1980 and before 26 April 1985; whose contracts fixed finance charges exceeding the maximum interest rate allowable under the North Carolina Retail Installment Sales Act and North Carolina's general usury statute; and whose contracts ultimately were assigned to one or both of the defendants. N.C.G.S. 1A-1, Rule 23(a).

**3. Rules of Civil Procedure § 23— class actions—prerequisites**

Parties seeking to employ the class action procedure under N.C.G.S. § 1A-1, Rule 23 must establish the existence of a class; the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; the named representatives must show that there is no conflict of interest between them and the members of the class who are not named parties; the named parties must have a genuine interest rather than a mere technical interest in the outcome of the action; the class representatives must establish that they will adequately represent those outside the jurisdiction; the parties must establish that the class members are so numerous that it is impractical to bring them all before the court; and adequate notice must be given to the members of the class represented.

**4. Rules of Civil Procedure § 23— class action—capacity and authority to sue**

Plaintiffs in a class action are not required to obtain actual authorization to represent each class member; allegations that a party is a member of and properly represents a class under Rule 23 suffice as the "affirmative averment" of "capacity and authority to sue" required by N.C.G.S. § 1A-1, Rule 9(a).

**5. Usury § 3; Unfair Competition § 1; Sales § 12; Rules of Civil Procedure § 23— class action—penal and personal relief**

Actions for usury, violations of North Carolina's Retail Installment Sales Act and actions for unfair and deceptive trade practices may be maintained as class actions even though the relief sought is penal and personal in nature.

**6. Rules of Civil Procedure § 23— class action—uniform contracts**

The fact that mortgage and loan documents have become highly uniform may not be raised as a shield to prevent prosecution of a suit as a class action; uniform contracts must comply with the law and the precise historic purpose of class actions has been to permit claims by many plaintiffs or against many defendants to be brought and resolved in one action.

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

ON discretionary review of a decision of the Court of Appeals, 79 N.C. App. 447, 339 S.E. 2d 437 (1986), affirming an order filed on 11 July 1985 by *Bailey, J.*, in Superior Court, WAKE County. Heard in the Supreme Court on 9 December 1986.

*Edelstein & Payne, by M. Travis Payne; Nixon, Yow, Waller & Capers by John B. Long, pro hac vice; Hull, Towill, Norman & Barrett, by David E. Hudson, pro hac vice; and Dye, Miller, Tucker and Everitt, by Thomas W. Tucker, pro hac vice, for the plaintiff appellants.*

*Moore, Van Allen, Allen and Thigpen, by Robert D. Dearborn, Randel E. Phillips and William D. Dannelly, for the defendant appellees.*

*James K. Dorsett, Jr. and James G. Billings for Barclays American Financial, Inc., amicus curiae.*

*Edmund D. Aycock for North Carolina Bankers Association, amicus curiae.*

*Thomas W. Graves, Jr. for North Carolina Citizens for Business and Industry, Inc., amicus curiae.*

*Margot Roten, Ellen W. Gerber and Theodore Fillette for North Carolina Clients Council, amicus curiae.*

*Michael D. Calhoun for North Carolina Consumer Council, Inc., amicus curiae.*

*Paul H. Stock for North Carolina League of Savings Institutions, amicus curiae.*

MITCHELL, Justice.

The plaintiffs appealed to this Court contending that the Court of Appeals erred in affirming an order of the trial court granting partial judgment for the defendants on the pleadings, dismissing the claims on behalf of unnamed class members, and striking all references in the complaint to a class. We agree and reverse the Court of Appeals.

The present action was initiated as a class action on 26 April 1985. Simultaneously with the filing of their complaint, the plaintiffs filed a "Motion for an Action Maintainable as a Class Action." They filed the complaint on behalf of themselves and unnamed members of a purported class of mobile home purchasers whose sales contracts have been assigned to one or both of the defendants. The plaintiffs sought injunctive relief and double damages for interest charged on those sales contracts which they alleged exceeded the interest rates permissible under the North Carolina Retail Installment Sales Act, N.C.G.S. ch. 25A. They also sought treble damages under N.C.G.S. § 75-1.1 alleging that the defendants engaged in an unfair and deceptive trade practice by charging such interest. Finally, the plaintiffs sought double damages under N.C.G.S. § 24-2, North Carolina's general usury statute.

The named plaintiff-appellants, Lillard and Jean Crow, alleged that they bought a mobile home on 4 August 1981 from a dealer in Lumberton. In connection with that purchase, they signed a retail installment contract which was assigned to one of the defendants, Citicorp Person-to-Person Financial Center, Inc., and later to the other defendant, Citicorp Acceptance Company, Inc. The Crows defaulted on two payments in 1983, and their mobile home was repossessed.

The plaintiffs requested that the trial court defer action on motions by the defendants to strike and dismiss all claims on behalf of the alleged class until the plaintiffs could complete discovery. Discovery, they contended, would demonstrate the existence of a class and the members' identities.

The trial court filed an order on 11 July 1985 concluding that the plaintiffs had failed to allege their capacity and authority to sue on behalf of any unnamed class members. It denied the plain-

tiffs' request to defer any decision, allowed the defendants' motion for partial judgment on the pleadings, dismissed the claims on behalf of unnamed class members without prejudice, and struck all references to class members from the complaint and prayer for relief.

The Court of Appeals affirmed. It based its holding on its conclusion that there was insufficient "community of interest" between the named plaintiffs and the unnamed members of the purported class. 79 N.C. App. 447, 450, 339 S.E. 2d 437, 438. We reverse and remand this action for discovery, a class certification hearing, and such further proceedings, not inconsistent with this opinion, as may be appropriate.

The plaintiffs raise two issues before this Court. First, they contend that they properly alleged the existence of a "class" under Rule 23 of the North Carolina Rules of Civil Procedure. N.C.G.S. § 1A-1, Rule 23 (1983). Second, they assert that the trial court erred by requiring an affirmative allegation of their actual authority to sue on behalf of the unnamed class members.

**[1]** Until today, we have not considered the proper definition of a "class" under Rule 23, our current class action provision. We now hold that a "class" exists under Rule 23 when each of the members has an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members. Further, the plaintiffs here have properly alleged the existence of such a class.

Traditionally, North Carolina law has permitted a class action when a "community of interest" existed among named and unnamed class members. Former N.C.G.S. § 1-70, the immediate precursor to our current Rule 23, provided in pertinent part that:

> Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants. . . . When the question is one of a common or general interest of many persons, or where the parties are so numerous that it is impractical to bring them all before the court, one or more may sue or defend for the benefit of all.

N.C.G.S. § 1-70 (repealed 1967). This statute was interpreted as permitting a class action only when each of the proposed class members had an interest which was a "part of one connected

whole" with the interests of the other members. *Mills v. Cemetery Park Corp.*, 242 N.C. 20, 30, 86 S.E. 2d 893, 900 (1955). When each class member shared such a jural relationship with each of the other members, they were deemed to have a "community of interest" sufficient to justify the prosecution of a class action on behalf of all of them. The class action device was not permitted where potential class members shared only (1) a parallel relationship to the opposing party, e.g., separate contracts with the same defendant, or (2) an interest in the same issue of law or of fact, but without any overlap in the circumstances of their respective cases. *Id.*

Our current class action provision, Rule 23(a), was enacted in 1967. It provides that:

> If persons constituting a class are so numerous as to make it impractical to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.

N.C.G.S. § 1A-1, Rule 23(a) (1983). It is identical to the first sentence of the 1938 version of Rule 23 of the Federal Rules of Civil Procedure. 28 U.S.C. Rule 23(a) (1950) (amended 1966).

We find it significant that the General Assembly did not adopt the language of three further subparagraphs found in the 1938 version of Federal Rule 23. Each of those subparagraphs delineated a different type of class action depending upon the "character of the right sought to be enforced for or against the class." *Id.* The three types of class action under the 1938 version of Federal Rule 23 soon came to be referred to as "true," "hybrid," and "spurious" class actions. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo. L.J. 551, 570 *et seq.* (1937). In practice, the application of the 1938 version of Federal Rule 23(a) and its three types of class actions proved very difficult, and courts often applied different labels to cases with nearly identical fact situations. *See generally*, 7A Wright, Miller & Kane, *Federal Practice and Procedure: Civil* § 1752 (1986). These difficulties spawned considerable scholarly criticism. *See, e.g.*, Chafee, *Some Problems of Equity*, 243-295 (1950); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 Harv. L.R. 874, 931 (1958); Gordon, *The Common Question Class Suit Under the Federal Rules and in Illinois*,

42 Ill. L.R. 518 (1947); *Kalven and Rosenfield, The Contemporary Function of the Class Suit,* 8 U.Chi. L.R. 684, 695-714 (1941); Keefe, Levy and Donovan, *Lee Defeats Ben Hur,* 33 Corn. L.Q. 327 (1948); Weinstein, *Revision of Procedure: Some Problems in Class Actions,* 9 Buffalo L.R. 433, 456 (1960); Note, *Federal Class Actions: A Suggested Revision of Rule 23,* 46 Col. L.R. 818, 822, *et seq.* (1946).

When adopting North Carolina's Rule 23(a), our General Assembly undoubtedly was aware of the criticism of the 1938 version of the Federal Rule. We believe that the General Assembly rejected the three additional subparagraphs of the 1938 version of the Federal Rule in order to simplify class action procedures in North Carolina and to give our courts greater flexibility in permitting such actions than had been allowed previously under either Federal Rule 23 or former N.C.G.S. § 1-70.

The defendants direct our attention to the commentary to Rule 23(a) which states that: "In respect to class actions, the Commission adhered rather closely to the statutory provisions in North Carolina. See former G.S. § 1-70." N.C.G.S. § 1A-1, Rule 23 (a) (1983), Comment. The defendants argue that this commentary reveals a legislative intent to reenact the "community of interest" standard applied under former N.C.G.S. § 1-70 when determining whether a "class" exists under current Rule 23(a). We note, however, that the commentaries printed in the General Statutes with the North Carolina Rules of Civil Procedure, N.C.G.S. § 1A-1, were neither adopted nor mentioned by the General Assembly when enacting those Rules. *See* 1967 N.C. Sess. Laws, ch. 954, s. 1. This approach by the General Assembly was prudent, since the commentaries contain references to federal case law and secondary research resources subject to change without the consent or knowledge of the General Assembly.

While we often find the commentaries to N.C.G.S. § 1A-1 helpful, they are not binding authority and certainly cannot be viewed as statements of *legislative* intent. We specifically reject the notion that the General Assembly intended its adoption of Rule 23(a) to reenact the "community of interest" standard of former N.C.G.S. § 1-70. Accordingly, we disapprove statements in cases holding or implying that the former "community of interest" standard applies under Rule 23(a). *E.g., Maffei v. Alert*

*Cable Television of North Carolina, Inc.*, 75 N.C. App. 473, 331 S.E. 2d 188 (1985), *reversed on other grounds*, 316 N.C. 615, 342 S.E. 2d 867 (1986); *English v. Holden Beach Realty Corp.*, 41 N.C. App. 1, 254 S.E. 2d 223, *disc. rev. denied*, 297 N.C. 609, 257 S.E. 2d 217 (1979); *Mosley v. National Finance Co.*, 36 N.C. App. 109, 243 S.E. 2d 145, *disc. rev. denied*, 295 N.C. 467, 246 S.E. 2d 9 (1978).

The defendants also contend that a change from the "community of interest" standard to the broader "same issue of law or of fact" standard we apply today amounts to judicial legislation. To the extent that this may be true, it is unavoidable. The application of Rule 23(a) in this case requires that we define the type of "class" which properly may maintain a class action. Rule 23(a) itself offers little guidance; it does not define the term "class."

We conclude that the repeal of former N.C.G.S. § 1-70 and adoption of the less restrictive language of only the first sentence of the 1938 version of Federal Rule 23 reveals a legislative intent that the term "class" under our current Rule 23 be defined more expansively than under former law. As our Court of Appeals correctly emphasized:

> Our Rule 23 should receive a liberal construction, and it should not be loaded down with arbitrary and technical restrictions. . . . The rule has as its objectives 'the efficient resolution of the claims or liabilities of many individuals in a single action' and 'the elimination of repetitious litigation and possible inconsistent adjudications involving common questions, related events, or requests for similar relief.'

*English*, 41 N.C. App. at 9, 254 S.E. 2d at 230-31 (citations omitted). Accordingly, we hold that a "class" exists under Rule 23 when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members. It is unnecessary for any member of the class to share a jural relationship or "community of interest" with any other member of the class.

Whether a proper "class" under Rule 23(a) has been alleged is a question of law. Because the trial court entered judgment

solely on the pleadings, we must determine whether the allegations of the complaint, taken as true and viewed in the light most favorable to the plaintiffs, support the conclusion that the named and unnamed plaintiffs comprise a "class" within the meaning of Rule 23(a). *See Ragsdale v. Kennedy,* 286 N.C. 130, 137, 209 S.E. 2d 494, 499 (1974).

**[2]** The plaintiffs have alleged the existence of a class comprised of themselves and unnamed others: (1) who are current residents of North Carolina; (2) who have purchased new mobile or manufactured homes in North Carolina, financing at least $3,000 through retail installment sales contracts entered after 1 April 1980 and before 26 April 1985; (3) whose contracts fixed finance charges exceeding the maximum interest rate allowable under the North Carolina Retail Installment Sales Act and North Carolina's general usury statute; and (4) whose contracts ultimately were assigned to one or both of the defendants. The plaintiffs further contend that, upon the facts alleged, the members of the proposed class each have an interest in several of the same issues of law or of fact. They contend that these issues include whether the defendants charged members of the class higher interest rates than permitted under the North Carolina Retail Installment Sales Act and our general usury statutes, whether such State interest rate ceilings have been preempted by the Federal Depository Institutions Deregulation and Monetary Control Act of 1980, and whether the defendants' actions were unfair and deceptive trade practices prohibited by N.C.G.S. § 75-1.1.

Taking the allegations of the complaint as true, it appears that a determination of the maximum interest rates allowable under State law and whether the defendants have engaged in unfair and deceptive trade practices will affect the named and unnamed plaintiffs in the same manner. Likewise, the question of whether State law has been preempted by federal acts will affect all members of the class in the same manner.[1] We conclude, therefore, that the plaintiffs sufficiently alleged the existence of a "class" under Rule 23(a). Accordingly, we reverse the decision of

1. It would be inappropriate for us to reach or decide these complex questions of substantive law on the pleadings. Therefore, we express no opinion as to the merits of the plaintiffs' claims for relief or the applicability of the statutes under which they have brought their claims.

the Court of Appeals which affirmed the order granting the defendant's motions and entering partial judgment for the defendants on the pleadings.

**[3]** Although we hold that the plaintiffs properly alleged the existence of a "class" under Rule 23, we do not decide whether they ultimately may maintain this action as a class action. Once discovery is completed upon remand and a class certification hearing has been held, the plaintiffs must have established to the satisfaction of the trial court the actual existence of a class, the existence of other prerequisites to utilizing the class action procedure, and the propriety of their proceeding on behalf of the class.

The party seeking to bring a class action under Rule 23(a) has the burden of showing that the prerequisites[2] to utilizing the class action procedure are present. *See* 7A Wright, Miller & Kane, *Federal Practice and Procedure: Civil* § 1759 (1986) (discussing F.R. Civ. P. 23). First, parties seeking to employ the class action procedure under our Rule 23 must establish the existence of a class. As we have indicated, the plaintiffs properly alleged the existence of a class. On remand, however, the plaintiffs also will be required to demonstrate the actual existence of the class. *See* 7A Wright, Miller & Kane, *Federal Practice and Procedure: Civil* § 1760 (1986) (discussing F.R. Civ. P. 23).

The named representatives also must establish that they will fairly and adequately represent the interests of all members of the class. This prerequisite is a requirement of due process. *See Hansberry v. Lee*, 311 U.S. 32, 45, 85 L.Ed. 22, 29 (1940) (discussing F.R. Civ. P. 23). It is also specifically imposed by our Rule 23. N.C.G.S. § 1A-1, Rule 23(a) (1983).

The named representatives must show that there is no conflict of interest between them and the members of the class who are not named parties, so that the interests of the unnamed class members will be adequately and fairly protected. *See Thompson v. Humphrey*, 179 N.C. 44, 58, 101 S.E. 738, 746 (1919) (decided without reference to the then prevailing class action statute, N.C.

2. Although we now specify certain of the prerequisites which these plaintiffs and parties like them will be required to demonstrate before employing the class action procedure, we caution that no list of such prerequisites should be viewed as all-inclusive.

Consolidated Statutes, § 457 (1919) (repealed 1933) (originally enacted in N.C. Code, Ch. 10, § 185 (1883)). The named parties also must have a genuine personal interest, not a mere technical interest, in the outcome of the action. *English*, 41 N.C. App. at 7, 254 S.E. 2d at 230, *citing Hughes v. Teaster*, 203 N.C. 651, 166 S.E. 745 (1932).

The class representatives within this jurisdiction also must establish that they will adequately represent those outside the jurisdiction. *See English*, 41 N.C. App. at 6, 254 S.E. 2d at 229, *citing Vann v. Hargett*, 22 N.C. 32 (1838) (decided under Court's equity jurisdiction). The class the plaintiffs in the present case seek to represent is defined as including only "current residents of North Carolina." Therefore, by definition, there are no class members outside the jurisdiction.

Parties seeking to utilize Rule 23 also must establish that the class members are so numerous that it is impractical to bring them all before the court. N.C.G.S. § 1A-1, Rule 23(a) (1983). It is not necessary that they demonstrate the impossibility of joining class members, but they must demonstrate substantial difficulty or inconvenience in joining all members of the class. There can be no firm rule for determining when a class is so numerous that joinder of all members is impractical. The number is not dependent upon any arbitrary limit, but rather upon the circumstances of each case. *See English*, 41 N.C. App. at 6-7, 254 S.E. 2d at 229, and authorities cited therein.

Additionally, although Rule 23(a) says nothing about the need for notice to members of the class represented, we believe that fundamental fairness and due process dictates that adequate notice of the class action be given to them. *See Eisen v. Carlisle and Jacquelin*, 391 F. 2d 555, 564 (2d Cir. 1968), *aff'd on other grounds*, 417 U.S. 156, 173-77, 40 L.Ed. 2d 732, 746-748 (1974), and cases cited therein (discussing representative actions under the Federal Rules of Civil Procedure). The actual manner and form of the notice is largely within the discretion of the trial court. The trial court may require, among other things, that it review the content of any notice before its dissemination.

The trial court should require that the best notice practical under the circumstances be given to class members. Such notice should include individual notice to all members who can be iden-

tified through reasonable efforts, but it need not comply with the formalities of service of process. *See, e.g., Eisen v. Carlisle and Jacquelin*, 391 F. 2d at 569-70 (discussing Federal Rules); *Johnson v. Georgia Highway Express, Inc.*, 417 F. 2d 1122, 1125 (5th Cir. 1969) (same). Notice of the action should be given as soon as possible after the action is commenced. *See English*, 41 N.C. App. at 10, 254 S.E. 2d at 230 (refusing class relief because notice sent after merits had been determined). As part of the notification, the trial court may require that potential class members be given an opportunity to request exclusion from the class within a specified time in a manner similar to the current federal practice. *See* F.R. Civ. P. 23(c)(2).

We again emphasize that we do not decide now whether this suit properly *should* proceed as a class action. If the prerequisites to a class action are established on remand, the decision whether a class action is superior to other available methods for the adjudication of this controversy continues to be a matter left to the trial court's discretion. Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results. The usefulness of the class action device must be balanced, however, against inefficiency or other drawbacks. *See, e.g., Maffei*, 316 N.C. 615, 342 S.E. 2d 867 (case not allowed to proceed as a class action although proper class shown, because each member's recovery would be *de minimus*). As we have indicated, the trial court has broad discretion in this regard and is not limited to consideration of matters expressly set forth in Rule 23 or in this opinion. *See Maffei*, 316 N.C. at 617, 342 S.E. 2d at 870.

**[4]** The defendants further contend that, even if the class action prerequisites exist and the plaintiffs can otherwise demonstrate the propriety of a class action, the trial court correctly struck and dismissed the class allegations in the present case on the ground that the plaintiffs had failed to allege their "capacity and authority to sue on behalf of any unnamed class member." In support of this contention, the defendants refer us to *Mosley v. Finance Company*, 36 N.C. App. 109, 243 S.E. 2d 145, *disc. rev. denied*, 295 N.C. 467, 246 S.E. 2d 9 (1978). We reject this contention.

Rule 9(a) of the North Carolina Rules of Civil Procedure requires that: "Any party suing in any representative capacity shall

make an affirmative averment showing his capacity and authority to sue." N.C.G.S. § 1A-1, Rule 9(a) (1983). The plaintiffs concede that they have not been given actual authority by the unnamed plaintiffs to sue on their behalf. One of the functions of class actions under Rule 23 in North Carolina, however, is to permit lawsuits to proceed without the direct participation of certain individuals who ordinarily would be necessary or proper parties. Allegations that a party is a member of and properly represents a class under Rule 23 suffice as the "affirmative averment" of "capacity and authority to sue" required by Rule 9(a).

Rule 23(a) addresses situations where those having an interest in the same issue of law or of fact are so numerous that it is impractical to bring them all into court, i.e., join them. Realistically, if the unnamed class members are so numerous, it would be equally impractical to force the class representatives to obtain actual authorization to represent each class member. The purpose of Rule 23(a) would be defeated if class representatives were required to have actual authorization from every class member. Where the class is large, as alleged in the present case, and the identity of the individual class members is known only to the defendants, a class action would be virtually impossible to maintain under such a rule. As we do not believe that the legislature intended this result, we reject the defendants' contention. To the extent it conflicts with our holding on this issue, *Mosley* is expressly disavowed.

**[5]** Further, it is contended that actions for usury, actions for violations of North Carolina's Retail Installment Sales Act and actions for unfair and deceptive trade practices may not be maintained properly as class actions. It is argued that the extraordinary relief of double or triple damages available in such cases amounts to a fine or forfeiture and is penal and personal in nature.

This Court has not previously denied parties the opportunity to proceed with a class action where the relief sought was "penal and personal" in nature. When our General Assembly has wished to prevent class actions to enforce statutory claims for relief such as those in the present case, it has said so expressly and unequivocally. *See, e.g.*, N.C.G.S. § 75C-5 (1985) ("class actions are not available under . . . [the Motion Picture Fair Competition Act]").

The failure of the General Assembly to expressly prohibit class actions to enforce the statutes under which the plaintiffs claim relief convinces us that it intended to allow them for such purposes.

**[6]** Finally, the defendants argue that allowing class actions in cases such as this will lead to results not intended by the General Assembly when it adopted Rule 23. They argue, in essence, that mortgage and loan documents have become highly uniform for various reasons. Thus, if class actions can be brought by borrowers on the basis of such standard and uniform documents, virtually every loan transaction in North Carolina could expose the lender to a class action. They argue that this would lead to "staggering and unintended liabilities." We are not persuaded.

Uniform contracts, like all other contracts, must conform to law. Moreover, the precise historic purpose of class actions has been to permit claims by many plaintiffs or against many defendants to be brought and resolved in one action. To date this Court has not allowed unintentional illegality in the language of standard or uniform contracts to be raised as a shield to prevent plaintiffs from prosecuting a suit as a class action. We decline to do so now.

The decision of the Court of Appeals affirming the judgment of the trial court is reversed. This case is remanded to the Court of Appeals for its further remand to the Superior Court, Wake County, for proceedings not inconsistent with this opinion.

Reversed and remanded.

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

PHILLIP W. HAGLER v. DOROTHY DALE HAGLER

No. 276PA86

(Filed 7 April 1987)

**Divorce and Alimony § 30; Husband and Wife § 11.2— separation agreement—equitable distribution not mentioned—bar to equitable distribution**

A separation agreement fully disposed of the parties' property rights arising out of the marriage and acted as a bar to equitable distribution, even though equitable distribution was not mentioned in the agreement, where it was apparent from the scope of the agreement that it was intended as a comprehensive settlement; the very existence of the agreement evinced an intention by the parties to determine for themselves their property division and future relationship; both parties were represented by counsel; and there was no attempt to show fraud or duress by either party.

Justice MARTIN dissenting.

Justice MITCHELL joins in the dissenting opinion.

ON discretionary review of a unanimous unpublished opinion of the Court of Appeals, 80 N.C. App. 166, 341 S.E. 2d 619 (1986), reversing summary judgment entered in favor of the plaintiff by *Blackwell, J.*, at the 9 May 1985 Civil Non-jury Session of District Court, ROCKINGHAM County.

On 21 January 1985, plaintiff-husband filed a complaint for absolute divorce from defendant-wife based upon a one-year separation. The wife answered, admitting the allegations in the complaint and requesting that the court make an equitable distribution of marital property under N.C.G.S. § 50-20. The husband moved for summary judgment alleging that a separation agreement entered into by the parties in 1983 precluded any equitable distribution. The matter was heard by the Honorable Robert R. Blackwell, who entered summary judgment for the husband on 14 May 1985. On appeal, the Court of Appeals reversed. We allowed the husband's petition for discretionary review on 28 August 1986. Heard in the Supreme Court 10 February 1987.

*Gwyn, Gwyn & Farver, by Julius J. Gwyn, for plaintiff-appellant.*

*Mary K. Nicholson for defendant-appellee.*

MEYER, Justice.

Husband and wife were married in September 1962. In July 1983, they entered into a separation agreement, the construction of which comprises the primary issue in this case. This agreement, duly recorded by the Register of Deeds of Rockingham County, contains provisions disposing of the marital residence, alimony, child support, child custody, remarriage, responsibility for outstanding bills, and acquisition of future property. In addition, the agreement contains these two paragraphs:

> 3. RELEASE BY "HUSBAND." The "HUSBAND" does hereby release and relinquish unto the "WIFE," her executors, administrators, distributees, heirs and assigns, all right of future support except as may be herein specifically provided, and all right of curtesy, inheritance, descent and distribution, and any and all other rights arising out of the marriage relation in and to any and all property now owned by the "WIFE," or which may be hereafter acquired by her and further does hereby release the right to administer upon her estate.
>
> 4. RELEASE BY "WIFE." The "WIFE" does hereby release and relinquish unto the "HUSBAND," his executors, administrators, distributees, heirs and assigns, all right of future support except as may be herein specifically provided, and all right of dower, inheritance, descent and distribution, and all other rights arising out of the marriage relationship in and to any and all property now owned by the "HUSBAND," or which may be hereafter acquired by him, and further does hereby release the right to administer upon his estate.

In the wife's answer to the husband's complaint for divorce, she did not allege a counterclaim but simply asked, in her prayer for relief, that "the court perform an equitable distribution of marital property to the parties pursuant to N.C.G.S. § 50-20." She did not allege that there was any marital property remaining to be distributed. A judgment of absolute divorce was entered on 21 March 1985. Thereafter, on 26 March 1985, husband moved for summary judgment on the wife's prayer for equitable distribution, arguing that the separation agreement precluded equitable distribution. The trial court granted husband's motion for summary judgment, agreeing with him that the agreement was a bar to equitable distribution.

On appeal, the Court of Appeals reversed, the basis of the opinion being that the separation agreement did not mention "marital property" as one of the items divided; therefore, marital property, if any, was still subject to equitable distribution.

A party moving for summary judgment is entitled to such judgment if he can show, through pleadings and affidavits, that there is no genuine issue of material fact requiring a trial and that he is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56 (1983); *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). Our inquiry, then, is whether there was a factual issue raised concerning the existence of "marital property," other than that dealt with by the terms of the agreement, that would have been the subject of equitable distribution. This requires an examination into what property was the subject of the separation agreement and what property may be the subject of the Equitable Distribution Act.

Prior to the enactment of the Equitable Distribution Act, N.C.G.S. § 50-20 (1984 & Supp. 1985), the property accumulated by parties to a marriage went, upon divorce, to the person in whose name the property was titled. *See generally*, 1 R. Lee, *N.C. Family Law* § 34 (4th ed. 1979 and Supp. 1985). While a wife may have made substantial contributions to the financial well-being of the family during the course of the marriage, she had no legal claim to property except that to which she was the record owner.

The Equitable Distribution Act was intended to alleviate many of the problems that had existed in property divisions of divorced couples. *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). *See generally* Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C. L. Rev. 247 (1983); *see also Mims v. Mims*, 305 N.C. 41, 286 S.E. 2d 779 (1982). The act provides for a judicial determination of the distribution of the property accumulated during the marriage, a distribution reflecting the contribution of each party to the family, whether that contribution be in the form of wages brought in or domestic services provided. Only this "marital property" may be distributed under this statute. "Separate property," acquired before marriage or given to one spouse by a third party, is unaffected. N.C.G.S. § 50-20(b) (Supp. 1985).

While the effect of the act is to give the non-title spouse an equitable claim in marital property, it does not displace the traditional principles of property ownership. Thus, in the absence of an equitable distribution under N.C.G.S. § 50-20, the state of the title of property owned by either spouse or by both spouses is unaffected. Nothing in the act creates a new form of ownership such as that recognized in "community property" states. Greene, *Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility With the Current View of the Marriage Relationship and the Rights of Women*, 13 Creighton L. Rev. 71 (1979).

Equitable distribution is a property right. N.C.G.S. § 50-20(k) (1984); *Wilson v. Wilson*, 73 N.C. App. 96, 325 S.E. 2d 668 (1985). Therefore, a married person is entitled to maintain an action for equitable distribution upon divorce if it is properly applied for and not otherwise waived. However, equitable distribution is not automatic. The statute provides that a party seeking equitable distribution must specifically apply for it. This may be done either by way of cross-action in an action brought for absolute divorce or as a separate action. N.C.G.S. § 50-21 (1984 & Supp. 1985). There is nothing in the statute regarding the sufficiency of the pleadings to support a claim for equitable distribution.

Our statutes also contain a mechanism whereby the parties to a marriage may forego equitable distribution and decide themselves how their marital estate will be divided upon divorce. N.C.G.S. §§ 50-20(d), 52-10.1 (1984). These agreements are favored in this state, as they serve the salutary purpose of enabling marital partners to come to a mutually acceptable settlement of their financial affairs. *See* Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C. L. Rev. 819 (1981). A valid separation agreement that waives rights to equitable distribution will be honored by the courts and will be binding upon the parties. N.C.G.S. § 52-10 (1984); *Blount v. Blount*, 72 N.C. App. 193, 323 S.E. 2d 738 (1984); *Blankenship v. Blankenship*, 234 N.C. 162, 66 S.E. 2d 680 (1951).

Paragraphs 3 and 4 of the separation agreement in question here release each spouse from the common law rights incident to marriage (dower, curtesy, inheritance, descent, and distribution), as well as "all other rights arising out of the marital relationship

in and to any and all property." As this language does not refer specifically to the right of equitable distribution, we must consider whether the language nonetheless sufficiently encompasses this right to be a valid release of it. In this, we are guided by the language of the agreement as it reflects the intention of the parties. *Blankenship v. Blankenship*, 234 N.C. 162, 66 S.E. 2d 680. We may also assume that each spouse, represented by counsel, was aware of the nature of the property rights he or she had before waiving any or all of them. A brief review of the various classes of marital property ownership existing at the time the agreement was signed and of the cognizable claims one spouse may have against such property may be helpful in understanding the meaning of the phrases "rights arising out of the marriage relationship."

We note that the terms "separate property" and "marital property" in the act bear no relation to the forms of ownership recognized in this state. That is, the term "separate property" is not synonymous with the concept of "individually owned" property; nor is the term "marital property" synonymous with the concept of "jointly owned" property. Our equitable distribution statutes define the terms as follows:

(b) For purposes of this section:

(1) "Marital property" means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property in accordance with subdivision (2) of this section. Marital property includes all vested pension, retirement, and other deferred compensation rights, including military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act.

(2) "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance.

> Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property. All professional licenses and business licenses which would terminate on transfer shall be considered separate property. The expectation of nonvested pension, retirement, or other deferred compensation rights shall be considered separate property.

N.C.G.S. § 50-20(b)(1), (2) (Supp. 1985).

The traditional forms of ownership of property, on the other hand, focus on the person or entity in which the property is titled. Property may be titled in the name of an individual spouse or in the name of both spouses. If the property is titled in the name of both spouses, it is not "owned" by either separately, but by the two of them jointly, either as tenants by the entireties, joint tenants, or tenants in common. *See generally*, P. Hetrick, *Webster's Real Estate Law in North Carolina* § 111 (1981 & Supp. 1985). Upon divorce, the tenancy by the entireties is automatically severed and the spouses become tenants in common, P. Hetrick, *Webster's Real Estate Law in North Carolina* § 127 (1981 & Supp. 1985), each entitled to an undivided one-half interest in the property. *Lanier v. Dawes*, 255 N.C. 458, 121 S.E. 2d 857 (1961).

The act was not intended to disturb these traditional forms of property ownership, the rights flowing from that ownership, or the rights a spouse may otherwise have in the property of the other. Equitable distribution is merely an alternative means of property division; alternative to already existing rights granted by statute or recognized at common law or acquired under a separation agreement. Thus, in the absence of an equitable distribution of entireties property under N.C.G.S. § 50-20, an ex-spouse (now tenant in common) retains the right to possession and the right to alienate and may bring an action for waste, ejectment, accounting, or partition. P. Hetrick, *Webster's Real Estate Law in North Carolina* §§ 112-124 (1981 & Supp. 1985). Moreover,

each spouse retains such other rights as he or she acquired under a valid separation agreement.

With these principles in mind, we turn to the separation agreement that is the subject of this appeal. We note first that the very existence of the agreement evinces an intention by the parties to determine for themselves what their property division should be and what their future relationship is to be, rather than to leave these decisions to a court of law. It is apparent from the scope of the agreement that it was intended as a comprehensive settlement; one dealing with all aspects of the marital estate, including the division of property. The fifteen paragraphs of the document cover alimony, child support, the marital home, the acquisition of property, and the distribution of existing property and obligations. Finally, we must assume that this arrangement was satisfactory to both spouses at the time it was entered into. There has been no showing of, or attempt to show, fraud or duress on the part of either party. Both parties were represented by counsel.

Paragraph 4 is entitled "Release by 'WIFE'." It purports to release "*all* right of future support"; "*all* right of dower, inheritance, descent and distribution"; and "*all* other rights arising out of the marriage relationship in and to any and *all* property now owned by the 'HUSBAND'." (Emphasis added.) While it might conceivably be argued that the words "now owned by the 'HUSBAND' [or 'WIFE,' as the case may be]" somehow implies an attempt to limit the general nature of the release, we conclude from our reading of the entire agreement that the parties intended to completely dispose of the marital estate and effectuate a complete waiver of claims by one party against the other.

An examination of the language used by the parties confirms our conviction in this regard. We consider what the parties meant by "rights arising out of the marriage relationship." As to the wife, the agreement enumerates certain of those rights: support, dower, inheritance, descent, and distribution. The words "and all other rights arising out of the marriage relationship" must refer to some other right not enumerated. Such a right might well be the right to equitable distribution, which is but an equitable claim on marital property available only to previously married persons. Indeed, it is hard to imagine what other equitable or legal claim

could have been contemplated by the parties. Claims on property that do not "arise out of the marriage relationship" are not waived by the language. We conclude that the phrase "rights arising out of the marriage relationship" clearly contemplates a right to equitable distribution.

When the language of a contract is clear and unambiguous, construction of the contract is a matter of law for the court.

> " 'The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.' [*Electric Co. v. Insurance Co.*, 229 N.C. 518, 520, 50 S.E. 2d 295, 297 (1948).] . . . When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law. The court determines the effect of their agreement by declaring its legal meaning. . . .
>
> ". . . .
>
> " 'Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly, and it is fundamental that that which is plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed. If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it. [. . .]' [17 Am. Jur. 2d *Contracts* § 255, at 649 (1964) (footnote omitted).]"

*Bicycle Transit Authority v. Bell*, 314 N.C. 219, 227, 333 S.E. 2d 299, 304 (1985) (quoting *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E. 2d 622, 624-25 (1973)).

It is a well-settled principle of legal construction that "[i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean." *Indemnity Co. v. Hood*, 226 N.C. 706, 710, 40 S.E. 2d 198, 201 (1946) (citations omitted).

We hold that the language of the separation agreement here clearly and unambiguously establishes that the parties' intention was to dispose fully of their respective property rights, both real and personal, arising out of the marriage.

Parties to a marriage who are committed to dissolution of their marriage relationship and who clearly intend to make a final and complete compromise and settlement of their marital affairs, including property rights, by agreement between them and without the intervention of the courts should be able, and indeed encouraged, to do so. The value of such agreements lies in the ability to have them enforced in the courts. The law favors such agreements, and when the court finds such a clear intent expressed in a separation agreement, it will be enforced.

For the reasons stated herein, we hold that the separation agreement entered into by the parties fully disposed of the parties' property rights arising out of the marriage and thus acts as a bar to equitable distribution. Accordingly, there is, as the trial judge so concluded, no genuine issue as to any material fact and plaintiff-husband was entitled to judgment in his favor as a matter of law. N.C.G.S. § 1A-1, Rule 56 (1983). The grant of summary judgment entered by the trial court was proper. The opinion of the Court of Appeals is therefore reversed, and the case is remanded to that court for further remand to the District Court, Rockingham County, for reinstatement of the summary judgment in favor of plaintiff-husband.

Reversed and remanded.

Justice MARTIN dissenting.

I respectfully dissent. This is a case of first impression with this Court. It was decided by the trial court on motion for summary judgment. The movant, Phillip Hagler, had the burden to satisfy the court that there was no genuine issue of material fact and that he was entitled to judgment as a matter of law. *Moore v. Crumpton*, 306 N.C. 618, 295 S.E. 2d 436 (1982). Therefore, plaintiff had the burden to prove that there was no marital property subject to equitable distribution. He has failed to do so. The record is devoid of such evidence. A genuine issue of material fact existed as to whether there was marital property subject to equi-

table distribution. At trial on the *merits*, defendant would have the burden of proof on this issue.

The majority finds that the separation agreement bars defendant's right to equitable distribution. I disagree. The waiver of rights is not favored in the law. A waiver is the intentional and voluntary surrender of a known right or benefit. *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 219 S.E. 2d 190 (1975). While the equitable distribution act was in effect at the time of execution of the separation agreement and it is presumed that the defendant was aware of it, nowhere in the agreement is there any reference to marital property or to equitable distribution. The separation agreement is by substance and form in the manner of such agreements drafted prior to the adoption of the equitable distribution statute. Thus the agreement fails to support a conclusion that defendant intended to relinquish her right to equitable distribution.

I agree that parties should be encouraged to settle marital differences by mutual agreement. But before a waiver of equitable distribution rights is found from an agreement, the intent of the parties should be clear. Such intent is not manifested here. The majority relies upon paragraphs 3 and 4 of the agreement. In paragraph 4, the wife relinquishes "any and all other rights arising out of the marriage relationship in and to any and all property now owned by the 'HUSBAND' . . . ." Paragraph 3 is the converse, the husband relinquishing all such rights in the wife's property.

The majority states that the phrase "all other rights arising out of the marriage relationship" includes defendant's right to equitable distribution. I find this to be unfounded, as demonstrated below, but even if correct, the paragraph would *only* relinquish defendant's right to equitable distribution in and to property then owned by the husband, *not* to marital property. The majority fails to recognize the modifying phrase "in and to any and all property now owned by the 'HUSBAND,' " which immediately follows the phrase relied upon by the majority. By selectively quoting from the agreement, the majority seeks to alter the legal effect of the agreement.

In stating that "all other rights arising out of the marriage relationship" includes defendant's right to equitable distribution, the majority overlooks N.C.G.S. § 50-20(k):

> The rights of the parties to an equitable distribution of marital property are a species of common ownership, the rights of the respective parties vesting at the time of the filing of the divorce action.

According to this statute, the right to equitable distribution does not arise out of the marital relationship but arises from the filing of the divorce action. It is a right attendant to divorce, not marriage. Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C. L. Rev. 247 (1983). While the marriage relationship exists, there is no right to equitable distribution. This linchpin to the majority's opinion fails.

The right to equitable distribution of marital property is a species of common ownership. N.C.G.S. § 50-20(k) (1984). A new concept of ownership is created by the statute, unknown at common law. The purpose of the statute is to equitably distribute "marital" property, not "separate" property, upon dissolution of the marriage. *Mims v. Mims*, 305 N.C. 41, 286 S.E. 2d 779 (1982). This being a new right, any alleged waiver should be scrutinized carefully. As defendant did not have a right to equitable distribution at the time the separation agreement was entered into, it is unreasonable to assume, as the majority does, that defendant intended to relinquish and waive a right that she did not then have and might not ever have. She signed the separation agreement on 8 July 1983, and the action for divorce was not filed until 21 January 1985. During this eighteen-month period either party could have died, the parties could have reconciled, or the divorce action might never have been filed for various reasons. At the time defendant signed the separation agreement, she could not be positive that she would ever have a right to equitable distribution. Knowledge of the *existence* of the right is essential to the waiver of the right. *Jones v. Insurance Co.*, 254 N.C. 407, 119 S.E. 2d 215 (1961); *Swartzberg v. Insurance Co.*, 252 N.C. 150, 113 S.E. 2d 270 (1960); *Brady v. Benefit Asso.*, 205 N.C. 5, 169 S.E. 823 (1933). There is no evidence in this record to show that defendant thought that she had a right to equitable distribution when she signed the separation agreement, or that she intended to waive her right to equitable distribution at that time, or that the right to equitable distribution existed for her benefit at that time. The language of the separation agreement does not support the majority's conclusion that it encompasses a complete settlement of

the parties' marital rights, as well as defendant's right to equitable distribution.

This is not to say that a party may not waive her right to equitable distribution by the execution of a valid separation agreement. But in order to do so, the clear intention of the party to waive a future right must be manifest. This could be done, for example, by a statement: "I hereby waive and relinquish all rights that I now have, or which may hereafter become vested in me, to equitable distribution pursuant to N.C.G.S. §§ 50-20 and -21." There being no such clear manifestation of intent in this case, I vote to affirm the decision of the Court of Appeals.

I am authorized to state that Justice MITCHELL joins in this dissenting opinion.

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MICHAEL MORRISON AND WANDA JEAN MORRISON v. SEARS, ROEBUCK & COMPANY v. COLBY FOOTWEAR INC. AND COLBY MACHINE CORPORATION v. YORK HEEL OF MAINE, INC.

No. 267PA86

(Filed 7 April 1987)

1. **Sales § 6.1— defective shoe heels—summary judgment for seller improper**

Defendant Sears was not entitled to summary judgment on plaintiffs' claim for breach of the implied warranty of merchantability arising from the collapse of a shoe heel where plaintiffs presented the deposition testimony of a manufacturing consultant and former employee of the company which manufactured the heel that the heels of the shoes in question were made of a type of plastic known as urethane, and affidavits from an expert engineer that the left heel was more flexible than normal, did not meet American footwear industry practices for quality, lacked sufficient rigidity due to an improperly formulated plastic compound to adequately support a 125 to 135 pound woman under working and walking conditions in an office environment, and was therefore not suitable for the purpose for which it was designed. N.C.G.S. 25-2-314.

2. **Sales §§ 6.1, 22.1— defective shoe heels—breach of implied warranty of merchantability—products liability defense applicable**

In an action for breach of the implied warranty of merchantability brought by a purchaser of a pair of high heel shoes after one heel collapsed, defendant Sears was not entitled to summary judgment under N.C.G.S. § 99B-2 on the theory that it had no reasonable opportunity to inspect the shoes. The defenses of N.C.G.S. § 99B-2(a) to products liability actions apply to

such actions when brought on the theory of breach of implied warranty of merchantability under the Uniform Commercial Code; however, the facts controlling the applicability of the defenses are in dispute in this case.

Justice MEYER dissenting.

ON appeal of a decision of the Court of Appeals, 80 N.C. App. 224, 341 S.E. 2d 40 (1986) which affirmed a judgment entered by *Rousseau, J.*, on 21 November 1984 in Superior Court, WILKES County. Heard in the Supreme Court 10 February 1987.

*Franklin Smith for the plaintiff appellants.*

*Moore, Willardson & Lipscomb, by Larry S. Moore and William F. Lipscomb, for the defendant appellee Sears, Roebuck & Company.*

MITCHELL, Justice.

The sole issue before us is whether the Court of Appeals erred in affirming the trial court's entry of summary judgment for the defendant Sears, Roebuck and Company (hereinafter "Sears") on the plaintiffs' claims for a breach of an implied warranty of merchantability. We hold that the Court of Appeals erred in that regard.

The plaintiffs, Wanda Jean Morrison and her husband, Michael Morrison, brought suit against Sears alleging that Mrs. Morrison bought a pair of high-heeled shoes from a Sears store in the spring of 1981. They alleged that on 2 April 1981, the second time she wore the shoes, the left heel gave way and buckled under. This caused her to fall and sustain a serious back injury which required surgery to correct. Mrs. Morrison sought to recover for damages resulting from her injury, and Mr. Morrison sought damages for loss of consortium. They brought their claims on both the theory of breach of implied warranty of merchantability and the theory of negligence, alleging that Sears had failed to market a reasonably safe product fit for ordinary use and had failed to warn the plaintiffs of the defect.

Sears filed a third-party complaint against Colby Footwear, Inc., the manufacturer of the shoes, and Colby Machine Corporation. The plaintiffs were thereafter permitted to amend their complaint to add Colby Footwear, Inc. and Colby Machine Cor-

poration as original defendants. The plaintiffs were also permitted to file an amended complaint which added York Heel of Maine, Inc., the manufacturer of the heel, as an additional party defendant.

The trial court granted summary judgment in favor of the defendant Sears and allowed the motion to dismiss by York Heel of Maine, Inc. The trial court also granted summary judgment in favor of Colby Machine Corporation but not Colby Footwear, Inc. Sears took a voluntary dismissal of its claims against the third-party defendants, Colby Footwear, Inc. and Colby Machine Corporation.

The plaintiffs appealed to the Court of Appeals assigning as error only the trial court's entry of summary judgment in favor of Sears. The Court of Appeals affirmed that summary judgment. This Court allowed the plaintiffs' petition for discretionary review of the Court of Appeals' decision, limited to the question of whether the Court of Appeals erred in affirming the trial court's summary judgment for the defendant Sears with regard to the plaintiffs' claims based on the theory of breach of warranty of merchantability.

By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a *prima facie* case at trial or be able to surmount an affirmative defense. *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E. 2d 325, 335 (1981). "The party moving for summary judgment must establish the lack of any triable issue by showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Watts v. Cumberland County Hosp. System*, 317 N.C. 321, 322-23, 345 S.E. 2d 201, 202 (1986); *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). "[A]ll inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Dickens v. Puryear*, 302 N.C. at 453, 276 S.E. 2d at 335, quoting *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E. 2d 189, 194 (1972). Upon a motion for summary judgment by a defendant, a plaintiff "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 defense." *Dickens v. Puryear*, 302 N.C. at 453, 276 S.E. 2d at 335.

To prove a breach of implied warranty of merchantability under N.C.G.S. § 25-2-314,

> a plaintiff must prove, first that the goods bought and sold were subject to an implied warranty of merchantability; second, that the goods did not comply with the warranty in that the goods were defective at the time of sale; third, that his injury was due to the defective nature of the goods; and fourth, that damages were suffered as a result. *Tennessee-Carolina Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E. 2d 181 (1974); *Burbage v. Atlantic Mobilehome Suppliers Corp.*, 21 N.C. App. 615, 205 S.E. 2d 622 (1974). The burden is upon the purchaser to establish a breach by the seller of the warranty of merchantability by showing that a defect existed at the time of the sale. *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E. 2d 573 (1975).

*Cockerham v. Ward*, 44 N.C. App. 615, 624-25, 262 S.E. 2d 651, 658, *disc. rev. denied*, 300 N.C. 195, 269 S.E. 2d 622 (1980).

The defendant Sears has argued before this Court that it was entitled to summary judgment as to the implied warranty of merchantability claims for two reasons. Sears contends that the plaintiffs did not meet their burden of proof because they came forward with no forecast of evidence that a defect existed in the shoe at the time of sale. Sears also contends that N.C.G.S. § 99B-2 provides it a defense in this case because Sears had no reasonable opportunity to inspect which, in the exercise of reasonable care, would have revealed the existence of the alleged defect.

**[1]** The plaintiffs alleged in their complaint that the shoes purchased "looked to be of excellent quality," but that the soles and heels are merely cast plastic without any type of metal support. As a result, when pressure is applied to the heels, they collapse easily. Therefore, the plaintiffs alleged that at the time of sale the shoes were not fit for the ordinary purpose for which they are used, due to defective design and construction.

The plaintiffs presented evidence through the deposition testimony of Marshall Brim, a manufacturing consultant and former employee of York Heel of Maine, Inc., that the heels of the

shoes in question are made of a type of plastic known as urethane. The plaintiffs also presented an affidavit and "supplemental affidavit" of B. Everett Gray, an engineer to be tendered as an expert, apparently in the field of footwear. The affidavit included a report prepared by Gray upon his examination of the shoes in question. The report indicated that Gray tested the shoes on 19 July 1984 to determine the amount of force required to deflect the heels, i.e., to move the heels of the shoes forward toward the toes. He determined that the right heel met the industry standard, but that the left heel was more flexible than normal. Therefore, it did not meet the American footwear industry practices for quality. Gray's "supplemental affidavit" contained his opinion that the heel of the left shoe sold to Mrs. Morrison lacked sufficient rigidity, due to an improperly formulated plastic compound, to adequately support a 125 to 135 pound woman under walking and working conditions in an office environment. He concluded, therefore, that the left shoe was "not suitable for the purpose for which [it] . . . was designed for use by a consumer."

In light of the principles applicable to motions for summary judgment and those applicable to claims for breach of implied warranty of merchantability under the Uniform Commercial Code, we conclude that such a forecast of evidence by the plaintiffs was sufficient to demonstrate that they will be able to make out at least a *prima facie* case that the shoe was defective at the time Sears sold it to Mrs. Morrison in 1981. Sears was not entitled to summary judgment in its favor on the ground that the plaintiffs had failed to make a sufficient forecast of evidence.

**[2]** We next turn to Sears' contention that N.C.G.S. § 99B-2(a) provides it with a defense in this case. That statute provides in pertinent part, that:

> No product liability action, except an action for breach of express warranty, shall be commenced or maintained against any seller when the product was acquired and sold by the seller in a sealed container or when the product was acquired and sold by the seller under circumstances in which the seller was afforded no reasonable opportunity to inspect the product in such a manner that would have or should have, in the exercise of reasonable care, revealed the existence of the condition complained of, unless the seller damaged or mishandled the product while in his possession . . . .

N.C.G.S. § 99B-2(a) (1985). Sears has argued before this Court that the legislature intended that N.C.G.S. § 99B-2(a), a part of the Products Liability Act, be available as a defense to actions for breach of an implied warranty of merchantability brought under the Uniform Commercial Code. We agree.

A basic rule of statutory construction is that the intent of the legislature controls. *Campbell v. Church*, 298 N.C. 476, 484, 259 S.E. 2d 558, 564 (1978). "The intent of the Legislature may be ascertained from the phraseology of the statute as well as the nature and purpose of the act and the consequences which would follow from a construction one way or another." *Id.*

The implied warranty of merchantability arises under the Uniform Commercial Code upon the *sale* of goods when, as alleged in the present case, the seller is a merchant with respect to goods of the kind sold. N.C.G.S. § 25-2-314(1) (1986) (emphasis added). The term "product liability action" as used in the Products Liability Act includes "any action brought for or on account of personal injury, death or property damage caused by or resulting from . . . the *selling* . . . of any product." N.C.G.S. § 99B-1(3) (1986) (emphasis added). Therefore, an action for breach of implied warranty of merchantability under the Uniform Commercial Code is a "product liability action" within the meaning of the Products Liability Act if, as here, the action is for injury to person or property resulting from a sale of a product.

Further, N.C.G.S. § 99B-2(a) specifically excepts actions for breach of *express* warranties from the defenses it provides in product liability actions. To aid in statutory construction, the doctrine of *expressio unius est exclusio alterius* provides that the mention of such specific exceptions implies the exclusion of others. *Campbell v. Church*, 298 N.C. 476, 482, 259 S.E. 2d 558, 563 (1979); *Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 43 L.Ed. 341 (1898). Therefore, we conclude that in products liability actions arising from breaches of *implied* warranties, unlike those arising from breaches of *express* warranties, the defenses provided by N.C.G.S. § 99B-2(a) are available to defendants.

Additionally, we note that subsection (b) of N.C.G.S. § 99B-2 incorporates by reference the Uniform Commercial Code's definition of a "buyer" and provides an additional cause of action for breach of implied warranty in certain situations not expressly

covered by the Code. These facts strengthen our view that the General Assembly, when enacting the Products Liability Act after the Uniform Commercial Code had been adopted, did not intend that the two acts be mutually exclusive, but intended an harmonious integration of the two. We hold that the defenses of N.C.G.S. § 99B-2(a) to products liability actions apply to such actions when brought on the theory of breach of implied warranty of merchantability under the Uniform Commercial Code.

Although the defenses provided by N.C.G.S. § 99B-2(a) may be available to Sears in the present case, we do not address or decide their actual applicability. Nor do we decide at this point that the trial court will be required to submit any such defense for the jury's consideration at trial. We only conclude that summary judgment for Sears was improper.

The plaintiffs' forecast of evidence tends to show that the facts controlling the applicability of the defenses provided by the statute are in dispute in this case. Drawing all reasonable inferences in favor of the plaintiffs, we conclude that their forecast of evidence tended to show that Sears possessed testing equipment at the time it sold the shoes in question to Mrs. Morrison which could have detected the defect in the shoe that is alleged to have buckled and caused her to fall. For purposes of withstanding Sears' motion for summary judgment, such evidence was sufficient to demonstrate that the plaintiffs will be able at trial to surmount the affirmative defense available under the statute to a defendant who had no reasonable opportunity to inspect.

Accordingly, the opinion of the Court of Appeals affirming summary judgment for the defendant Sears is reversed. This case is remanded to that Court for further remand to the Superior Court, Wilkes County, for trial.

Reversed and remanded.

Justice MEYER dissenting.

A brief recitation of particular facts from the forecast of the evidence is necessary to an understanding of this dissenting opinion. Plaintiffs' Complaint alleges that Wanda Jean Morrison purchased a pair of high-heeled shoes from defendant Sears' store in Winston-Salem in the spring of 1981 and that while wearing these

shoes for the second time on April 2, 1981, the heel of the left shoe buckled causing plaintiff to fall and receive injuries. Plaintiffs allege that the left heel gave way because the material of which it was made was of inadequate strength and quality due to *defective design and construction.* Plaintiffs' asserted claims against Sears for breach of implied warranty are the only claims before us.

Through their pleadings and extensive discovery, the parties have established the following: Sears purchased the shoes in question from Colby Footwear, Inc. The heel in question, which plaintiffs contend "buckled under," and sole of the shoe was a separate unit which Colby purchased from York Heel of Maine, Inc. which manufactured the heel.

Colby Footwear, Inc. is in the business of manufacturing women's shoes. Colby requested York Heel to make this particular type of heel so Colby could use it in manufacturing shoes of the type in question. Colby provided York Heel with the design specifications and specified the materials it wanted the heels made of. York Heel then produced some models of the heels for Colby and Colby approved them. York Heel then made the molds for the heels which were paid for and owned by Colby. Colby controlled the manufacturing process in terms of the type of heel, the type of materials and the type of structure.

After the heel and sole unit was completed Colby attached the leather upper portion of the shoe to the heel and sole unit. During Colby's manufacturing process the shoes were inspected at various steps. The completed shoes were sent to Sears' warehouse in Garland, Texas.

All shoes offered for retail sale by Sears are delivered to Sears in individual boxes which are contained in shipping cases. After receipt of such cases, the individual boxes containing each pair of shoes are removed from the cases and placed in inventory where they remain until requested by and shown to a customer. If the customer does not buy the shoes they are returned to the individual boxes which are returned to inventory until requested by another customer. Shoes are handled carefully at all times before they are sold to a customer to prevent damage from occurring, and any shoes which appear to be damaged are removed from inventory and not sold. Sears does not remove shoes from

boxes to inspect them upon receipt from the manufacturer, and in its retail sales stores, are not equipped to conduct inspections of shoes other than inspections for damage which is readily observable by any person who may look at the shoes.

As stated in plaintiffs' Complaint, the shoes in question looked to be of excellent quality at the time of sale in 1981. Even three years later in 1984 there was no visible defect in the shoes in question. N.C.G.S. § 99B-2(a) provides in pertinent part:

> No product liability action, . . . shall be commenced . . . against any seller when the product was acquired and sold by the seller . . . under circumstances in which the seller was afforded no reasonable opportunity to inspect the product in such a manner that would have or should have, in the exercise of reasonable care, revealed the existence of the condition complained of, unless the seller damaged or mishandled the product while in his possession. . . .

(Other provisions of the statute apparently not pertinent here relate to the exclusion from the operation of the statute of actions for breach of express warranty, and to actions for breach of implied warranty against a seller only when the *manufacturer* is not subject to the jurisdiction of our state courts or is insolvent.) Otherwise stated, the statute clearly provides that actions based on the theory of *implied* warranty may not be brought against "any seller when the product was acquired and sold by the seller . . . under circumstances in which the seller was afforded no reasonable opportunity to inspect the product in a manner which would have . . . in the exercise of reasonable care revealed the existence of the condition complained of, unless the seller damaged . . . the product while in his possession."

The rule stated in this statute is essentially the common law rule applicable to *negligence claims* that a retailer has no duty to test or inspect a product *for latent conditions or defects.*

> (A) retailer who purchases from a reputable manufacturer and sells the product under circumstances where he is a mere conduit of the product is under no affirmative duty to inspect or test for *a latent defect*, and, therefore, liability cannot be based on a failure to inspect or test in order to discover such defect and warn against it.

(Emphasis added.) 2 Frumer and Friendman, Products Liability Sec. 18.08(1)(a) (1979). In cases like this one where the retail seller does not manufacture the product, he may assume that the manufacturer has done his duty in properly constructing the article and in not placing upon the market a commodity which is defective and likely to inflict injury. *See Cockerham v. Ward*, 44 N.C. App. 615, 262 S.E. 2d 651, *disc. rev. denied*, 300 N.C. 195, 269 S.E. 2d 622 (1980) (quoting *General Motors Corp. v. Davis*, 141 Ga. App. 495, 223 S.E. 2d 825 (1977)). The law does not require a retailer to send shoes it acquires for sale to the public to a testing laboratory to be tested for latent defects. It is clear from the forecast of the evidence in this case that no inspection short of one by an expert with sophisticated scientific equipment would have disclosed the alleged latent defect in the design, composition and construction of the shoe heel in question.

The uncontradicted evidence in this case shows that Sears is not equipped to conduct this type of inspection in its retail stores. Plaintiffs obtained an affidavit from B. Everett Gray of St. Louis, Missouri which states he has personal knowledge that Sears has testing laboratories which are suitable for the testing of footwear. Apparently the majority believes that because Sears allegedly has such testing laboratories, presumably somewhere in the United States, it had a "reasonable opportunity to inspect" the shoes in a manner that would have, or should have, revealed the alleged defect. I do not subscribe to any such belief.

Even if I agreed that Sears had a duty to inspect for latent defects, and I most assuredly do not, I find it beyond the pall of reason to hold that, because Sears had laboratories at some undisclosed location capable of testing footwear, a jury question is presented as to Sears' "reasonable opportunity to inspect" pursuant to our statute.

The trial court properly granted Sears' motion for summary judgment. I vote to affirm the decision of the Court of Appeals.

STATE OF NORTH CAROLINA v. ROCHELLE DANIEL

No. 85A85

(Filed 7 April 1987)

1. **Criminal Law § 138.27— aggravating factors—victim's youth—position of trust—same evidence not used for both factors**

In a sentencing hearing for second degree murder of defendant's child, the trial court did not improperly use the same evidence of the victim's infancy in finding as aggravating factors that the victim was very young and that defendant took advantage of a position of trust or confidence in order to commit the offense since the latter aggravating factor was not grounded in the youth of defendant's child but more fundamentally in the child's dependence upon defendant. N.C.G.S. § 15A-1340.4(a)(1).

2. **Criminal Law § 138.40— acknowledgment of wrongdoing mitigating circumstance—meaning of "voluntary"**

An acknowledgment of wrongdoing is "voluntary" within the meaning of the statutory voluntary acknowledgment of wrongdoing mitigating circumstance if the acknowledgment is admissible against defendant. N.C.G.S. § 15A-1340.4(a)(2)l.

3. **Criminal Law § 138.40— voluntary acknowledgment of wrongdoing mitigating circumstance—defendant's motives irrelevant**

The statutory voluntary acknowledgment of wrongdoing mitigating circumstance should be found by the court where the evidence shows an unrepudiated acknowledgment of guilt, admissible against defendant, made before arrest or at an early stage in the criminal process, even if defendant's motives for the acknowledgment are suspect. *State v. Sweigart*, 71 N.C. App. 383, 322 S.E. 2d 188 (1984) is overruled to the extent it is inconsistent with such holding.

4. **Criminal Law § 138.30— erroneous failure to find statutory mitigating circumstance—necessity for new sentencing hearing**

Whenever there is error in a sentencing judge's failure to find a statutory mitigating circumstance and a sentence in excess of the presumptive is imposed, the matter must be remanded for a new sentencing hearing.

Justice MEYER dissenting.

APPEAL by defendant from judgment of *Allen, J.*, entered at the 1 October 1984 Criminal Session of BUNCOMBE County Superior Court, imposing a life sentence pursuant to defendant's plea of guilty to second degree murder. Reargued 11 March 1987.

*Lacy H. Thornburg, Attorney General, by Steven Mansfield Shaber and Catherine C. McLamb, Assistant Attorneys General, for the state.*

*J. Robert Hufstader, Public Defender, for defendant appellant.*

EXUM, Chief Justice.

Defendant pled guilty to murdering her newborn child. The sentence imposed, life imprisonment, is in excess of the presumptive sentence for second degree murder, which is fifteen years' imprisonment. N.C.G.S. §§ 15A-1340.4(f) (1983), 14-17 (1986). The first question presented is whether the trial court erred in finding as aggravating factors that the victim was very young and that defendant took advantage of a position of trust or confidence. The second question presented is whether the trial court erred in failing to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing before her arrest or at an early stage in the investigation. We find error only in the trial court's failure to find this mitigating circumstance and order that defendant be given a new sentencing hearing.

On 16 April 1984 a criminal investigator for the Buncombe County Sheriff's Department was called to investigate the contents of a plastic garbage bag that had been found near Black Mountain, North Carolina. The bag contained the remains of a black female infant and household trash, including a discarded piece of schoolwork bearing the name of defendant's younger sister. The officer traced the paper to the home of defendant's mother, advised the mother and her three daughters of their rights, and questioned them about the garbage bag. None acknowledged having any information regarding the bag or its contents.

Later the same day a second investigator interviewed defendant at her place of work. Defendant reiterated that she knew nothing about the bag or the baby. That evening, defendant and her mother and sisters agreed to come to the sheriff's department for polygraph tests and additional interviews. During questioning preliminary to the polygraph test, defendant was told the state had evidence indicating she was the mother of the child. The investigating officer testified that defendant asked about its birth-

date "in an attitude of, 'If you know so much, then when was the child born?' " When the officer responded that it had been born the preceding Wednesday, defendant grew silent and began to cry. Subsequently she was advised of her *Miranda* rights, signed a waiver, and recounted the events occurring on Wednesday, 11 April.

Defendant said she had given birth shortly after her younger sisters had left for school. Her baby appeared healthy at birth and had gone to sleep shortly afterwards. When the infant later awakened and began to cry, defendant grew concerned that her mother's boyfriend would hear the cries. Defendant got a garbage bag from the kitchen, laid old clothes in the bottom, and placed the child on top of them. She then put more clothes on top of the child to muffle her cries. Anxious that her mother's boyfriend would soon arise and discover the infant, defendant took the bag to her car and drove around awhile, looking for a place to dispose of the bag. She eventually drove to a wooded area on a road where her mother had once lived and tossed the bag over onto the side of the road. Defendant also said that two years earlier she had given birth after an extremely long and painful labor to a deformed male whose breathing was "ragged." She said she had wrapped the infant in a blanket, deposited it in a garbage bag, and disposed of it in the woods behind her house. Investigating officers could not find this child's remains.

After defendant made these statements she was placed under arrest and charged in a warrant with the murder of the child born in April 1984. Subsequently defendant was indicted for the first degree murder of this child. Pursuant to a plea arrangement, defendant pled guilty to murder in the second degree. A sentence commitment was not part of the arrangement. Under these circumstances, a sentencing judge must consider the aggravating and mitigating factors listed in N.C.G.S. § 15A-1340.4(a). *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983). Accordingly, the trial court found as mitigating factors that defendant had no record of criminal convictions, that she suffered from a mental condition that was insufficient to constitute a defense but that significantly reduced her culpability, and that she had been a person of good character or had enjoyed a good reputation in the community in which she lived. In addition to these factors, the trial judge found:

> The accused has been a good and responsible sister. The accused has been an obedient and extremely helpful daughter. The conduct of the accused between the offense date and sentencing date has been exemplary. The accused demonstrated a need and desire to assist in providing for her family. The accused fully cooperated with the investigating officers.

Despite these additional findings, the trial court refused to find the statutory factor that defendant had voluntarily acknowledged wrongdoing in connection with the offense to law enforcement officers prior to arrest or at an early stage of the criminal process. N.C.G.S. § 15A-1340.4(a)(2)l (1983).

**[1]** The trial court found as aggravating factors that the victim was very young and that defendant took advantage of a position of trust or confidence in order to commit the offense. N.C.G.S. § 15A-1340.4(a)(1)j, n (1983). Defendant now contends that the trial court's finding of the two aggravating factors was erroneously based on the same fact—the victim's infancy—in derogation of N.C.G.S. § 15A-1340.4(a)(1), which provides that "the same item of evidence may not be used to prove more than one factor in aggravation."

The fact of infancy was obviously the basis of the trial court's finding that the victim was very young. However, the aggravating factor that the defendant took advantage of a position of trust or confidence was grounded not in the youth of her child but more fundamentally in the child's dependence upon her. A finding of this aggravating factor depends no more on the youth of the victim than it does on the notion that confidence or trust in the defendant must repose consciously in the victim. Such a finding depends instead upon the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other. A relationship of trust or confidence existed because defendant was the child's mother and because she was singularly responsible for its welfare. The abuse of her parental role relates to defendant's character and conduct and was reasonably related to the purposes of sentencing. *State v. Goforth*, 67 N.C. App. 537, 539, 313 S.E. 2d 595, 596, *cert. denied*, 311 N.C. 765, 321 S.E. 2d 149 (1984). We therefore find it proper that both the child's youth and a relationship of trust or confidence were considered as independent aggravating factors in determining defendant's sentence.

The trial court erred, however, in refusing to find that "[p]rior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing." N.C.G.S. § 15A-1340.4(a)(2)l. "When evidence in support of a particular mitigating or aggravating factor is uncontradicted, substantial, and there is no reason to doubt its credibility," it is error for the trial court not to find that factor. *State v. Jones*, 309 N.C. 214, 218-19, 306 S.E. 2d 451, 454 (1983).

All the evidence shows, without contradiction and with no reason to doubt its credibility, that defendant made her inculpatory statement before her arrest. The state concedes this statement was sufficient to "clearly establish her guilt of . . . a murder." We agree. Defendant's statement sufficed to provide the state not only with probable cause to arrest her, but also with enough evidence to convict her. The statement constituted a confession of guilt to the crime charged. We held in *State v. Graham*, 309 N.C. 587, 308 S.E. 2d 311 (1983), that a confession made before the issuance of a warrant or information, before the return of a true bill of indictment or presentment, or before arrest—whichever comes first—entitles defendant to a finding of the voluntary acknowledgment of wrongdoing mitigating circumstance.[1] Under *Graham*, defendant was entitled to have her acknowledgment of wrongdoing found as a mitigating circumstance provided it was voluntary.

The state argues that because defendant initially denied her guilt, confessed only after police indicated they knew the baby was hers, and never expressed any remorse about the crime, her confession was neither voluntary nor an acknowledgment of wrongdoing within the meaning of the statutory mitigating circumstance. The state takes the position that the policy behind this mitigating circumstance "is that a criminal who shows remorse for his actions displays a real possibility of rehabilitation which, in turn, must be considered in mitigation of his sentence."

We agree that this is the policy underlying this particular circumstance. *Id.; State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689

1. *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985), held that a defendant who later retracts or repudiates an earlier "inculpatory statement" that might have qualified for this mitigating circumstance is not entitled to a finding of the circumstance's existence. Here there was no retraction.

(1983). We note also that remorse is a subjective state of mind which is often not apparent; if apparent, it may not be sincere. In *State v. Graham*, the Court made clear that the existence of remorse, a subjective state of mind, was for the fact finder to determine. The Court also recognized that a confession may or may not be motivated by remorse. We held, however, that "[t]he defendant's motive in acknowledging his guilt at an early stage does not go to the *existence* of this mitigating factor, but goes to the *weight* the trial judge must give that factor." *Graham*, 309 N.C. at 590-91, 308 S.E. 2d at 314 (emphasis added). The Court further stated:

> On one end of the spectrum, a confession may be more than a simple admission of guilt, but rather an admission of culpability, responsibility, and remorse. As such, this factor becomes one of the most important and persuasive factors in mitigation of a defendant's sentence: embodied in the confession is the essence of the Fair Sentencing Act—a focus on the offender's individual culpability, his character and attitudes, and on the very real possibility of rehabilitation. On the other end of the spectrum the confession may be a simple admission of guilt, later challenged by motion to suppress as being the product of coercion, etc., or given for purposes of serving the defendant's own self-interests. Under these circumstances the factor, as we interpret it, becomes almost meaningless in terms of its mitigating value.

*Id.* at 591, 308 S.E. 2d at 315.

**[2]** As for the requirement that an acknowledgment of wrongdoing be "voluntarily" made, we hold that if the acknowledgment is admissible against defendant, it is voluntary within the meaning of this mitigating circumstance.

**[3]** We think it wise to make the test for the existence of this mitigating circumstance as objective as possible. "[A]ll circumstances which are transactionally related to the admitted offense and which are reasonably related to the purposes of sentencing must be considered during sentencing." *State v. Melton*, 307 N.C. at 378, 298 S.E. 2d at 679. Such circumstances include an unrepudiated acknowledgment of guilt, admissible against defendant, made before arrest or at an early stage in the criminal process, even if defendant's motives for the acknowledgment are

suspect. Defendant's pre-arrest statements to investigators meet this test, and therefore the trial court erred in not finding the statutory voluntary acknowledgment of wrongdoing mitigating circumstance. To the extent that *State v. Sweigart*, 71 N.C. App. 383, 322 S.E. 2d 188 (1984), is inconsistent with our holding in this case, it is overruled.

**[4]** We also conclude that failure to find this mitigating circumstance entitles defendant to a new sentencing hearing. We held in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689, that "in every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing." *Id.* at 602, 300 S.E. 2d at 701. The rationale for our holding in *Ahearn* was stated as follows:

> [A]ny error in a sentencing procedure gives rise to a twofold analysis. Reliance on a factor in aggravation determined to be erroneous may or may not have affected the balancing process which resulted in the decision to deviate from the presumptive sentence. Certainly there will be many cases where, on remand, the trial judge will properly reach the same result absent the erroneous finding. We repeat that the weight to be given any factor is within the sound discretion of the sentencing judge. The judge is not required to engage in a numerical balancing process. By the same token, our appellate courts should not attempt to second-guess the sentencing judge with respect to the weight given any particular factor. Nor should appellate courts engage in numerical balancing in order to determine whether a sufficient number of aggravating factors remain to 'tip the scales.'
>
> More important, however, it must be assumed that every factor in aggravation measured against every factor in mitigation, with concomitant weight attached to each, contributes to the *severity* of the sentence—the quantitative variation from the norm of the presumptive term. It is only the sentencing judge who is in a position to re-evaluate the severity of the sentence imposed in light of the adjustment.

*Id.* at 602, 300 S.E. 2d at 700-01.

This rationale applies with equal force to a sentencing judge's erroneous failure to find a circumstance that the legisla-

ture has determined to have mitigating value. It is simply impossible for an appellate court to say what effect the error in either case might have had on the ultimate sentence. Unlike capital sentencing procedures,[2] where a jury has only two choices, death or life imprisonment, a sentencing judge under the Fair Sentencing Act has a broad range of options. The judge's findings concerning aggravating and mitigating circumstances influence not only the decision whether to vary the sentence from the presumptive term, but also the decision as to *how much* to vary it.

For these reasons we conclude that whenever there is error in a sentencing judge's failure to find a statutory mitigating circumstance and a sentence in excess of the presumptive term is imposed, the matter must be remanded for a new sentencing hearing.

For error in failing to find the early acknowledgment of wrongdoing mitigating circumstance defendant is given a

New sentencing hearing.

Justice MEYER dissenting.

Believing as I do that defendant's acknowledgment of wrongdoing was not "voluntarily" made and that it thus does not meet the requirements of N.C.G.S. § 15A-1340.4(a)(2)l, I respectfully dissent.

On 16 April 1984 a criminal investigator in the Buncombe County Sheriff's Department was called to investigate the contents of a plastic garbage bag that had been found near Black Mountain, North Carolina. The bag contained the remains of a black female infant and some household trash, including a discarded piece of schoolwork bearing the name of defendant's younger sister. The officer traced the paper to the home of defendant's

2. In capital sentencing procedures, erroneous submission of an aggravating circumstance, *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398, *rehearing denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456 (1983), or erroneous failure to submit a mitigating circumstance, *State v. Pinch*, 301 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *rehearing denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983), is not reversible *per se*; both kinds of error are subject to a harmless error analysis.

mother, advised the mother and her three daughters of their rights, and questioned them about the garbage bag. All denied having any information regarding the bag or its contents.

Later the same day a second investigator interviewed defendant at her place of work. Defendant reiterated that she knew nothing about the bag or the baby. That evening defendant and her mother and sisters agreed to come to the sheriff's department for polygraph tests and additional interviews. During questioning preliminary to the polygraph test, defendant was told the state had evidence indicating she was the mother of the child. The investigating officer testified that defendant asked about its birthdate "in an attitude of, 'If you know so much, then when was the child born?' " When the officer responded that it had been born the preceding Wednesday, defendant grew silent and began to cry. Subsequently she was again advised of her rights under *Miranda* and, after waiving them, recounted the events occurring on Wednesday, 11 April.

Defendant said she had given birth shortly after her younger sisters had left for school. Her baby appeared healthy at birth and had gone to sleep shortly afterwards. When the infant later wakened and began to cry, defendant grew concerned that her mother's boyfriend would hear the cries. Defendant got a garbage bag from the kitchen, laid old clothes in the bottom, and placed the child on top of the clothes and more clothes on top of the child to muffle her cries. Anxious that her mother's boyfriend would soon arise and discover the infant, defendant took the bag to her car and drove around awhile, looking for a place to dispose of the bag. She eventually drove to a wooded area on a road where her mother had once lived and tossed the bag over onto the side of the road. Defendant also said that two years earlier she had given birth to a male infant whose breathing had been "ragged." She said she had also wrapped this infant in a blanket, deposited it in a garbage bag, and disposed of it in the woods behind her house. Investigating officers could not find this child's remains. After defendant made these statements she was placed under arrest and charged in a warrant with the murder of the child born in April 1984.

The defendant first denied that she had given birth or knew anything about the baby, even after being confronted with the

fact that trash found in the bag with the body contained her younger sister's school papers. Only when faced with apparently overwhelming evidence of her guilt and the prospect of a polygraph test which might reveal her deception did she give up her futile denials and acknowledge that the baby was hers and describe the events surrounding its birth and disposal. Defendant evidenced no remorse for the death of either this or her previous child. I do not believe that under these circumstances the trial judge was compelled to find that the acknowledgment was voluntary within the requirement of the statutory mitigating factor.

I also disagree with the majority's holding that "if the acknowledgment [of guilt] is admissible against the defendant, it is voluntary within the meaning of this mitigating circumstance."

Whether this defendant was entitled to the mitigating circumstance depends on the meaning we attach to the word "voluntarily." The General Assembly clearly meant that more be shown than simply that the defendant acknowledged wrongdoing before arrest or early in the process, for it specifically provided that before the acknowledgment qualifies as a statutory mitigating factor, the acknowledgment be voluntary.

In the context of criminal prosecutions and confessions, the word "voluntary" has not been a term of easy application and universally accepted meaning. The majority holds that "if the acknowledgment is admissible against the defendant, it is voluntary within the meaning of this mitigating factor." However, the General Assembly did not provide that the acknowledgment of wrongdoing should be a mitigating factor depending upon its constitutional admissibility; rather the statute mandates that the trial judge determine whether the acknowledgment was given "voluntarily."

Just as a defendant should not be denied this mitigating factor because other factors preclude its admissibility of a confession, he should not be automatically entitled to it as a matter of law because it was admitted against him. Admissibility of a confession may be denied because of factors, such as failure of the prosecuting authorities to give *Miranda* warnings (*Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966)) or failure to provide counsel, *Brewer v. Williams*, 430 U.S. 387, 51 L.Ed. 2d 424, *reh'g denied*, 431 U.S. 925, 53 L.Ed. 2d 240 (1977), which do not cause

the confession to be involuntary. Inadmissibility of the confession as evidence would not preclude use of the statement as a mitigating factor. Neither should a determination that the confession was given under circumstances that make it admissible as evidence at trial, and thus necessarily voluntary within the interpretation of Fifth Amendment requirements, automatically require the trial judge to find that it was given voluntarily within the meaning of N.C.G.S. § 15A-1340.4(a)(2)l. Indeed, this Court has already held that if a defendant retracts or repudiates a confession previously given, he is not entitled to this mitigating factor. *State v. Hayes*, 314 N.C. 460, 314 S.E. 2d 741 (1985).

I would construe the use of the word "voluntarily" in the statute to mean that the trial judge should be able to look not only at the time of the acknowledgment but at the circumstances and forces which led to the defendant's statement to determine whether the purposes which prompted the inclusion of the factor in the list of mitigating factors are served by the acknowledgment under the circumstances of the particular case. I believe that such construction is required by both reason and logic.

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STATE OF NORTH CAROLINA v. WILLARD DEAN NATIONS

No. 448A86

(Filed 7 April 1987)

1. **Criminal Law § 75.13— interview of defendant—social services worker—not agent of police**

The evidence supported the trial court's determination that a department of social services worker who interviewed defendant after his right to counsel attached and he had asserted his right to counsel was not an agent of the police and that his interview of defendant did not amount to interrogation prohibited by *Michigan v. Jackson*, 475 U.S. 625, 89 L.Ed. 2d 631 (1986).

2. **Criminal Law § 75.4— assertion of right to counsel—initiation of contact with police—subsequent confession**

The trial court could properly find that, after defendant had asserted his right to counsel, defendant initiated contacts with a social worker and a police officer which ultimately resulted in a voluntary confession where the court heard testimony that defendant expressed to a volunteer jailer a desire to confess; the jailer allowed a department of social services worker to interview defendant in connection with an unrelated charge; and defendant repeatedly expressed his desire to confess and clear his conscience.

**3. Criminal Law § 76.8— right to counsel—failure to find waiver "intelligently" made**

The standard of the validity of a sixth amendment waiver of the right to counsel is that it be voluntarily, knowingly and intelligently made. However, failure of the trial court to find that defendant "intelligently" waived his right to counsel did not invalidate the waiver where the court had before it competent evidence from which it could find that defendant "intelligently" waived this right.

**4. Rape and Allied Offenses § 2— first degree sexual offense statute—no partial repeal by another statute**

The first degree sexual offense statute, N.C.G.S. § 14-27.4, was not partially repealed by the enactment as part of the same legislative act of the substitute parent sexual offense statute, N.C.G.S. § 14-27.7. Furthermore, there was no merit to defendant's contention that the district attorney arbitrarily chose to prosecute him under § 14-27.4 rather than under § 14-27.7.

BEFORE *Kirby, J.*, at the 24 February 1986 Criminal Session of Superior Court, RUTHERFORD County, defendant was convicted of first-degree sexual offense and received the mandatory life sentence. Defendant appeals as a matter of right pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court 9 February 1987.

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

*Hugh J. Franklin for defendant-appellant.*

MEYER, Justice.

The primary issue presented is whether the trial court erred in denying defendant's motion to suppress his confession that was admitted into evidence during his trial for first-degree sexual offense against an eight-year-old boy. In an opinion in a related case, *State v. Nations*, 319 N.C. 329, 354 S.E. 2d 516 (1987) ("*Nations II*"; filed concurrently with this opinion), we address the admissibility of that confession in defendant's trial for first-degree sexual offense against a ten-year-old female.

Defendant also contends that the trial court erred in denying his motion to dismiss the indictment charging first-degree sexual offense under N.C.G.S. § 14-27.4, because that statute had been partially repealed by another statute.

For the reasons set forth below, we find no error.

On 25 September 1985, Detective Mike Wallace of the Rutherford County Sheriff's Department contacted defendant in connection with a report of child sexual abuse in Rutherford County. The defendant voluntarily went to the Rutherford County Jail. Prior to interviewing the defendant, Wallace advised him that he was investigating a child sex abuse case. Wallace told the defendant that he had previously interviewed a male victim and the victim's mother. Wallace also advised defendant of his *Miranda* rights. Defendant signed a waiver of these rights.

Shortly after the beginning of the interview, defendant asserted his right to the assistance of counsel. At that point, Wallace ceased talking with defendant and left the interview room. While defendant was still in the interview room, Wallace arrested him on a warrant charging that defendant had engaged in a sex offense with an eight-year-old male victim. Defendant was placed in the Rutherford County Jail.

On the evening of 5 October 1985, while in the Rutherford County Jail, defendant confessed to the offense for which he was charged. He also confessed to acts constituting sexual offense against a ten-year-old female child, for which he was subsequently indicted and convicted.

During a hearing on defendant's pretrial motion to suppress the confession, the trial court heard testimony from the defendant; Bob Hensley, of the Rutherford County Department of Social Services; Lieutenant David Petty, of the Rutherford County Sheriff's Department; Michael Wallace, of the Rutherford County Sheriff's Department; and Gerald Toney, a volunteer jailer on duty the evening defendant confessed to various illegal sexual acts with both children.

The testimony revealed that defendant was arrested on 25 September 1985, based upon a warrant charging first-degree sexual offense, in that he had engaged in a sexual offense with an eight-year-old male child. On 27 September 1985, a first appearance was held before a district court judge, at which time the court appointed counsel to represent defendant.

Approximately eight days later, on the evening of 5 October 1985, defendant remained in the Rutherford County Jail. That evening, he spoke with a volunteer jailer, Gerald Toney, and

stated that he was upset and wanted to talk with someone from "mental health." As Toney went to inform the jailer that defendant wanted to speak with someone, Bob Hensley, Supervisor of Protective Services with the Rutherford County Department of Social Services, was entering the jail. Hensley's visit to the jail was prompted by a telephone call he had received earlier that evening. A woman had informed him that defendant had sexually molested her daughter and that defendant was being held in the Rutherford County Jail. She further informed Hensley that there was a "possibility that he [defendant] would be released" that evening.

Gerald Toney told Hensley that defendant wanted to speak with someone from the mental health center. Toney then informed defendant that Hensley was there and mistakenly identified Hensley as someone from "mental health."

At the motion hearing in February 1986, Hensley testified as follows concerning his meeting with defendant:

> A. Mr. Nations and I talked privately in the lawyers booth at the jail. Mr. Nations asked me if my—if his conversation with me would be confidential. I explained to him that I could not assure that, that my job was to protect children and that that would be my first priority and that by General Statute, whenever I learned that there had been a commission of a crime that I had an obligation to report that to the District Attorney. Mr. Nations—I do want to back up a minute though. Mr. Nations did ask me when I first met with him was I from mental health and I told him no, that I was not, that I was from Social Services. Then after we went through the other, I explained to him that I had received a call from Sandra . . . and that she had told me that it was her understanding that her oldest daughter . . . had been sexually molested by him. Mr. Nations then went on to tell me that indeed this had happened, that since Sandra and the other child . . . were three or four years of age he had had oral sex with them on a regular basis for six or seven years. Also during this time, he did talk about . . . [this] situation and told me that the statements made by the . . . boy were also true.

Hensley also testified to the sequence of events that led to defendant's giving a statement containing his confession to law enforcement officials:

> A. Okay, he was upset and I asked him—I said, "[]Is there someone that I can call that you would like to talk with—a minister, a relative, or someone like that," and he said there was no one in the world that he knew he could talk with. And I said, well—I said, "You've told me some pretty serious stuff." I said, "Would you be willing to tell one of the officers this," and he said yes, he would, and it was at that point that I left the officer's cell and went and asked if someone could contact Mr. Petty to come down to the jail.
>
> Q. So that's how Petty was sent for?
>
> A. That's right.
>
> Q. It sprung from the defendant's request?
>
> A. Well, I asked him would he be willing to talk with an officer.
>
> Q. Did anybody put you up to saying that, Mr. Hensley? Were you acting on behalf of any officer?
>
> A. No, I was—Mr. Nations had told me that he felt better by getting this off his conscience by telling it.

Lieutenant Petty, of the Rutherford County Sheriff's Department, testified that on the evening of 5 October 1985 he was on call. The dispatcher at the jail called Petty and informed him that defendant wanted to speak with an officer. Petty then went to the jail, where defendant was speaking with Hensley, and asked defendant if he wanted to talk to him. When defendant responded affirmatively, Petty escorted him to his office and advised him of his *Miranda* rights. Defendant then signed a waiver of his *Miranda* rights. With defendant's consent, Petty then recorded defendant's statement in which he confessed to sexual acts for which he was being held, as well as to uncharged acts against a minor female.

After the confession was recorded, defendant was taken to another room. There, he began crying and beating his head against the door, and officials at the jail originated a petition to

have him committed to Broughton Hospital. (The transcript of the district attorney's examination of Officer Petty at the trial of *Nations II* indicates that this petition was subsequently dismissed.)

Having heard the testimony presented at the hearing on the motion to suppress, Judge James M. Long entered twenty-seven findings of fact. Significantly, he found that defendant initiated contacts with both Hensley and Lieutenant Petty on the evening of 5 October 1985; that defendant voluntarily made the incriminating statements to clear his conscience; that the visit by Bob Hensley to the defendant was not at the direction of any law enforcement agency charged with enforcement of criminal statutes; that Bob Hensley's visit to the defendant was not made for the purpose of obtaining information with which to initiate criminal proceedings against the defendant; and that at the time of the confession defendant was not suffering from any mental disorder that would impair his ability to evaluate his rights and liabilities in his situation.

Based on his findings of fact, Judge Long concluded as a matter of law that Bob Hensley was not an agent of the police or any other law enforcement agency and did not question defendant for the purpose of eliciting statements which could be used for criminal prosecution. Applying a "totality of the circumstances" test, Judge Long further concluded that the State carried its burden in showing that the contacts with Hensley and Petty which resulted in the confession were voluntarily initiated by the defendant and that the confession was not the product of custodial interrogation. Finally, the court concluded that defendant "understandingly and knowingly waived his right against self-incrimination and earlier invoked right to counsel."

At defendant's trial upon an indictment, proper in form, charging first-degree sexual offense against an eight-year-old male child, the State offered into evidence defendant's tape-recorded confession made on the evening of 5 October 1985.

I.

Defendant argues that his confession was obtained in violation of his sixth amendment right to the assistance of counsel.

The sixth amendment, applicable to the states through the fourteenth amendment, *Gideon v. Wainwright*, 372 U.S. 335, 9

L.Ed. 2d 799 (1963), guarantees that in all criminal prosecutions an accused shall enjoy the right "to have assistance of counsel for his defense." U.S. Const. amend. VI. This sixth amendment right attaches at the initiation of adversary judicial criminal proceedings. *Kirby v. Illinois*, 406 U.S. 682, 32 L.Ed. 2d 411 (1972). Once the sixth amendment right has attached, the police may not "interrogate" the defendant unless counsel is present or the defendant has expressly waived his right to assistance of counsel. *Brewer v. Williams*, 430 U.S. 387, 51 L.Ed. 2d 424 (1977). Likewise, police may not *initiate* interrogation of a defendant whose sixth amendment right has attached. *Michigan v. Jackson*, 475 U.S. 625, 89 L.Ed. 2d 631 (1986).

"Interrogation," as that term is used in sixth amendment cases, refers to conduct of law enforcement which is "deliberately and designedly" set out to elicit incriminating information. *Brewer*, 430 U.S. at 399, 51 L.Ed. 2d at 437. It has been suggested that once the sixth amendment right to assistance of counsel attaches,

> the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation. Thus, the surreptitious employment of a cellmate, see *United States v. Henry*, 447 U.S. 264, 65 L.Ed. 2d 115, 100 S.Ct. 2183 (1980), or the electronic surveillance of conversations with third parties, see *Maine v. Moulton, supra* [474 U.S. 159, 88 L.Ed. 2d 481 (1986)]; *Massiah v. United States*, 377 U.S. 201, 12 L.Ed. 2d 246, 84 S.Ct. 1199 (1964), may violate the defendant's Sixth Amendment right to counsel even though the same methods of investigation might have been permissible before arraignment or indictment.

*Michigan v. Jackson*, 475 U.S. 625, 632, 89 L.Ed. 2d 631, 640 (footnote omitted).

Applying these principles to the present case, it is clear that defendant's right to counsel attached at his first appearance before a judge of the district court, on 27 September 1985, at which time counsel was appointed to represent him.

**[1]** Defendant contends that Hensley acted as an agent of the State, and thus his questioning of defendant amounted to pro-

hibited interrogation under *Jackson.* Defendant relies on *New Jersey v. T.L.O.*, 469 U.S. 325, 83 L.Ed. 2d 720 (1985), in which the Supreme Court held that public school officials are state actors for purposes of the fourth amendment protections against warrantless searches.

*T.L.O.* is inapplicable to the facts of the present case in which the fourth amendment right is not involved. Moreover, based on the facts adduced at the hearing, the trial court found:

> 13. That Bob Hensley was not a sworn law enforcement officer, and he did not have any type of arrest power or jurisdiction, and was not affiliated in any way with any law enforcement agency.
>
> 14. That the visit of Bob Hensley to the jail seeking information in regard to defendant was made in performance of his statutory duties to protect and safeguard the welfare of children under his or his agency's care, custody or protection.
>
> 15. That the visit of Bob Hensley was *not* at the direction of any law enforcement agency, officer, or other agency of the State of North Carolina charged with enforcement of criminal statutes, and was not made wholly or in part for the purpose of obtaining information with which to initiate further criminal proceedings against the defendant Willard Nations.

Findings of fact concerning the admissibility of a confession are conclusive and binding if supported by competent evidence. *State v. Simpson*, 314 N.C. 359, 368, 334 S.E. 2d 53, 59 (1985). This is true even though the evidence is conflicting. *Id.; State v. Williams*, 319 N.C. 73, 352 S.E. 2d 428 (1987). Because this finding was supported by competent evidence, which supports the court's conclusion that Hensley was not an agent of the police, we reject defendant's contention that Bob Hensley's interview of defendant amounted to interrogation prohibited by *Jackson.* As this Court recently noted in *State v. Etheridge*, 319 N.C. 34, 352 S.E. 2d 673 (1987), "Our appellate court decisions are replete with examples of individuals who, though occupying some official capacity or ostensible position of authority, have been ruled unconnected to law enforcement for . . . purposes [of interrogation]." *Id.* at 43, 352 S.E. 2d at 679.

It is, of course, well settled that interrogation does not result merely from a defendant's initiation of contact with law enforcement officials. *See State v. Todd*, 310 N.C. 110, 326 S.E. 2d 249 (1985) (statement by defendant volunteered, not product of interrogation); *United States v. Bailey*, 728 F. 2d 967 (7th Cir.), *cert. denied*, 467 U.S. 1229, 81 L.Ed. 2d 881 (1984) (not error to admit confession made to an agent of the Drug Enforcement Agency while defendant in custody). Unless the conduct of the police is deliberate and designed to elicit an incriminating statement, there is no interrogation for sixth amendment purposes. *Brewer v. Williams*, 430 U.S. 387, 399, 51 L.Ed. 2d 424, 437.

**[2]** In denying the motion to suppress, the trial court found:

> 11. That the defendant *initiated* the contacts with both Hensley and officer Petty and his incriminating statements to them were made of his own volition and not as the result of any *interrogation.* The statements to Hensley and Petty were not the result of any threats, promises, or coercion, but were voluntarily made by the defendant to confess his wrongs and to clear his conscience.

(Emphasis added.)

Our review of the record indicates that this finding was supported by competent evidence. The trial court heard testimony that defendant expressed to the volunteer jailer a desire to confess. The jailer allowed a department of social services worker to interview defendant in connection with an unrelated charge. Defendant repeatedly expressed his desire to confess and clear his conscience. Based on these facts, the trial court could properly find that defendant initiated the contacts with Hensley and Petty which ultimately resulted in a voluntary confession, knowingly and intelligently made.

**[3]** Finally, defendant contends that the trial court erred in finding that he waived his sixth amendment right to counsel. The standard for the validity of a sixth amendment waiver is that it be voluntarily, knowingly, and intelligently made. *Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562 (1975); *Michigan v. Jackson*, 475 U.S. 625, 89 L.Ed. 2d 631; *State v. Reese*, 319 N.C. 110, 353 S.E. 2d 352 (1987). Defendant argues that the trial court's order fails to state that defendant *intelligently waived his right*

*to counsel. The trial court found and concluded that defendant "freely, understandingly* and knowingly" (emphasis added) waived his right against self-incrimination and right to counsel.

It is noteworthy that in finding that the defendant "understandingly" waived his right to counsel, the trial court employed the language frequently used by this Court in evaluating the validity of a defendant's waiver of the right to the presence of counsel. *See State v. Harris*, 315 N.C. 556, 571, 340 S.E. 2d 383, 392 (1986) ("trial court properly found that defendant's confession was made freely, voluntarily and *understandingly*"); *State v. Simpson*, 314 N.C. 359, 369, 334 S.E. 2d 53, 60 (evidence supported finding that confession was "freely, voluntarily, and understandingly made"). To hold that the validity of a waiver rests on the trial judge's use of a magic word, "intelligently," is to overlook the substantive principles by which courts are guided in determining whether waivers are valid.

The trial court had before it competent evidence from which it could find that defendant "intelligently" waived his right to counsel. After giving his statement, defendant coherently responded to questions designed to clarify the contents of the statement. There was also evidence that defendant's post-confession behavior was erratic and that he was committed to Broughton Hospital shortly after he confessed. The court found as fact:

> 18. That although there is evidence that the personnel of the Rutherford County Jail had some questions and concerns about the mental well-being of the defendant on this occasion, there is no credible evidence of any sort before this Court to indicate that the defendant was suffering from any mental disorder or disease such as would impair his ability to evaluate his rights and liabilities in his situation, nor such as would in any way render him incapable of voluntarily waiving any or all rights in regard to making a statment [sic] to law enforcement officers or constituting any type of duress such as would invalidate any waiver of rights.

We have reviewed the testimony presented at the hearing on the motion to suppress. We find that the trial court's conclusions are supported by appropriate findings of fact, which in turn are supported by ample competent evidence.

II.

**[4]** Defendant argues that the indictment under N.C.G.S. § 14-27.4 should have been dismissed because that statute has been partially repealed by N.C.G.S. § 14-27.7.

N.C.G.S. § 14-27.4, "First-degree sexual offense," defines the elements of first-degree sexual offense, which is a Class B felony:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or
>
> (2) With another person by force and against the will of the other person, and:
>
> a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
>
> b. Inflicts serious personal injury upon the victim or another person; or
>
> c. The person commits the offense aided and abetted by one or more other persons.

N.C.G.S. § 14-27.4(a) (1986).

N.C.G.S. § 14-27.7, "Intercourse and sexual offenses with certain victims; consent no defense," provides:

> If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, or if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class G felony. Consent is not a defense to a charge under this section.

N.C.G.S. § 14-27.7 (1986).

Defendant acknowledges that the two statutes were enacted as parts of the same legislative act. 1979 N.C. Sess. Laws ch. 682. We cannot attribute to the General Assembly an intent to simultaneously enact and repeal a law.

Secondly, defendant argues that if N.C.G.S. § 14-27.7 does not repeal § 14-27.4, then different persons committing the same act would be subjected to different forms of punishment, depending on whether they are indicted under § 14-27.4 (a Class B felony) or § 14-27.7 (a Class G felony). Of course, a parent or custodial parent would not be subject to N.C.G.S. § 14-27.4 unless the victim were under a certain age or defendant used force or violence against the minor victim. Absent evidence to the contrary, we decline to adopt defendant's argument that prosecutors arbitrarily choose to prosecute under one provision rather than another.

For the reasons stated herein, we find

No error.

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STATE OF NORTH CAROLINA v. WILLARD DEAN NATIONS

No. 570A86

(Filed 7 April 1987)

**Criminal Law § 75.4— assertion of right to counsel during interrogation—interview by social services worker—no police-initiated interrogation**

A social services worker's interview of defendant after defendant had invoked his fifth amendment right to the presence of counsel during interrogation did not amount to police initiated interrogation in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981), since (1) the social services worker was not an agent of the police, and (2) his interview of defendant did not amount to "interrogation" because there was no evidence that the police were reasonably likely to elicit an incriminating response by allowing the social services worker to interview defendant.

BEFORE *Kirby, J.*, at the 28 April 1986 Criminal Session of Superior Court, RUTHERFORD County, defendant was convicted of first-degree sexual offense and received the mandatory life sentence. Defendant appeals as a matter of right pursuant to

N.C.G.S. § 7A-27(a). Heard in the Supreme Court 9 February 1987.

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

*Hugh J. Franklin for defendant-appellant.*

MEYER, Justice.

Defendant was charged and tried for first-degree sexual offense against a ten-year-old female child. Prior to indictment, while defendant was being held in the Rutherford County Jail on another charge, he confessed to the facts which formed the basis of the charge of first-degree sexual offense against a female child.

On appeal, defendant argues that the trial court erred in denying his pretrial motion to suppress the confession, which was introduced at defendant's trial. We find no error.

The facts surrounding the confession are set forth in *State v. Nations*, 319 N.C. 318, 354 S.E. 2d 510 (1987) ("*Nations I*"; filed concurrently with this opinion). Defendant argues that the confession was obtained in violation of his fifth amendment right to the presence of counsel during interrogation.

The fifth amendment, applicable to the states through the fourteenth amendment, *Malloy v. Hogan*, 378 U.S. 1, 12 L.Ed. 2d 653 (1964), is a protection against self-incrimination. In *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), the United States Supreme Court held that this fifth amendment right is the source of the right to the presence of counsel during custodial interrogation. "Interrogation," for fifth amendment purposes, refers not only to express questioning of a suspect by the police, but also to questioning or actions that police "should know are reasonably likely to elicit an incriminating response from a suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L.Ed. 2d 297, 308 (1980). Absent initiation by the defendant, if he invokes his right to the presence of counsel during interrogation, police may not "interrogate" the defendant further until he has been afforded the opportunity to consult with counsel. *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378 (1981).

Applying the law to the facts of the case before us, it is clear that defendant, when first questioned about the offense for which he was being held, invoked his fifth amendment right to the presence of counsel during interrogation. Thus, any subsequent *police-initiated* interrogation would violate the rule set forth in *Edwards*. We must therefore determine whether Robert Hensley's interview with the defendant amounted to police-initiated interrogation, as that term has been used in "fifth amendment interrogation" cases.

First, for the reasons set forth in *Nations I*, we hold that Hensley was not an agent of the police. Second, Hensley's interview of defendant did not amount to "interrogation," as there was no evidence that by allowing Hensley to interview the defendant, the police were "reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. at 301, 64 L.Ed. 2d at 308. In its findings of fact on the motion to suppress, the trial court found:

> 15. That the visit of Bob Hensley was *not* at the direction of any law enforcement agency, officer, or other agency of the State of North Carolina charged with enforcement of criminal statutes, and was not made wholly or in part for the purpose of obtaining information with which to initiate further criminal proceedings against the defendant Willard Nations.

In evaluating the same confession in *Nations I*, we held that there was competent evidence to support the trial court's finding that defendant initiated contact with law enforcement officials; we also held that there was competent evidence that defendant knowingly and intelligently waived his right to the assistance of counsel. With respect to the present case, the rationale of *Nations I* applies with equal force and supports our holding that the defendant initiated contact with law enforcement officials and effected a valid waiver of his right to the presence of counsel.

Defendant also argues that the indictment under N.C.G.S. § 14-27.4 should have been dismissed because that statute has been partially repealed by N.C.G.S. § 14-27.7. For the reasons set forth in *Nations I*, we find this argument to be without merit.

No error.

STATE OF NORTH CAROLINA v. ALLEN LEE LANGFORD

No. 399A86

(Filed 7 April 1987)

1. **Criminal Law § 101.2— newspaper article—exposure of jury to voir dire testimony—absence of prejudice**

Although the trial court failed to follow the requirements of N.C.G.S. § 15A-1236(a)(4) to admonish the jurors to "avoid reading, watching, or listening to accounts of the trial," any exposure of the jury to a newspaper article concerning matters inquired into during a *voir dire* hearing on the first day of defendant's trial was not so prejudicial as to require a new trial where defendant himself placed information substantially similar to that contained in the article before the jury during the course of the trial.

2. **Rape and Allied Offenses § 6.1— first degree rape—employment or display of knife—evidence not conflicting—instruction on second degree rape not required**

The evidence in a first degree rape case was not conflicting as to whether defendant "employed or displayed" the knife in his possession to the victim so as to require the trial court to instruct on the lesser offense of second degree rape where it was undisputed that defendant had an open knife in his hand or lying within his reach during all times pertinent to his act of sexual intercourse with the victim; the evidence would not support a reasonable finding that the victim was not aware of the knife; and defendant's statement to a detective was not a denial that he had employed or displayed a knife but amounted to a description of how he had done so.

ON defendant's appeal of right under N.C.G.S. § 7A-27(a) from judgment entered by *Kirby, J.*, on 29 January 1986 in Superior Court, HENDERSON County, sentencing the defendant to imprisonment for life upon his conviction by a jury for first-degree rape. Heard in the Supreme Court on 11 March 1987.

*Lacy H. Thornburg, Attorney General, by James Peeler Smith, Special Deputy Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Geoffrey C. Mangum, Assistant Appellate Defender, for the defendant appellant.*

MITCHELL, Justice.

The defendant contends on appeal that he is entitled to a new trial because the trial court denied his request to inquire into possible exposure of the jury to prejudicial newspaper reports. He also contends he is entitled to a new trial because the trial

court erroneously failed to instruct the jury to consider a verdict of second degree rape. We find no prejudicial error in the defendant's trial and reject both contentions.

The State introduced the victim's testimony at trial which tended to show that she was working in her father's electronics shop at 2:45 p.m. on 24 September 1985. The defendant, Allen Lee Langford, entered the store as she was talking on the telephone. She told the defendant that she would be with him in a second. He then walked behind her desk, placed a large knife to her neck, and told her to hang up the telephone. She did as she was told.

The defendant told the victim that he had been watching the shop and knew that she was alone. She began to struggle and tried to push the defendant's knife away, but he pulled her backwards and threw her down. The defendant then ordered the victim to remove her clothes. When she refused, he ripped her blouse open and cut the front of her brassiere.

The victim began screaming, and the defendant Langford told her to shut up or he would kill her. He then pulled her pants off. While she was screaming, the defendant slapped her across the face and "busted" her lip. The defendant and the victim struggled on the floor and he attempted to have sex with her. As they fought, she hit her head on the floor and was knocked out. The defendant was gone when the victim regained consciousness at about 3:00 p.m. Blood from inside her vagina had formed a pool on the floor at that time. She immediately contacted her father who called the police.

The victim testified that the knife the defendant used during the attack was "maybe 10 inches long," including the handle. She identified a Case XX folding knife as looking "just like" the knife the defendant used during his attack on her. When the defendant was arrested on 27 September 1985, he had a Case XX folding knife in his pocket.

Dr. Robert Finch testified that he examined the victim on 24 September 1985 in the emergency room of Pardee Hospital in Hendersonville. She told him at that time that she had been raped. His examination of her revealed a bruise on her upper lip, a small cut on her neck, some scratches on her cheek, scratches on her elbow, a scratch and bruise on her knee, and a cut at the

opening of her vagina. Blood was coming from her cervix and there was blood in her vaginal vault or within her vagina. Dr. Finch testified that he could not see any tears within the vagina, and "presumably the blood coming from the cervics [sic] was the result of trauma in the uterus." Dr. Finch further testified that the injuries he observed "certainly are consistent with traumatic penetration of the vagina consistent with a sexual assault."

George Erwin, Deputy Sheriff and Captain of Detectives of the Henderson County Sheriff's Department, testified that he interviewed the defendant on the day the defendant was arrested. After the trial court conducted a *voir dire* hearing, Erwin was permitted to testify before the jury that the defendant stated that he had entered the electronics shop where the victim worked to use the telephone. She had "flirted" with him. He said that he "started to get something going with her and she just started flipping out and it flipped me out but I never knocked her out." The defendant acknowledged slapping the victim one time and stated that he thought he had hit her in the mouth. At points in his statement, the defendant indicated that the victim fought him and screamed. But at other points in his statement, he indicated that she had not. The defendant acknowledged that he had sexual intercourse with the victim. He also acknowledged that he had a Case XX knife about seven or eight inches long with him at the time, and that the blade was open.

The defendant offered evidence by exhibiting his face to the jury and having the jury examine it at close range. He offered no additional evidence.

**[1]** By his first assignment of error, the defendant contends that the trial court erred by denying his request to conduct an inquiry as to whether the jurors had been exposed to prejudicial and inflammatory news coverage between the first and second days of trial. We find it unnecessary to address or decide this question, however, as the defendant in the present case has waived his right to assign it as error.

Toward the end of the first day of trial, the State called Detective Captain Erwin to testify concerning the defendant's statement to him. A *voir dire* hearing was commenced to determine whether Erwin's testimony in this regard would be admitted. During the *voir dire* hearing evidence was introduced

tending to show that the defendant was an habitual user of hard drugs, and had been since he was eleven years old. He had been charged at various times with thirty-five criminal charges in Henderson County. In addition to the attack on the victim in this case, the defendant had admitted to a rape of a clerk at a convenience store, an attempted rape of a female jogger, and an indecent exposure.

The *voir dire* hearing had not been completed when the trial court recessed for the evening. It was continued when the trial court reconvened the following morning. The defendant presented the testimony of a clinical psychologist concerning the defendant's drug abuse and resulting psychological state in an effort to show that his confession to the crime charged in the present case had been involuntary. At the conclusion of the *voir dire* hearing, the trial court denied the defendant's motion to suppress his statements made to Detective Captain Erwin.

The defendant's counsel thereafter brought a copy of that morning's *Hendersonville Times* to the trial court's attention. That newspaper contained an account of most of the testimony offered during the *voir dire* hearing on the previous day. The defendant's counsel moved for a mistrial, or, "at the very least, to inquire of the jurors whether or not they have read this article. . . ." The trial court denied the motion for mistrial and denied the defendant's request for an inquiry of the jurors. Instead, the trial court instructed the jury as follows:

> I think we're ready to resume, however, before we do that I want to say to you that it has been called to my attention that there is a local newspaper and that the local newspaper rightfully so, prints news of local events and may very well print stories concerning this matter. I instruct you that your duty in this case is to try this case from the evidence which you hear from the witness stand, and not consider anything that you may have read about this matter in the local press. That's all I desire to say about that.

The defendant correctly points out that the trial court erred when it failed to follow the requirements of N.C.G.S. § 15A-1236 (a)(4) to admonish the jurors to "avoid reading, watching, or listening to accounts of the trial . . . ." *State v. Harris*, 315 N.C. 556, 340 S.E. 2d 383 (1986). The defendant argues that this failure,

combined with the trial court's denial of his motion for a mistrial and refusal to inquire into possible exposure of the jury to the prejudicial newspaper article in question, amounted to prejudicial error entitling him to a new trial. We do not agree.

In the recent case of *State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986), we stated that:

> When there is a substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial.

316 N.C. at 683, 343 S.E. 2d at 839. No such inquiry was conducted by the trial court in the present case. We find it unnecessary here, however, to decide whether the action of the defendant's counsel in merely providing a copy of a newspaper article to the trial court, standing alone, could provide "a substantial reason to fear" that the jury had been influenced by the article. We assume here *arguendo* that the jury was exposed to the newspaper article in question. We conclude, however, that any such exposure was not so prejudicial to the defendant as to require a new trial, since the defendant himself placed information substantially similar to that contained in the article before the jury during the course of the trial.

After the trial court denied the defendant's alternative motions for a mistrial or for an inquiry as to the jurors' exposure to the article, it completed the *voir dire* hearing and ruled Detective Captain Erwin's testimony concerning the defendant's statement admissible. Thereafter, in the presence of the jury and in response to questions by the defendant during cross-examination, Erwin testified that he had known of the defendant's drug abuse for years. After Erwin testified on cross-examination to statements by the defendant tending to establish the elements of the crime charged, the following colloquy took place between defense counsel and Erwin:

> Q. Detective Erwin, you've heard *stated in Court here* today and *yesterday* that Allen Langford has been involved, I say involved in, I mean charged or convicted, of course, I don't know the breakdown, if any, between the two, of approx-

imately 35 criminal offenses, of course, much less serious than what we're here today on. But Detective Erwin, you don't know of any incidents, do you on any of those 35 or whatever instances that Allen Langford has ever made any statement or confession to the authorities, do you?

A. I have never been told.

Q. You don't know, right?

A. Right, I don't know if he has or not.

Q. It wouldn't surprise you, well strike that. Before this occasion, before this incident occurred, before you initiated this investigation, you knew who Allen Langford was, didn't you?

A. Yes sir, I knew of him. I had never even seen the gentleman but I knew of him. I knew the name, Allen Langford alias Shorty Langford.

Q. How did you know his name?

A. Different investi—I'm the Captain of Detectives—

Q. Yes sir.

A. —and my responsibility is to supervise all criminal investigations.

Q. Detective Erwin, as you were testifying you are Chief of Detectives and are aware of most investigations at least to some extent that go on in that Department?

A. Yes, that's correct.

Q. You knew Allen Langford's name and probably some of the things he'd been involved in?

A. Yes sir.

Q. But no one ever told you in your Department about his propensity or inclination to cooperate with authorities when approached?

A. No sir, they never told either one way or the other.

(Emphasis added.)

The evidence introduced before the jury by the defendant, therefore, tended to show the defendant's habitual use of drugs

and the fact that he had been "charged or convicted" of 35 criminal offenses in addition to that charged here. The defendant also informed the jury by this line of questioning that he was known to use an alias. Further, the defendant introduced the substance of much of the previous day's *voir dire* hearing.

Even if it is assumed *arguendo* that the defendant was entitled to a jury which had not been exposed to any information concerning the matters inquired into during the *voir dire* hearing on the previous day, the defendant waived his rights in this regard by specifically opening an inquiry into the nature of the testimony at the *voir dire* hearing and by drawing out much of the same testimony during his cross-examination of the witness Erwin before the jury. Even a constitutional right may be waived "by conduct inconsistent with a purpose to insist upon it." *State v. Hutchins*, 303 N.C. 321, 341-42, 279 S.E. 2d 788, 801 (1981). Certainly the actions of the defendant in the present case in putting before the jury essentially the same information contained in the newspaper report of the *voir dire* hearing amounted to "conduct inconsistent with a purpose to insist upon" any right he may have had to keep such information from the jury. Therefore, we can conclude only that the defendant waived any rights which may have accrued to him by virtue of the possibility that members of the jury had been exposed to similar information through the newspaper article of which he now complains. This assignment of error is without merit and is overruled.

**[2]** The defendant next assigns as error the trial court's failure to instruct the jury with regard to the lesser offense of second degree rape. The defendant argues in support of this assignment that the evidence was conflicting as to whether he had "employed or displayed" the knife in his possession to the victim as contemplated in N.C.G.S. § 14-27.4(a)(2)a.

For purposes of this argument, the defendant acknowledges that he had the knife open and in his possession at the time he had sexual intercourse with the victim. He also recognizes that the victim gave direct testimony tending to show unequivocally that the defendant held the knife to her neck and cut her neck with it while he forced her to have sexual intercourse. She also testified that he cut off her brassiere with the knife prior to raping her.

The defendant argues, however, that certain parts of his statement to Detective Captain Erwin tended to show that he neither employed nor displayed the knife at the time he had sexual intercourse with the victim. He contends, therefore, that the evidence was in conflict in this regard, and that he was entitled to an instruction on the lesser offense of second degree rape. We do not agree.

The defendant points specifically to a portion of his statement to Erwin which was introduced at trial and was as follows:

> Erwin: Okay, all right, did you ever threaten the girl with the knife that you remember?
>
> Langford: I had the knife and I layed [sic] the knife down.
>
> Erwin: Okay, where did you lay it at?
>
> Langford: She could have plainly, right with, I mean I layed [sic] it down right in front of her and her back was turned away from me, I mean layed [sic] it down.
>
> Erwin: Okay, is this before you had intercourse?
>
> Langford: Yes, I mean—
>
> Erwin: Was the blade open or was it closed? The blade was open?
>
> Langford: Yes, I just layed [sic] it down there and I thought maybe she would grab it and stab me or something but she didn't, maybe that's what I was hoping for.
>
> Erwin: Okay.

The defendant argues that his statement to Erwin in this regard "negated both the use and display of a knife." We do not agree.

When there is a conflict in the evidence as to whether the defendant had a deadly weapon in his possession or whether he employed or displayed it, the trial court must instruct on the lesser included offense of second degree rape. *State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189 (1980). In this case, however, it is undisputed that the defendant had an open knife in his hand or lying in the open easily within his reach during all times pertinent to his act of sexual intercourse with the victim. Further, we con-

clude that the evidence in this case would not support a reasonable finding that the victim was not aware of the knife. The defendant's statement to Erwin only amounted to a description of how he employed or displayed the knife, not a denial that he had employed or displayed a knife. Therefore, he was not entitled to a jury instruction on the lesser included offense of second degree rape. This assignment of error is without merit and is overruled.

The defendant received a fair trial free from prejudicial error.

No error.

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STATE OF NORTH CAROLINA v. ALLEN LEE LANGFORD

No. 406A86

(Filed 7 April 1987)

1. **Rape and Allied Offenses § 6.1— first degree rape case—employment or display of knife—evidence not conflicting—instruction on second degree rape not required**

The evidence in a first degree rape case was not conflicting as to whether defendant had "employed or displayed" a knife in his possession to the victim so as to require the trial court to instruct on the lesser offense of second degree rape since (1) defendant's mere failure to recollect whether he had the knife open during the rape created no conflict with the victim's clear and unequivocal testimony that defendant held the open knife to her throat, (2) the victim's response on cross-examination to the question whether she actually saw a knife or whether the knife was "just mentioned" did not create a conflict because it is clear that the victim answered, in effect, that the knife was not just mentioned but that she actually saw the knife as it was placed to her throat.

2. **Rape and Allied Offenses § 2— first degree rape—employment or display of dangerous weapon**

N.C.G.S. § 14-27.2 does not require a showing that a dangerous or deadly weapon was used in a particular manner in order to sustain a conviction for first degree rape. Instead it requires a showing only that such a weapon was "employed or displayed," and such a weapon has been "employed" within the meaning of the statute when the defendant has it in his possession at the time of the rape.

3. **Criminal Law § 138.7— consecutive life sentence—no retaliation for not guilty plea**

The trial court's statement that "I'm aware that I could have avoided this trial had I been willing at the outset of the trial to commit myself to concur-

rent sentences" did not show that the court made defendant's life sentence for first degree rape run consecutively to a life sentence entered against defendant in an unrelated rape case in retaliation for defendant's decision to plead not guilty and demand a jury trial in the present case.

4. **Criminal Law § 138.7— consecutive life sentence—no consideration of likelihood of parole**

The trial court's comment during the sentencing hearing that both the prosecutor and defense counsel had "said things that are relevant and ought to be considered in passing judgment" did not show that the trial court agreed with the prosecutor's improper argument concerning the likelihood of parole and that the court's decision to impose a consecutive life sentence in this case was improperly based on the court's consideration of the amount of time defendant was likely to serve in prison under the policies of the Parole Commission.

ON appeal of right by the defendant under N.C.G.S. § 7A-27(a) from judgment entered by *Kirby, J.*, on 6 February 1986 in Superior Court, HENDERSON County, sentencing the defendant to imprisonment for life upon his conviction for first degree rape. Heard in the Supreme Court on 11 March 1987.

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

*Malcolm Ray Hunter, Jr., Appellate Defender, by Geoffrey C. Mangum, Assistant Appellate Defender, for the defendant appellant.*

MITCHELL, Justice.

The defendant contends on appeal that he is entitled to a new trial because the trial court erroneously failed to instruct the jury to consider a possible verdict of second degree rape. He further contends that he is entitled to a new sentencing hearing, at least, because the trial court improperly ordered that the life sentence entered in the present case be consecutive to a life sentence previously entered against him in an unrelated case. He asserts that the trial court ordered a consecutive sentence because he exercised his right to trial by jury and because the trial court was dissatisfied with current policies of the Parole Commission. We find no prejudicial error in the defendant's trial or sentence and reject each of his contentions.

A detailed recitation of the evidence introduced at trial is unnecessary for purposes of this opinion. The defendant was

indicted for first degree rape. The victim testified that the defendant, Allen Lee Langford, entered the store where she was employed on three separate occasions between 11:00 p.m. and 2:00 a.m. on the evening of 14 July and the morning of 15 July 1985. On the last occasion, the defendant asked to use the restroom. When he came out of the restroom, the victim was alone in the store replacing a garbage can liner. When she turned around the defendant was standing behind her. He grabbed the victim by the throat with both hands, using enough force to prevent her from breathing or screaming. He told her to be quiet and he would not hurt her. The defendant removed one hand and used it to hold a knife against the victim's throat. He pushed her into the restroom and forced her to have sexual intercourse with him. She testified that she had sexual intercourse with him against her will and as a result of his threats toward her with the knife.

The defendant made an inculpatory statement to police which was introduced into evidence. He admitted that, using a knife, he took the victim into a back room and raped her. He later stated that he had the knife with him but could not remember whether it was open.

The defendant offered no evidence.

The trial court submitted possible verdicts of "guilty of first degree rape" and "not guilty" to the jury. The jury found the defendant guilty of first degree rape. The trial court sentenced the defendant to imprisonment for life, with the sentence to commence at the expiration of a life sentence previously entered against him in another first degree rape case, reported as *State v. Langford*, 319 N.C. 332, 354 S.E. 2d 518 (1987). The defendant appealed to this Court as a matter of right.

**[1]** The defendant first assigns as error the trial court's refusal to grant his request to instruct the jury to consider a possible verdict of second degree rape. He contends that the evidence was conflicting as to whether he had "employed or displayed" the knife in his possession as contemplated in N.C.G.S. § 14-27.2(a)(2)a (1986).

Portions of the victim's testimony concerning the defendant's use of a knife during the course of the rape were as follows:

Q. Did he have any sort of weapon in his possession?

A. He had the knife at my throat.

Q. What kind of knife did he have?

A. A pocketknife.

Q. Folding pocketknife?

A. Yes sir.

Q. Are you able to say what size blade it had?

A. About three inches.

. . . .

Q. Did this man touch you any place with the blade of the knife?

A. My throat.

On cross-examination, part of the victim's testimony concerning the defendant's use of a knife was as follows:

Q. [D]id you actually see a knife or was the knife just mentioned?

A. No, it was a quick glance as he brought it up.

. . . .

Q. And you testified, as I recall, there was no display of a knife any further?

A. No, he had it at my throat.

. . . .

Q. But you indicated there was no display of a knife. You testified on direct examination that he had his hands around your throat like this?

A. Yes sir.

. . . .

Q. Which hand was he holding the knife in?

A. He let go with one hand, that's when I heard the click and he brought the knife up.

In his inculpatory statement to the police, the defendant stated at one point that he could not remember whether the knife he had in his possession at the time of the rape was open. The defendant argues that this evidence of his lack of recollection, combined with an answer by the victim during cross-examination, created a conflict in the evidence as to whether he "employed or displayed" the knife during the rape. He argues that, as a result, the trial court was required to submit a possible verdict of guilty of the lesser included offense of second degree rape for consideration by the jury. We do not agree.

The defendant's mere failure to recollect whether he had the knife open during the rape created no conflict with the victim's clear and unequivocal testimony that he held the open knife to her throat. Nor was a conflict created in the evidence by the victim's response on cross-examination to the question of whether she actually saw a knife or whether the knife was "just mentioned." This inquiry really posed alternative questions: Was the knife only mentioned, or, instead, did the victim actually see the knife? She responded: "No, it was a quick glance as he brought it up." Taking her answer in light of her other testimony concerning the knife, it is clear she answered, in effect, that the knife was not "just mentioned"; and she actually saw the knife as the defendant brought it to her throat. In fact, she even was able to estimate the length of the open blade before it was placed to her throat. We hold that the evidence was not conflicting as to whether the defendant "employed or displayed" a dangerous or deadly weapon.

**[2]** The defendant next argues in support of this assignment of error that, even if he "employed or displayed" a dangerous or deadly weapon, the evidence was conflicting as to whether he used it as such. The statute, N.C.G.S. § 14-27.2, does not require a showing that a dangerous or deadly weapon was used in a particular manner in order to sustain a conviction for first degree rape. Instead it requires a showing only that such a weapon was "employed or displayed." *State v. Blackstock*, 314 N.C. 232, 241, 333 S.E. 2d 245, 251 (1985); *State v. Sturdivant*, 304 N.C. 293, 299, 283 S.E. 2d 719, 724 (1981). Further, such a weapon has been "employed" within the meaning of N.C.G.S. § 14-27.2 when the defendant has it in his possession at the time of the rape. *See State v. Fields*, 315 N.C. 191, 337 S.E. 2d 518 (1985) (possession at time

of felony enough to establish "use" of a deadly weapon for conviction of felony murder under N.C.G.S. § 14-17).

The trial court's failure to instruct the jury that they could return a verdict of guilty of the lesser included offense of second degree rape was not error. The defendant's assignment of error in this regard is without merit and is overruled.

The defendant next assigns as error that part of the trial court's judgment directing that the life sentence imposed in this case be consecutive to the life sentence entered against this defendant in an unrelated case. He contends that this was error because the trial court made the sentence consecutive in retaliation for his decision to plead not guilty and demand a jury trial in the present case.

The defendant had an absolute constitutional right to plead not guilty and be tried by a jury. N.C. Const. Art. I, § 24; *State v. Boone*, 293 N.C. 702, 712-13, 239 S.E. 2d 459, 465 (1977). He should not and could not be punished for exercising that right. *Id.* In the present case, though, the record does not support the defendant's contention that his life sentence was made to run consecutive to the sentence in the prior case because he exercised his right to a jury trial.

The defendant's counsel argued to the trial court that the sentence in this case should be served concurrently with the sentence in the defendant's previous case because, among other things, the defendant had recognized his need for help and had cooperated with law enforcement officers and counsel. During his argument to the trial court at the time of sentencing, the prosecutor stated:

> I think that Mr. Langford may have pled guilty if I had agreed to recommend by way of a plea bargain to your Honor that he get concurrent sentences, but Judge, I could not recommend that and I still don't recommend it to this Court because I don't want the blood of future victims on my hands and I don't want the blood of future victims on the hands of this Court.

**[3]** The trial court stated during sentencing, among other things, that courts, "try our best when we get here to weigh all the factors that are humane, fair, sensible, society ought to weigh and

pass in judgment." However, the trial court did state at one point: "I'm aware that I could have avoided this trial had I been willing at the outset of the trial to commit myself to concurrent sentences." The defendant points to that statement by the trial court in isolation and contends that it shows that the trial court made the defendant's sentences run consecutively because he exercised his right to plead not guilty. We do not agree.

The trial court's statement that a jury trial could have been avoided had it been willing to commit in advance to a concurrent sentence was merely a statement—albeit an unnecessary statement—of an historical fact. Neither the record as a whole nor the trial court's statement itself indicates that the defendant demanded his right to a jury trial and incurred additional punishment as a result. Instead, the record tends to show that the defendant was forced to plead not guilty and to proceed to trial by jury when the prosecutor and trial court refused to agree in advance to a concurrent sentence. There is no indication in the record that the trial court would have made the sentence concurrent had the defendant pled guilty. The trial court merely refused to decide this issue until it heard the evidence adduced at trial. The record before us simply does not support the defendant's contention that the consecutive sentence was entered by reason of vindictiveness or to penalize him for his exercise of a constitutional right.

**[4]** The defendant also contends that the trial court erroneously sentenced him to a consecutive life sentence in this case because the decision was based on an improper consideration of the amount of time the defendant was likely to serve in prison under the policies of the Parole Commission. The prosecutor had argued to the trial court that he was troubled by the fact that concurrent sentences would result in the defendant being released "in 20 years if not before." At one point during sentencing the trial court stated: "Both the District Attorney and your Attorney has [*sic*] said things that are relevant and ought to be considered in passing judgment." The defendant takes this statement by the trial court as a profession that the trial court agreed with the prosecutor's improper argument concerning the likelihood of parole when it ordered a consecutive sentence. Only by a tortured construction of the comment of the trial court, taken in isolation and out of context, can it be read as an expression of the trial court's agreement with the specific statement of the prosecutor

concerning the possibility of parole. We do not construe it as such. This assignment of error is without merit and is overruled.

The defendant received a fair trial free from prejudicial error.

No error.

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NORTH CAROLINA BAPTIST HOSPITALS, INC. v. DONNIE HARRIS AND VERN DELL HARRIS

No. 284PA86

(Filed 7 April 1987)

**1. Husband and Wife § 1— liability of wife for husband's medical expenses**

The doctrine of necessaries, heretofore applicable only to medical services provided to the wife, applies to such services provided to either spouse. Therefore, a wife may be held responsible for the necessary medical expenses incurred by her husband even in the absence of an express undertaking on her part. The Court of Appeals opinion in *Presbyterian Hospitals v. McCartha*, 66 N.C. App. 177, 310 S.E. 2d 409, is overruled to the extent that it conflicts with this ruling.

**2. Husband and Wife § 1— necessary medical expenses—action against spouse—prima facie case**

In order to make out a *prima facie* case against a spouse for the recovery of expenses incurred in providing necessary medical services to the other spouse, the following must be shown: (1) medical services were provided to the spouse; (2) the medical services were necessary for the health and well-being of the receiving spouse; (3) the person against whom the action is brought was married to the person to whom the medical services were provided at the time such services were provided; and (4) the payment for the necessaries has not been made.

ON discretionary review of a unanimous, unpublished opinion of the North Carolina Court of Appeals, 80 N.C. App. 167, 341 S.E. 2d 619 (1986), affirming the judgment of *Gregory, J.*, entered at the 20 May 1985 Civil Session of District Court, YADKIN County, dismissing plaintiff's complaint against defendant for failure to state a claim for relief.

This case originated as an action by North Carolina Baptist Hospitals, Inc., to recover payment for services rendered to Don-

nie G. Harris in January 1982. The hospital brought suit against both Mr. Harris and his wife, Vern Dell Harris, alleging an outstanding debt of $3,303.61. The case was heard on plaintiff's motion for summary judgment at the 14 November 1983 session of the Yadkin County District Court, the Honorable Edgar B. Gregory presiding. Summary judgment was entered against defendant Donnie G. Harris in the full amount of the outstanding debt plus interest and costs. That judgment was not appealed. In the same order, Judge Gregory dismissed the plaintiff's complaint against defendant Vern Dell. Plaintiff appealed this latter portion of the judgment. In an unpublished opinion filed on 4 December 1984, the dismissal of the action against Vern Dell was reversed by the Court of Appeals and remanded for further findings of fact. *NC Baptist Hospitals v. Harris*, 71 N.C. App. 638, 323 S.E. 2d 513 (1984). Following remand, plaintiff renewed its motion for summary judgment against Vern Dell, accompanied by additional affidavits. This motion was denied. The matter was tried at the 20 May 1985 Civil Session of the Yadkin County District Court, before Judge Gregory. Judge Gregory heard the evidence in the case on 20 May 1985 and took the matter under advisement. On 23 May 1985, Judge Gregory made findings of fact and dismissed plaintiff's complaint against Vern Dell.

Plaintiff made a timely appeal to the Court of Appeals. The parties stipulated to the facts as found by the trial court. By unpublished opinion filed on 1 April 1986, the Court of Appeals affirmed the dismissal of the complaint against Vern Dell. *N. C. Baptist Hos., Inc. v. Harris*, 80 N.C. App. 167, 341 S.E. 2d 619 (1986). This Court granted discretionary review by an order entered on 28 August 1986. Heard in the Supreme Court 9 February 1987.

*Turner, Enochs, Sparrow & Boone, P.A., by Thomas E. Cone and Wendell H. Ott, for the plaintiff-appellant.*

*Finger, Parker & Avram, by Raymond A. Parker, II, and M. Neil Finger, for the defendant-appellees.*

*Miller, Johnston, Taylor & Allison, by James W. Allison and Paul A. Kohut, for The Presbyterian Hospital, amicus curiae.*

MEYER, Justice.

On 20 January 1982 defendant Donnie Harris was admitted to plaintiff North Carolina Baptist Hospital for medical treatment. This treatment was in fact provided. It was stipulated by the parties that the treatment was necessary for the health and well-being of Mr. Harris.

At the time of Mr. Harris' admission to the hospital, the hospital's business office submitted to his wife, defendant Vern Dell Harris, a form to sign authorizing treatment. Vern Dell signed this form in her husband's name, "by Vern Dell Harris." She declined to sign as guarantor. The trial judge found as a fact that Vern Dell neither requested her husband's admission to the hospital, anticipated that he would be admitted, nor agreed to pay for the services.

The hospital charged $3,303.61 for the services provided to defendant Donnie Harris. Neither Donnie nor Vern Dell has paid this bill to date.

**[1]** We are called upon in this case to decide whether, in the absence of an express undertaking on her part, a wife may be held responsible for the necessary medical expenses incurred by her husband. We hold that she may be and that the "doctrine of necessaries," heretofore applicable only to medical services provided to the wife, applies to such services provided to either spouse.

At common law it was the duty of the husband to provide for the necessary expenses of his wife. *Bowen v. Daugherty*, 168 N.C. 242, 84 S.E. 265 (1915). This duty arose from the fact of the marriage, not from any express undertaking on his part. *Id.* The doctrine of necessaries was a recognition of the traditional status of the husband in the marital relationship as the financial provider of the family's needs, *Perry v. Stancil*, 237 N.C. 442, 75 S.E. 2d 512 (1953), and has been enforced even where the husband was incompetent, *Reynolds v. Reynolds*, 208 N.C. 254, 180 S.E. 70 (1935), or where the wife was financially capable of providing for her own needs. *See Bowling v. Bowling*, 252 N.C. 527, 114 S.E. 2d 228 (1960). It is well settled that "doctrine of necessaries" applies to necessary medical expenses. *Alamance County Hospitals, Inc. v. Neighbors*, 315 N.C. 362, 338 S.E. 2d 87 (1986).

A corresponding duty on the part of the wife has also been a feature of the common law. She was obliged to provide domestic services which pertain to the comfort, care, and well-being of her family and consortium to her husband. *Ritchie v. White*, 225 N.C. 450, 35 S.E. 2d 414 (1945).

The traditional allocation of marital rights and duties was based at least in part on the legal disability of married women to manage their own financial affairs. *See* 2 R. Lee, *N.C. Family Law* § 107 (4th ed. 1980 & Supp. 1985). At early common law, the property of a woman vested in her husband at the point of marriage. *O'Connor v. Harris*, 81 N.C. 279 (1878); *Arrington v. Yarborough*, 54 N.C. 72 (1 Jones Eq.) (1853). As early as 1837, however, the legislature began taking steps to reduce the control of the husband over his wife's property. Thus, a wife could dispose of her property to her husband if the court could be assured, during a privy examination, that the transaction was entered into voluntarily. *Perry v. Stancil*, 237 N.C. 442, 75 S.E. 2d 512 (1953). With the Constitution of 1868, the legislature provided for the right of the wife to dispose of her property to third parties, although still requiring the consent of the husband. Transactions between the spouses were presumed to be the result of the husband's control over the wife as late as 1891. *See, e.g., Walker v. Long*, 109 N.C. 510, 14 S.E. 299 (1891).

Even after the enactment of the "Martin Act," 1911 Sess. Laws ch. 109 (now N.C.G.S. § 52-2), giving a married woman the right to dispose of her own property without the permission of her husband, and N.C.G.S. § 47-14.1 (formerly § 47-116), abolishing the privy examination, the judge-made doctrine of necessaries continued to provide financial protection for married women. *See, e.g., Ritchie v. White*, 225 N.C. 450, 35 S.E. 414. Several commentators have noted a resulting disequilibrium in the law: wives share their husbands' freedom to contract and are additionally entitled to financial support, while no longer being required to provide the traditional domestic services. As Professor Lee noted:

> The husband's common law duty to support his wife and minor children was partly balanced by the wife's duty to render services in the home. But the law can enforce the former, not the latter.

2 R. Lee, *N.C. Family Law* § 131, at 128 (4th ed. 1980).

We have consistently held that a wife is responsible for her own necessaries upon her express contract or on equitable principles when the husband was unable to pay, notwithstanding her husband's concurrent liability. *Bowen v. Daugherty*, 168 N.C. 242, 84 S.E. 265. It appears that this Court has not addressed the question of whether a wife may also be liable for the necessary medical expenses of her husband. A review of those cases in which other jurisdictions have reached this issue, and of our state's public policy as expressed through legislation, persuades us that the doctrine of necessaries should be expanded to include this situation.

Most jurisdictions reaching this issue have held that the doctrine of necessaries should be applied in a gender-neutral fashion. Some states have eliminated it from their common law altogether. *See, e.g., Condore v. Prince George's County*, 289 Md. 516, 425 A. 2d 1011 (1981); *Schilling v. Bedford County Memorial Hospital, Inc.*, 225 Va. 539, 303 S.E. 2d 905 (1983). Other jurisdictions have expanded the doctrine to apply equally to either gender. *See, e.g., Jersey Shore Medical Center-Fitkin Hospital v. Baum's Estate*, 84 N.J. 137, 417 A. 2d 1003 (1980); *Richland Memorial Hospital v. Burton*, 282 S.C. 159, 318 S.E. 2d 12 (1984). Still other jurisdictions have imposed liability on the wife where the husband is unable to pay for his own necessaries. *See, e.g., Borgess Medical Center v. Smith*, 149 Mich. App. 796, 386 N.W. 2d 684 (1986); *Marshfield Clinic v. Discher*, 105 Wisc. 2d 506, 314 N.W. 2d 326 (1982). One jurisdiction reaching this issue recently has held that the common law doctrine, as historically applied, is still the law. *See Shands Teaching Hosp. and Clinics, Inc. v. Smith*, 497 So. 2d 644 (Fla. 1986). We agree with plaintiff that the trend is toward a gender-neutral application of the doctrine. *See* Annot. "Wife's Liability for Necessaries Furnished Husband," 11 A.L.R. 4th 1160 (1982 and Supp. 1986). Our concern here must be with the policy of North Carolina as evinced by the actions of our legislature. It is to this consideration we now turn.

This Court has not addressed the question of whether, or under what circumstances, a wife may be held liable for the necessary medical expenses provided to her husband. The defendant wife relies on *Presbyterian Hospitals v. McCartha*, 66 N.C. App. 177, 310 S.E. 2d 409, *disc. rev. improvidently allowed*, 312 N.C. 485, 322 S.E. 2d 761 (1984). There the Court of Appeals, under

facts similar to the ones at bar, determined that a wife was not liable for the medical expenses of her husband. The court reasoned that since the hospital was looking to the husband for payment and not relying on the wife's credit, there was no basis in law or equity for her to be held liable.

A review of several historical developments in the law of our state indicates a trend toward "gender neutrality." Many of the statutory provisions that formerly applied only to males now apply to both genders. Thus, N.C.G.S. § 14-322, which had provided for criminal sanctions against males for non-support, now applies to either gender. There is no longer a statutory presumption that the husband is the supporting spouse for alimony purposes. N.C.G.S. § 50-16.1(4) (1984). No longer is the duty to support children the sole primary responsibility of the father. N.C.G.S. § 50-13.4(b) (1984).

Perhaps the most convincing evidence that our legislature intends to bring gender neutrality into the law of domestic relations is the Equitable Distribution Act. N.C.G.S. §§ 50-20, -21 (1984 & Supp. 1985). This act is uniform in its treatment of parties to a marriage as equal partners in a joint enterprise and appears to us to be a clear break from the archaic notions reflected in earlier statutes.

We followed the legislative trend toward gender neutrality in our recent case of *Mims v. Mims*, 305 N.C. 41, 286 S.E. 2d 779 (1982). There, we considered the judge-made rule that where a wife buys property and puts it in her husband's name, a resulting trust in the property arises in her favor; yet where the husband buys property and puts it in his wife's name, the law presumes it to have been a gift to her. We noted that this rule arose in our courts sitting in equity to protect the interests of the wife, whom the law presumed to be controlled by her husband in financial matters. In deciding that this gender-biased rule was no longer in keeping with the modern concept of the marriage and with recent legislative trends already alluded to, we said:

> These notions no longer accurately represent the society in which we live, and our laws have changed to reflect this fact. No longer must the husband be, nor is he in all instances the sole owner of the family wealth. No longer is the wife viewed as "little more than a chattel in the eyes of the

> law." *Nicholson v. Hospital*, 300 N.C. 295, 298, 266 S.E. 2d 818, 820 (1980). No longer in all cases is the husband the supporting and the wife the dependent spouse. No longer is the wife thought generally to be under the domination of her husband.

*Mims v. Mims*, 305 N.C. at 49, 286 S.E. 2d at 785 (citation omitted) (footnotes omitted).

We find that the reasoning in *Mims* is sound and applies equally well to the judge-made gender-biased rule requiring a husband to pay for the necessaries of his wife, but relieving her of a reciprocal duty. We therefore hold that a wife is liable for the necessary medical expenses provided for her husband. To the extent that the Court of Appeals opinion in *McCartha*, 66 N.C. App. 177, 310 S.E. 2d 409, conflicts with our ruling, that case is overruled.

Defendant contends that a gender-neutral application of the doctrine would be better accomplished by abolishing the doctrine of necessaries altogether. We see no reason to take this course. The doctrine has historically served several beneficial functions. Among these are the encouragement of health-care providers and facilities to provide needed medical attention to married persons and the recognition that the marriage involves shared wealth, expenses, rights, and duties. We conclude that the benefits to the institution of marriage will be enhanced by expanding rather than abolishing the doctrine of necessaries. Our decision is a recognition of a personal duty of each spouse to support the other, a duty arising from the marital relationship itself and carrying with it the corollary right to support from the other spouse.

Because this obligation, like the husband's obligation to pay for the medical expenses of his wife, arises from the marriage relationship, attempts by the wife, as here, to disavow this duty have no effect.

**[2]** Having held that the doctrine of necessaries applies equally to both spouses, we turn to the question of whether the dismissal of plaintiff's action against Vern Dell Harris was proper. In order to make out a *prima facie* case against a spouse for the recovery of expenses incurred in providing necessary medical services to the other spouse, the following must be shown:

(1) medical services were provided to the spouse;

(2) the medical services were necessary for the health and well-being of the receiving spouse;

(3) the person against whom the action is brought was married to the person to whom the medical services were provided at the time such services were provided; and

(4) the payment for the necessaries has not been made.

Turning to the facts in the present case, it appears that all of the elements of a *prima facie* case have been proven or stipulated to by the parties and that no affirmative defenses have been shown. The trial judge found as facts, and the parties so stipulated, that services were provided to defendant Donnie Harris; that these services were necessary to his health and well-being; that Donnie Harris was married to Vern Dell Harris at the time that the services were provided; that the outstanding balance for the services was $3,303.61; and that the payment for those services has not been made. We conclude, therefore, that plaintiff is entitled to recover of Vern Dell Harris $3,303.61, the cost of the medical services provided for her husband by plaintiff.

We, therefore, reverse the decision of the Court of Appeals, vacate the judgment of the trial court, and remand the case to the Court of Appeals for further remand to the District Court, Yadkin County, for entry of judgment for $3,303.61, plus interest, in favor of plaintiff against Vern Dell Harris.

Reversed and remanded.

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THE STATE OF NORTH CAROLINA BY AND THROUGH THE PENDER COUNTY CHILD SUPPORT ENFORCEMENT AGENCY, *EX REL.* ALENE LEWIS CREWS, APPELLEE; ALENE LEWIS CREWS, INTERVENOR-APPELLANT v. FREDDIE PARKER, AKA FREDERICK EDGE PARKER, JR., APPELLEE

No. 549PA86

(Filed 7 April 1987)

**1. Social Security and Public Welfare § 2— acceptance of public assistance—assignment of rights to state—limited to funds expended by state**

In an action to recover public assistance funds from the father of a child who lived with her grandmother, the grandmother did not assign all support

rights to the state as a condition of receipt of public assistance, but only her right to that support necessary to reimburse the state for the amount of public assistance it expended on behalf of the child, and the grandmother retained an interest in the father's child support obligation. N.C.G.S. § 110-137.

**2. Rules of Civil Procedure § 24— child support action between state and father —grandmother's right to intervene**

A grandmother who sought reimbursement from the father of her grandchild for funds expended prior to the receipt of AFDC payments was entitled to intervene in an action by the state against the father for reimbursement of AFDC funds where the state had proposed a settlement. The grandmother's interest would clearly be impaired by any judgment involving defendant's child support obligation which failed to take her claim for reimbursement into account. N.C.G.S. § 1A-1, Rule 24(a)(2).

Justice WEBB dissenting.

ON intervenor's petition for discretionary review of the decision of the Court of Appeals, 82 N.C. App. 419, 346 S.E. 2d 270 (1986), affirming order of *Morris-Goodson, J.*, denying intervenor's motion to intervene, filed 12 December 1985 in District Court, PENDER County. Heard in the Supreme Court 11 February 1987.

*Lacy H. Thornburg, Attorney General, by T. Byron Smith, Assistant Attorney General, and Harold L. Pollock, for the state, appellee.*

*Pisgah Legal Services, Inc., by Curtis B. Venable, Legal Services of the Lower Cape Fear, by Mason Hogan, and LSNC Resource Center, by Pam Silberman, for Alene Lewis Crews, intervenor-appellant.*

MARTIN, Justice.

The sole issue for review in this case is whether the Court of Appeals correctly affirmed the trial court's denial of appellant Alene Crews' motion to intervene in an action for child support brought against defendant Parker by the State of North Carolina. For the reasons set forth below, we reverse the Court of Appeals.

The record establishes that Cheryl Michele Crews was born 5 April 1968 and has lived with her grandmother, appellant Alene Crews, since birth. Neither biological parent has ever provided support for the child. Mrs. Crews applied for public assistance from the Aid to Families with Dependent Children (AFDC) program in 1981. At that time she identified defendant Parker as the

father of the child. The state, through the Pender County Child Support Enforcement Agency, acted upon this information in February of 1985, filing a civil complaint against defendant Parker in which it sought an adjudication of paternity, an order mandating prospective child support, and an order mandating reimbursement of past public assistance expenditures.

Defendant and the state presented a proposed settlement to the trial court for approval. This consent order provided that defendant would acknowledge paternity and agree to pay $125 per month as child support and a total of $900 as settlement of public assistance arrearages. (Actual arrearages were in excess of $2,000.) Mrs. Crews moved to intervene, alleging that the state had failed to assist her in obtaining compensation from the defendant for amounts expended during the many years she had supported the child prior to receiving public assistance. (Presuming a minimal payment of $50 per month, this claim would total about $6,000.) She requested not only that the state be enjoined from entering into any settlement which failed to take into account her claim for reimbursement of past support but also that the state be compelled to aid her in recovering such reimbursement from the defendant. The trial court denied her motion to intervene, concluding that Mrs. Crews had assigned *all* support rights to the state as a condition of her receipt of public assistance, including the right to compensation for past support. The Court of Appeals affirmed.

As a preliminary matter, we note that the North Carolina Rules of Civil Procedure permit intervention of right:

> When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C.R. Civ. P. 24(a)(2). Mrs. Crews contends that notwithstanding a statutory assignment of support rights to the state, she has retained an interest in child support that is not adequately represented by the parties in the state's action against defendant Parker. We agree.

**[1]** We will first address the question of the effect of the statutory assignment upon Mrs. Crews' interest. Title IV of the Social Security Act establishes AFDC and sets forth requirements that the states must meet under the Federal Child Support Enforcement Program. 42 U.S.C. §§ 601-615, 651-665 (1983 & Cum. Supp. 1986). In order to receive federal AFDC funding, a state must submit its public assistance plan for approval. 42 U.S.C. § 601 (1983). This plan must provide, inter alia, that recipients of assistance

> assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed.

42 U.S.C. § 602(a)(26)(A) (Cum. Supp. 1986); *see also* 45 C.F.R. § 232.11(a) (1986).

Contrary to the interpretation of the Court of Appeals, the language of 42 U.S.C. § 602(a)(26)(A) does not itself create an assignment of support rights by operation of law. The provision merely directs the state to legislate such an assignment in formulating its own assistance plan. North Carolina complied with the federal requirements by enacting N.C.G.S. § 110-137 (Cum. Supp. 1985). Consequently, the only assignment in the record before us is the one created by operation of *state* law:

> § 110-137. Acceptance of public assistance constitutes assignment of support rights to the State or county.
>
> By accepting public assistance for or on behalf of a dependent child or children, the recipient shall be deemed to have made an assignment to the State or to the county from which such assistance was received of the right to any child support owed for the child or children *up to the amount of public assistance paid.* The State or county shall be subrogated to the right of the child or children or the person having custody to initiate a support action under this Article and to recover any payments ordered by the court of this or any other state.

(Emphasis added.)

The starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 64 L.Ed. 2d 766 (1980). Recognizing that the custodian of a minor child may make a claim against the child's parent for amounts expended in raising the child, N.C.G.S. § 50-13.4, a reading of the plain language of section 110-137 (with particular attention to the key phrase "up to the amount of public assistance paid") supports Mrs. Crews' assertion that she made only a partial assignment of this support right by accepting AFDC benefits. That is, she assigned her right to that support necessary to reimburse the state for the amount of public assistance it expended on behalf of the child, but not her right to compensation already owed for the years of support prior to her receipt of AFDC.

In reaching the opposite conclusion, the Court of Appeals failed to construe the phrase "up to the amount of public assistance paid." Whether this was an oversight or a response to concerns that the state law might be in conflict with federal regulations, we shall not venture to guess. It is true that the state must administer its public assistance program in accordance with federal regulations. N.C.G.S. § 108A-27 (Cum. Supp. 1985). However, we would also point out that a state plan need not strictly follow the language of 42 U.S.C. § 602(a)(26)(A) in order to satisfy federal requirements but may substitute an assignment by operation of law which is "substantially identical" to that described by the federal act. 45 C.F.R. § 232.11(b) (1986). We observe that North Carolina's public assistance plan has been duly approved.

Here the import of section 110-137 is entirely consistent with our reading of applicable federal legislation. The federal statutes clearly express the intention that an AFDC recipient, notwithstanding an assignment by operation of state law, retain some active and continuous interest in support rights. *See Medsker v. Adult and Family Services Division*, 42 Or. App. 769, 601 P. 2d 865 (1979) (an assignment does not utterly destroy any interest the custodial parent had in the other parent's duty to pay or payments which are made); *accord In re Marriage of Stutsman*, 311 N.W. 2d 73 (Iowa 1981); *In re Marriage of Lathem*, 642 S.W.

2d 694 (Mo. App. 1982); *Ostwald v. Ostwald*, 331 N.W. 2d 64 (S.D. 1983). For example, under 42 U.S.C. § 657(b)(1) (Cum. Supp. 1986), an assignor is still entitled to the first $50 of any support that the state is able to collect, regardless of any outstanding arrearages owed to the state. If the state collects support in excess of the public assistance paid, the assignor is entitled to receive the excess. 42 U.S.C. § 657(b)(4) (Cum. Supp. 1986). When public assistance ends, the assignment terminates, except as to unpaid public assistance arrearages, and support rights revert back to the assignor. 42 U.S.C. § 657(c) (Cum. Supp. 1986); *see also* 45 C.F.R. § 302.51(f) (1984).

Hence we discern no conflict between the federal guidelines and the provision of N.C.G.S. § 110-137 which limits the assignment to the amount of public assistance paid. Section 110-137 is substantially identical to the federal act and may properly govern the question of what rights Mrs. Crews has retained. We hold that the language of section 110-137 operates to assign to the state or county only the right to reimbursement for those amounts of support money provided through AFDC. Thus, Mrs. Crews retained her interest in defendant Parker's child support obligation.

The reliance of the Court of Appeals on *Matter of Stovall*, 721 F. 2d 1133 (7th Cir. 1983), is misplaced. While that case did find an Illinois assistance plan to be substantially identical to the federal AFDC requirements, it interpreted the language of 42 U.S.C. § 602(a)(26)(A) without expressly determining the implications of the plan's assignment provisions, which included the phrase "up to the amount of financial aid provided." Thus, *Stovall* provides no real insight as to the appropriate construction of limiting language in state plan assignment provisions. Had it done so, we might have found this particular federal ruling somewhat more instructive. We note also that the sole question before the *Stovall* court was whether the defendant-father's child support obligation was dischargeable in bankruptcy. Consequently, we find it less than persuasive as precedent on the issue of intervention rights.

**[2]** Having resolved that Mrs. Crews retained an interest in the support obligation of defendant Parker, we now consider whether the protection of this interest would be impaired within the mean-

ing of N.C.R. Civ. P. 24(a)(2) by disposition of the child support action without Mrs. Crews' intervention. Mrs. Crews contends that she is in privity with the state and that a settlement between the state and the defendant would merge all claims, thereby foreclosing later action upon the defendant's obligation.

We have held that the state is the real party in interest in actions to recover public assistance paid for support of a child. *Settle v. Beasley*, 309 N.C. 616, 308 S.E. 2d 288 (1983). In order for a prior judgment to bind Mrs. Crews, an individual not a party to the action, she must be in privity with the real party in interest. *See id.* Privity, for purposes of estoppel, denotes a mutual or successive relationship to the same rights of property. *Masters v. Dunstan*, 256 N.C. 520, 124 S.E. 2d 574 (1962).

Here, by virtue of the partial assignment, Mrs. Crews and the state have concurrent interests in defendant's support obligation. However, it is not necessary to our analysis of the intervention rules that we determine whether Mrs. Crews and the state are in privity under the facts of this case. We are guided in our reasoning by the wisdom of the commentary to N.C.G.S. § 1A-1, Rule 24(a)(2) (1983):

> In respect to subsection (2), it will be noted that the harm to the intervenor's interest is to be considered from a "practical" standpoint, rather than technically. In other words, the intervenor need not be threatened with being bound in a strict res judicata sense.

Clearly Mrs. Crews' interest would be impaired by any judgment involving defendant's child support obligation which failed to take her claim for reimbursement into account, regardless of whether she would be bound by that judgment. She would, as a practical matter, suffer the expense and inconvenience of bringing a separate suit against defendant. And, although we have declined to decide if defendant's potential claim of res judicata has merit, Mrs. Crews would be impeded by his ability to force litigation of that additional issue.

Our courts favor the swift and efficient resolution of disputes. Allowing the state to settle defendant's obligation to pay public assistance arrearages without providing Mrs. Crews an opportunity to litigate in this action her own claim for arrearages

inevitably prolongs and complicates the litigation process. This is precisely the type of situation contemplated by the rule for intervention of right. For this reason as well as those stated above, the decision of the Court of Appeals is reversed and the case remanded to that court for further remand to the trial court with instructions to allow intervention pursuant to N.C.R. Civ. P. 24(a)(2).

Reversed and remanded.

Justice WEBB dissenting.

I dissent. I believe that the Court of Appeals opinion written by Judge Martin is correct. I vote to affirm the Court of Appeals on the basis of the opinion of the Court of Appeals. I note that nowhere in Judge Martin's opinion does he say that the language of 42 U.S.C. § 602(a)(26)(A) creates an assignment of support rights by operation of law.

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STATE OF NORTH CAROLINA v. RAYMOND EUGENE BROWN

No. 770A85

(Filed 7 April 1987)

1. **Criminal Law § 9.5; Constitutional Law § 65— aiding and abetting—convictions of principals in prior trial—not admissible**

In a prosecution for first degree rape, armed robbery, first degree kidnapping, and first degree sexual offense where the State sought to establish that defendant was an aider and abettor as to all of the crimes except the rape, the trial court erred by admitting testimony that two others had already been convicted of the crimes charged against defendant. It was the province of the jury in this case, not the jury in some other case, to determine whether every element of the State's charges against defendant on the theory of aiding and abetting had been established beyond a reasonable doubt. Furthermore, the testimony violated defendant's Sixth Amendment right to confront witnesses against him.

2. **Criminal Law § 33.1; Constitutional Law § 65— rape—prior convictions of accessories—inadmissible**

In a prosecution for rape, armed robbery, first degree kidnapping, and first degree sexual offense in which the State sought to establish that defendant was the principal as to the rape, evidence of previous convictions of other men for these crimes was irrelevant under N.C.G.S. § 8C-1, Rule 401, and, furthermore, violated defendant's Sixth Amendment right to confront witnesses against him.

APPEAL by the defendant from judgments entered by *Hobgood (Robert H.), J.*, at the 9 September 1985 Criminal Session of Superior Court, CUMBERLAND County.

The defendant was indicted for one count each of first-degree rape, robbery with a dangerous weapon, first-degree kidnapping, and first-degree sexual offense. A jury found him guilty as charged. He received consecutive life sentences for first-degree rape and first-degree sexual offense, and consecutive sentences of twelve years for first-degree kidnapping and fourteen years for robbery with a dangerous weapon.

The defendant appealed the convictions resulting in life sentences to the Supreme Court as a matter of right. His motion to bypass the Court of Appeals with respect to his appeal of the other convictions was allowed on 13 February 1986. Heard in the Supreme Court on 12 February 1987.

*Lacy H. Thornburg, Attorney General, by Laura E. Crumpler, Assistant Attorney General, for the State.*

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

MITCHELL, Justice.

The defendant contends, *inter alia*, that the trial court erred by admitting into evidence the previous convictions of two others for the same crimes with which he was charged in this case. We agree and hold that the defendant is entitled to a new trial.

The State's evidence tended to show that on the night of Sunday, 17 June 1984, the victim left her apartment and went to Hardee's for food. She returned home immediately and parked directly in front of her apartment. Two men approached her and asked if she knew of a "Cashwell" who lived in that apartment. She said she did not and added that she lived alone. One of the men then displayed a knife and told her they wanted her money. The other man took her money out of her wallet. The men were later identified as Eric Gilliam and Jeffrey Battle, but they referred to themselves and each other as "Killer." Gilliam told the victim that she would be "dead in a ditch" if she made any sound.

Gilliam and Battle got into the victim's car with her. Gilliam drove the car to a road in a dark wooded area, where he informed the victim that they were going to have sex with her. Another car driven by the defendant, Raymond Eugene Brown, pulled up behind the victim's car. Battle pushed the victim forward and told her not to look back. The men undressed her, and Battle forced her to perform fellatio on him. Gilliam, Battle and the defendant Brown each engaged in sexual intercourse with the victim. When the defendant Brown got into the car, the victim saw he had a set of handcuffs.

As Gilliam was getting dressed, he told the victim, in the presence of both Battle and the defendant Brown, that she would be shot if she reported the incident. He said he liked her and would come back for her. The men got into the car the defendant Brown had brought and left. The victim waited ten minutes, as instructed, then returned to her apartment. She reported the incident to police.

Late the following Friday night, 23 June 1984, Gilliam and Battle knocked on the victim's door. She saw them through her window and called the police. The authorities had been "staking out" the area and stopped Gilliam's car as it left the apartment complex. The defendant Brown was in the front passenger's seat. A search of the defendant Brown's person revealed that he was carrying a pocketknife, a straight-edged razor, and a handcuff key. Five other knives and a set of handcuffs were found in the car.

The defendant Brown made a statement to authorities within a few hours. He contended in the statement and at trial that his sexual intercourse with the victim was consensual. He said he was riding with Gilliam and Battle on 17 June 1984. They pulled into an apartment complex where Gilliam said he used to live. Gilliam and Battle got out of the car and told the defendant to follow them when they left in another car. He complied, following them out of the complex and down the road where the incident occurred. The defendant said that Gilliam came back to the car he was driving and told him, "This girl is friendly . . . ." The defendant got into her car, spoke with her awhile, then engaged in sexual intercourse with her.

The defendant Brown said he had seen no weapon that night and was unaware that any money had been taken. According to the defendant, Gilliam told him he had seen "the girl" again later in the week and she had said she enjoyed the encounter. She had invited Gilliam to come over again. For this reason the men had returned to the apartment complex on the night they were apprehended. The defendant Brown also testified that Gilliam and Battle had handed him the pocketknife and razor when they were stopped on 23 June 1984, because possessing weapons violated the terms of their probation and parole.

**[1]** The defendant Brown contends that the trial court erred by admitting testimony that Gilliam and Battle already had been convicted of the same crimes charged against him. *See State v. Battle and Gilliam*, 317 N.C. 293, 344 S.E. 2d 783 (1986) (finding no error in their convictions). The State sought to establish at trial that, as to the crime of first degree rape, the defendant Brown was the principal, aided and abetted by Gilliam and Battle. As to the other crimes, the State sought to show that Gilliam and Battle were principals, with the defendant acting as an aider and abettor. The prosecutor argued that testimony concerning Gilliam's and Battle's convictions of the crimes for which they were the alleged principals was admissible in this case against the defendant Brown for the same crimes on the theory that he aided and abetted the other men. The prosecutor relied upon two old cases, *State v. Duncan*, 28 N.C. 98 (1846) and *State v. Chittem*, 13 N.C. 49 (1830). The trial court ruled that the testimony "is admissible in this trial."

To convict the defendant under the theory of aiding and abetting, the State had the burden of proving, among other things, that the crimes alleged had in fact been committed. *State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973). *See generally State v. Woods*, 307 N.C. 213, 218, 297 S.E. 2d 574, 577 (1982). Although it is not required that the principal be convicted, the guilt of the principal must be established beyond a reasonable doubt. *Id.* This burden could not be carried by testimony concerning judgments rendered in other trials to which the defendant was not a party and not able to cross-examine witnesses. The admission of such evidence violated his right to confrontation under the Constitution of the United States and the Constitution of North Carolina. *See Kirby v. United States*, 174 U.S. 47, 55, 43 L.Ed. 890, 893-94

(1899); *State v. Kerley*, 246 N.C. 157, 159, 97 S.E. 2d 876, 878 (1957).

*State v. Duncan*, 28 N.C. 98 (1846) and *State v. Chittem*, 13 N.C. 49 (1830) do not control the present case. Those cases apparently were tried under the Nineteenth Century rule that a defendant could not be convicted as an accessory until the State established that the principal had been *convicted*. Therefore, in *Duncan* and *Chittem* this Court quite properly found no error in the admission of evidence that the principals had been convicted. *See Kirby v. United States*, 174 U.S. 47, 54, 43 L.Ed. 890, 893 (1899). To the extent that they go further and hold that the record of a principal's conviction could be used during the trial of the alleged accessory as evidence that the crime actually was committed, however, we expressly disavow *Duncan* and *Chittem*.

More recently, we have stated the correct rule when, as here, the defendant is tried on the theory of aiding and abetting to be as follows:

> [W]here one defendant had been separately tried and convicted or had pleaded guilty prior to the defendant then on trial, the record of the codefendant's prior conviction or plea is not admissible, and the fact that the codefendant had been convicted or had pleaded guilty to the same charge is not competent . . . . If one is convicted or pleads guilty, this is not evidence of the guilt of the other.

*State v. Jackson*, 270 N.C. 773, 775, 155 S.E. 2d 236, 237 (1967). We further indicated that the admission of such incompetent testimony violated the Sixth Amendment guarantee of an accused's right to confront the witnesses against him made obligatory on the States by the Fourteenth Amendment to the Constitution of the United States. 270 N.C. at 776, 155 S.E. 2d at 238.

Since a deprivation of a constitutional right is involved in the present case, the State must demonstrate to this Court that the error was harmless beyond a reasonable doubt if the convictions of the defendant are to be upheld. N.C.G.S. § 15A-1443(b) (1983). The State has been unable to do so.

Here, the jury was exposed to strong and virtually irrebuttable evidence that the alleged principals were convicted of the same crimes charged against this defendant. Such evidence must

have strongly influenced the jury to believe that the alleged principals actually had committed the crimes charged here, a critical element in the charges against this defendant Brown upon the State's theory that he participated in the crimes as an aider and abettor. It was the province of the jury in this case, not the jury in some other case, to determine whether every element of the State's charges against Brown on the theory of aiding and abetting had been established beyond a reasonable doubt. The evidence concerning the previous convictions of the alleged principals was likely, in our view, to have caused the jury in this case to rely improperly upon the verdicts of the jury in the previous cases against the alleged principals. Therefore, we do not find the error harmless beyond a reasonable doubt.

**[2]** The defendant Brown also is entitled to a new trial on the charge of first degree rape, which was tried on the theory that he was the principal and the other men were aiders and abettors. As to that charge against the defendant, the evidence of the previous convictions of the other men was irrelevant under Rule 401 of the North Carolina Rules of Evidence, because it did not have "any tendency to make the existence of any fact . . . of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1986). Being irrelevant, the evidence was not admissible. N.C.G.S. § 8C-1, Rule 402 (1986). Further the admission of such evidence violated the defendant's Sixth Amendment right to confront the witnesses against him with regard to this charge, just as it did with regard to the other charges. We do not find this error harmless beyond a reasonable doubt.

The defendant is entitled to a new trial as to all charges.

New trial.

MARGIE S. SEIFERT v. PAUL J. SEIFERT

No. 553A86

(Filed 7 April 1987)

1. **Divorce and Alimony § 30— equitable distribution—pension benefits—payment before actual receipt**

Absent agreement, a court cannot order the immediate or periodic payment of a distributive award of vested pension and retirement benefits prior to actual receipt; however, if the marital estate contains adequate property other than the pension and retirement benefits, an in kind or monetary distribution of these assets may be made which takes into account the anticipated pension and retirement benefits. N.C.G.S. § 50-20(e), N.C.G.S. § 50-20(b)(3).

2. **Divorce and Alimony § 30— equitable distribution—pension benefits—present value and fixed percentage methods**

Where the value of the total marital estate is sufficient to permit it, both present value and fixed percentage are permissible methods of evaluating pension and retirement benefits and arriving at an equitable distribution of marital property; however, the trial court here erred by deferring until actual receipt payments calculated under the present valuation method. N.C.G.S. § 50-20(b)(3).

APPEAL of right pursuant to N.C.G.S. 7A-30(2) from a decision of a divided panel of the Court of Appeals, 82 N.C. App. 329, 346 S.E. 2d 504 (1986), vacating the judgment entered by *Keever, J.*, on 24 September 1985 in District Court, CUMBERLAND County, and remanding for further proceedings. Heard in the Supreme Court 12 March 1987.

*McLeod, Senter & Winesette, P.A., by Joe McLeod and William L. Senter; Reid, Lewis & Deese, by Renny Deese, for plaintiff appellee.*

*Harris, Sweeny & Mitchell, by Ronnie M. Mitchell; Blackwell, Swaringen & Russ, by John V. Blackwell, Jr., for defendant appellant.*

WHICHARD, Justice.

The issue in this equitable distribution action is whether the trial court erred in deferring, until actual receipt, an anticipated award of military pension and retirement benefits calculated under a present value valuation method. We hold that it did.

Plaintiff-wife instituted this action against defendant-husband seeking an absolute divorce, based on separation for one year, and equitable distribution of the marital property. The parties' primary marital assets are their vested individual pension and retirement benefits. They also have $27,000 equity in a house and lot and approximately $15,475 in personal property.

The parties stipulated that plaintiff-wife's pension and retirement benefits had a total value of $43,284.07 on the date of separation, which is the date for valuation of marital property when a divorce is granted based on separation for one year. N.C.G.S. 50-21(b) (1984). Using defendant-husband's base pay on the date of separation, $1,780 per month, the trial court determined that he would have been entitled to $1,112.50 per month in benefits had he retired on that date. The court further determined that as of the date of separation defendant-husband had served twenty-four years and eleven months in the United States Army, of which he was married to plaintiff-wife for twenty-two years and three months. Therefore, eighty-seven and one-half percent of defendant-husband's pension and retirement benefits was earned during the marriage. Using a life expectancy for defendant-husband of 25.5 years and a rate of investment return of ten percent, the court computed the present lump sum value of defendant-husband's pension and retirement benefits at $108,491.60. The court included the full amount as marital property and concluded that an equal division of the marital property would be equitable.

The court then awarded plaintiff-wife the full amount of her vested pension, the house, certain personal property, and $20,966.26 as her share of the present value of defendant-husband's pension. The share of defendant-husband's pension was not to be paid, however, until he began receiving the benefits, and was then payable in monthly installments of $188.07. The court awarded defendant-husband the remaining value of his pension and certain other personal property.

On plaintiff-wife's appeal the Court of Appeals vacated the judgment, holding that "the trial court erred and abused its discretion when, after properly choosing in its discretion to use the present value evaluation method, it impermissibly postponed or deferred payment instead of ordering immediate payment." *Sei-*

*fert v. Seifert*, 82 N.C. App. 329, 339, 346 S.E. 2d 504, 509 (1986). It also implicitly approved the fixed percentage of future payments method of valuation and distribution, finding it consistent with the statute which prescribes acceptable methods of payment of pension and retirement benefit awards.

**[1]** Chief Judge Hedrick dissented on the ground that an immediate distributive award of the husband's pension would violate N.C.G.S. 50-20(b)(3). He also asserted that the fixed percentage of future payments method, discussed and approved by the majority, violates our statutory and case law by dispensing with valuation of the marital property. *Seifert v. Seifert*, 82 N.C. App. at 339-40, 346 S.E. 2d at 509-10.

N.C.G.S. 50-20(b)(3), in pertinent part, provides:

> [A] distributive award of vested pension and retirement benefits may be payments payable:
>
> a. As a lump sum by agreement;
>
> b. Over a period of time in fixed amounts by agreement; or
>
> c. As a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits.

Thus, absent agreement, a court cannot order the immediate or periodic payment of a distributive award of vested pension and retirement benefits prior to the employee-spouse's actual receipt thereof.

Like the majority in the Court of Appeals, however, we do not construe this statute to preclude, absent agreement, application of the present value valuation method to vested pension and retirement benefits in valuing and distributing an entire marital estate. Our statute clearly provides for both in kind and monetary awards in order to achieve an equitable distribution of the marital estate. N.C.G.S. 50-20(e), in pertinent part, provides:

> In any action in which the court determines that an equitable distribution of all or portions of the marital property in kind would be impractical, the court in lieu of such distribution shall provide for a distributive award in order to achieve

> equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital property.

A "distributive award" is "payments that are payable either in a lump sum or over a period of time in fixed amounts . . . ." N.C.G.S. 50-20(b)(3) (1984). Thus, if the marital estate contains adequate property other than the pension and retirement benefits, an in kind or monetary distribution of these assets may be made which takes into account the anticipated pension and retirement benefits. This is impermissible only when the value of the pension or retirement benefits is so disproportionate in relation to other marital property that an immediate distribution would be inappropriate. *See King v. King*, 332 Pa. Super. Ct. 526, 534, 481 A. 2d 913, 917 (1984).

**[2]** The fixed percentage method of evaluating pension and retirement benefits also clearly comports with the statute, which provides that a distributive award of vested pension and retirement benefits may be payable "[a]s a prorated portion of . . . benefits . . . [when] the party against whom the award is made actually begins to receive benefits." N.C.G.S. 50-20(b)(3) (1984). Under this method if, after valuing the marital estate, the court finds a distributive award of retirement benefits necessary to achieve an equitable distribution, the nonemployee spouse is awarded a percentage of each pension check based on the total portion of benefits attributable to the marriage. The portion of benefits attributable to the marriage is calculated by multiplying the net pension benefits by a fraction, the numerator of which is the period of the employee spouse's participation in the plan during the marriage (from the date of marriage until the date of separation) and the denominator of which is the total period of participation in the plan. *See Jerry L.C. v. Lucille H.C.*, 448 A. 2d 223, 225 (Del. Super. Ct. 1982). The nonemployee spouse receives this award only if and when the employee spouse begins to receive the benefits. N.C.G.S. 50-20(b)(3) (1984).

Under the fixed percentage method, deferral of payment is possible without unfairly reducing the value of the award. The present value of the pension or retirement benefits is not considered in determining the percentage to which the nonemployee spouse is entitled. Moreover, because the nonemployee spouse

receives a percentage of the benefits actually paid to the employee spouse, the nonemployee spouse shares in any growth in the benefits. *See* N.C.G.S. 50-20(b)(3) (1984) ("Said award shall not be based on contributions made after the separation, but shall include any growth [i]n the amount of the pension or retirement account vested at the time of the separation."). Yet, the formula gives the nonemployee spouse a percentage only of those benefits attributable to the period of the marriage, and that spouse does not share in benefits based on contributions made after the date of separation. *Id.*

Finally, so long as the trial court properly ascertains the net value of the pension and retirement benefits to determine what division of the property will be equitable, application of the fixed percentage method does not, as the dissenting opinion in the Court of Appeals suggests, violate the mandate that the court must identify the marital property, ascertain its net value, and then equitably distribute it. *See Cable v. Cable*, 76 N.C. App. 134, 331 S.E. 2d 765, *disc. rev. denied*, 315 N.C. 182, 337 S.E. 2d 856 (1985) (cited in the dissenting opinion). On the contrary, valuation of these benefits, together with other marital property, is necessary to determine the percentage of these benefits that the nonemployee spouse is equitably entitled to receive.

We thus conclude that where the value of the total marital estate is sufficient to permit it, both present value and fixed percentage are permissible methods of evaluating pension and retirement benefits in arriving at an equitable distribution of marital property. Here, however, the trial court erred in deferring, until actual receipt, payments calculated under the present valuation method. As stated by the Court of Appeals: "This, in effect, operated as a double reduction: plaintiff received a *discounted* value for immediate distribution but nevertheless was required to wait to receive payment until, if and when, the defendant reached retirement and began receiving benefits." *Seifert v. Seifert*, 82 N.C. App. at 338, 346 S.E. 2d at 509. The effect is an unfair or inequitable reduction in the value of the award between the date of separation and the date of the employee-spouse's retirement.

We note that the parties' pension and retirement benefits in this case were so disproportionate in relation to other assets that

there was insufficient marital property from which to make a present equitable award, given the determination that an equal division would be equitable. Thus, if upon remand the trial court again determines that an equal division of the marital property would be equitable, it should value the marital assets (including the pension and retirement benefits), calculate the percentage of the pension and retirement benefits to which plaintiff-wife is entitled, and order a deferred award of such benefits payable when defendant-husband actually begins to receive them. N.C.G.S. 50-20 (b)(3) (1984).

The decision of the Court of Appeals vacating the judgment of the trial court is affirmed. The case is remanded to the Court of Appeals for remand to the trial court for further proceedings not inconsistent with this opinion.

Affirmed.

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DAVIE JEAN BLANTON v. MOSES H. CONE MEMORIAL HOSPITAL, INC.

No. 57PA86

(Filed 7 April 1987)

1. **Hospitals § 3— corporate negligence— respondeat superior—no distinction**

What has previously been called corporate negligence is nothing more than an application of negligence principles; a corporation can only act through its agent and, if it is liable for negligence, it has to be through the doctrine of respondeat superior.

2. **Hospitals § 3.3— negligence of unqualified physician—liability of hospital**

The trial court should have denied defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiff alleged that defendant granted clinical privileges to a doctor to perform operations without ascertaining that the doctor was qualified to perform them; failed to enforce the standards of the Joint Commission on Accreditation of Hospitals; permitted its agents to follow instructions of the physician which were dangerous to plaintiff; failed to monitor and oversee the treatment and care of plaintiff by the physician on its premises; and permitted the doctor to perform a series of surgeries for which she was not properly qualified without requiring that she be supervised or assisted by a properly qualified member of its medical staff. Plaintiff's allegation that defendant allowed the physician to perform an operation on its premises which was not medically required did not state a claim.

ON discretionary review of the decision of the Court of Appeals, 78 N.C. App. 502, 337 S.E. 2d 200 (1985), reversing and re-

manding the judgment of dismissal entered by *Davis (James C.), Judge*, at the 8 January 1985 Session of Superior Court, GUILFORD County. Heard in the Supreme Court 10 December 1986.

This is an action for damages to the plaintiff for injuries she received in a series of operations performed on the premises of the defendant hospital. The plaintiff's allegations may be summarized as follows: From 12 September 1978 through 17 November 1978 three operations were negligently performed on the plaintiff on the premises of the defendant hospital, which operations proximately caused substantial injuries to the plaintiff. The hospital breached duties owed to the plaintiff and was negligent in that it, (1) granted clinical privileges to her physician to perform an operation for which the physician was not qualified, (2) failed to ascertain that the physician who performed the operations was qualified to perform them, (3) failed to enforce the standards of the Joint Commission on Accreditation of Hospitals relating to the quality of patient care, (4) permitted its agents, servants and employees to follow instructions of the physician which were dangerous to the plaintiff, (5) failed to monitor and oversee the treatment and care of the plaintiff by the physician on the premises of the hospital, (6) permitted an unqualified physician to perform surgery without requiring that the physician be supervised or assisted by a properly qualified member of its medical staff, and (7) permitted the physician to perform an operation on its premises that was not medically required.

The superior court allowed a motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). The Court of Appeals reversed and we granted the defendant's petition for discretionary review.

*Clark & Wharton, by David M. Clark, for plaintiff appellee.*

*Henson, Henson, Bayliss & Coates, by Perry C. Henson and Jack B. Bayliss, Jr., for defendant appellant.*

*James B. Maxwell and Burton Craige for the North Carolina Academy of Trial Lawyers, amicus curiae.*

*Alene M. Mercer, H. Lee Evans, Jr. and Robert M. Clay, for the North Carolina Association of Defense Attorneys, amicus curiae.*

*W. C. Harris, Jr. and Samuel O. Southern, for the North Carolina Hospital Association Trust Fund, amicus curiae.*

WEBB, Justice.

The question on this appeal is whether it was error for the superior court to allow the defendant's motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). We hold it was error and affirm the decision of the Court of Appeals.

In the Court of Appeals the focus of the parties' briefs and the court's opinion was on whether *Bost v. Riley*, 44 N.C. App. 638, 262 S.E. 2d 391, *cert. denied*, 300 N.C. 194, 269 S.E. 2d 621 (1980) applies retroactively. The Court of Appeals held that it does.

In this Court the appellant argues in addition to its argument on the retroactive application of *Bost* that the complaint fails to allege corporate negligence. The term "corporate negligence" has been used in discussing the liability of hospitals to patients. *See Darling v. Hospital*, 33 Ill. 2d 326, 211 N.E. 2d 253, 14 A.L.R. 3d 860 (1965), *cert. denied*, 383 U.S. 946, 16 L.Ed. 2d 209 (1966); *Jones v. New Hanover Hospital*, 55 N.C. App. 545, 286 S.E. 2d 374, *cert. denied*, 305 N.C. 586, 292 S.E. 2d 570 (1982); *Cox v. Hayworth*, 54 N.C. App. 328, 283 S.E. 2d 392 (1981); and *Robinson v. Dusznyski*, 36 N.C. App. 103, 243 S.E. 2d 148 (1978). *See also Redpath, Corporate Negligence of Hospitals and the Duty to Monitor and Oversee Medical Treatment*, 17 Wake Forest L. Rev. 309 (1981). The above cases hold that it is the rule that if a doctor is not an agent of a hospital and he negligently injures his patient while on the premises of the hospital, the hospital is not liable to the patient on the theory of respondeat superior.

**[1]** The courts have sometimes said that there is a difference between a hospital's liability based on respondeat superior and liability based on corporate negligence. We believe that the use of these two labels is unfortunate when analyzing the liability of hospitals. Respondeat superior is a doctrine which makes a principal liable for the acts of an agent within the scope of the agent's

authority. *See Rogers v. Black Mountain*, 224 N.C. 119, 29 S.E. 2d 203 (1944). A corporation can act only through its agents. *See* Robinson, *North Carolina Corporation Law and Practice*, The Harrison Press § 13-4. If it is liable for negligence it has to be through the doctrine of respondeat superior. Even if a hospital is not liable for the negligence of a doctor because the doctor is not an agent of the hospital it still may be liable if, through a person who is an agent of the hospital it has breached a duty it owes to a patient. This is what has been called corporate negligence. This is no more than the application of common law principles of negligence and is not some recently developed doctrine upon which liability is based.

**[2]** In determining whether the plaintiff has alleged sufficient facts to withstand a motion to dismiss we are guided by the standard of the reasonable man of ordinary prudence. "Actionable negligence is the failure of one owing a duty to another to do what a reasonable and prudent man would ordinarily have done, or doing what such a person would not have done, which omission or commission is the proximate cause of injury to another." S. Speiser, C. Krause and A. Gans, *The American Law of Torts* § 9.1 p. 995 (1983). The liability of the defendant to the plaintiff depends on whether the defendant owed a duty of care to the plaintiff, which duty was violated, proximately causing injury to the plaintiff.

We have recognized that hospitals in this state owe a duty of care to patients. *Rabon v. Hospital*, 269 N.C. 1, 152 S.E. 2d 485 (1967). Hospitals have a duty to exercise ordinary care in the selection of their agents. *Hoke v. Glenn*, 167 N.C. 594, 83 S.E. 807 (1914). In *Payne v. Garvey*, 264 N.C. 593, 142 S.E. 2d 159 (1965) this Court, while affirming a judgment of nonsuit in favor of the defendant hospital, said a hospital is under a duty to use reasonable care in the selection, inspection and maintenance of equipment. *Starnes v. Hospital Authority*, 28 N.C. App. 418, 221 S.E. 2d 733 (1976) is to the same effect.

The plaintiff has alleged the defendant granted clinical privileges to a doctor to perform operations without ascertaining whether the doctor was qualified to perform them. *Hoke* holds that a hospital is liable for negligence in the selection of its agents. The doctor in this case is not an agent of the hospital but

we believe the principle of *Hoke* should apply and a hospital should be liable for negligence in allowing an unqualified doctor to perform operations in the hospital. *Dusznyski* recognized this duty while holding that the action against the hospital should have been dismissed. We hold that a reasonable man of ordinary prudence in the position of the hospital owes a duty of care to its patients to ascertain that a doctor is qualified to perform an operation before granting him the privilege to do so.

The plaintiff has also alleged that the defendant failed to enforce the standards of the Joint Commission on the Accreditation of Hospitals. In *Wilson v. Hardware, Inc.*, 259 N.C. 660, 131 S.E. 2d 501 (1963), the plaintiff brought an action against the manufacturer for injuries caused by the breaking of a ladder. The evidence showed that the ladder was not constructed according to the American Standard Safety Code for Portable Wood Ladders. The defendant purported to follow that code in the construction of its ladders. This Court held this was some evidence of negligence on the part of the defendant. If it is some evidence of negligence for the manufacturer of ladders to violate an industry safety standard which safety standard the manufacturer had purported to follow we believe it is some evidence of negligence for a hospital to violate a safety standard which the hospital had purported to follow. The duty of a hospital to its patients should be at least as great as a ladder manufacturer to users of its ladders.

The plaintiff has alleged further that the defendant permitted its agents to follow instructions of the physician which were dangerous to the plaintiff. In *Byrd v. Hospital*, 202 N.C. 337, 162 S.E. 738 (1932), while holding that a nurse who obeys the orders of a physician in charge of a patient is not ordinarily liable, the Court recognized that if an order of a physician to a nurse is "so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to the patient by the execution of such order" the nurse may be held liable. We hold that if the plaintiff can prove an agent of the hospital followed some order of the doctor which meets the test of *Byrd* the plaintiff will have a claim based on this allegation.

The plaintiff has alleged that the defendant hospital failed to monitor and oversee the treatment and care of the plaintiff by the physician on its premises. The plaintiff in her brief says that

she will prove pursuant to this allegation that the defendant failed to monitor and supervise the doctor's overall performance in the hospital on an ongoing basis. We believe evidence of a failure to monitor and supervise on an ongoing basis would be relevant under this allegation. We hold that pursuant to the reasonable man standard the defendant had a duty to monitor on an ongoing basis the performance of physicians on its staff and this allegation states a claim.

The plaintiff has also alleged that the defendant hospital permitted the doctor "to perform a series of surgeries . . . for which she was not properly qualified without requiring that she be supervised or assisted by a properly qualified member of its medical staff." We hold that this states a claim. Under ordinary circumstances a hospital is not required to supervise a surgeon in the performance of an operation. *See Cox*, 54 N.C. App. 328, 283 S.E. 2d 392. We believe that a reasonable man in the position of the hospital, if it allowed an unqualified surgeon to perform an operation, should provide supervision or assistance to such a surgeon. The plaintiff contends it is negligence not to provide such assistance although the hospital does not know the doctor is unqualified if it would have known through the exercise of ordinary care. We believe that a reasonable man of ordinary prudence in the position of the hospital, although it may have been negligent in not knowing the lack of his qualifications, would not require that the surgeon be supervised or assisted by a properly qualified member of its staff if it did not know the doctor was not qualified. Under this allegation the plaintiff will have to prove knowledge in order to prove her claim.

The plaintiff has also alleged that the defendant allowed the physician to perform an operation on its premises which was not medically required. The doctor was not the agent of the defendant hospital. The hospital did not control the doctor's decision to perform the operation and is not liable for it except as indicated in other parts of this opinion.

In light of the position we have taken in this opinion that the case is governed by common law principles of negligence and that what has previously been called corporate negligence is nothing more than an application of negligence principles, the question of retroactiveness does not arise.

The decision of the Court of Appeals is

Affirmed.

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IN THE MATTER OF: THE APPEAL OF K-MART CORPORATION FROM THE DENIALS OF ITS CLAIMS FOR EXEMPTION BY MECKLENBURG COUNTY FOR 1978, 1979, 1980, 1981, 1982, AND 1983

No. 257PA86

(Filed 7 April 1987)

1. **Taxation § 25.10— decision on property tax exemption—review by Property Tax Commission**

Although the decision by a county board of equalization and review to grant or deny a property tax exemption is a discretionary one, N.C.G.S. § 105-282.1(c), it is reviewable by the Property Tax Commission. N.C.G.S. § 105-290.

2. **Administrative Law § 8— judicial review under APA—whole record test**

Although the 1985 amendment of N.C.G.S. § 150A-51 deleted the phrase "in view of the entire record as submitted," the amendment maintains the whole record test for judicial review under the Administrative Procedure Act.

3. **Taxation § 19.1— large appliances in public warehouse—exemption from property taxes**

Appellant was entitled to a property tax exemption under N.C.G.S. § 105-275(10) for 1978 and 1979 for large appliances placed in a public warehouse where appellant shipped the warehoused property ordered by customers directly to the customers' homes from the warehouse during those years. The decision of the Court of Appeals upholding the Property Tax Commission's denial of the exemption for the years 1980-83 when appliances were shipped from the warehouse to a retail store and then either picked up by the customer or delivered to the customer's home is affirmed, not as a precedent but as the decision in this case, where one member of the Supreme Court did not participate in the decision and the remaining six members are evenly divided.

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

ON K-Mart Corporation's petition for discretionary review of the decision of the Court of Appeals, 79 N.C. App. 725, 340 S.E. 2d 752 (1986), affirming a decision of the North Carolina Property Tax Commission entered 7 February 1985 sustaining the denial of appellant's applications for exemption from property tax by the

Mecklenburg County Board of Equalization and Review for the years 1978 through 1983. Heard in the Supreme Court 11 February 1987.

*Hamel, Helms, Cannon, Hamel & Pearce, by H. Parks Helms, for K-Mart Corporation, appellant.*

*Hamlin L. Wade for Mecklenburg County, appellee.*

MARTIN, Justice.

This appeal involves the denial by the Mecklenburg County Board of Equalization and Review of K-Mart's applications for property tax exemption for the six years 1978-1983. The Court of Appeals held that K-Mart's applications were properly denied. We affirm in part and reverse in part.

K-Mart owns and operates approximately sixty-nine retail stores in North Carolina and six are located in Mecklenburg County. These stores and other retail stores are serviced by a public warehouse in Charlotte, North Carolina. K-Mart contracts with the owner of the warehouse for the storage of its property in the warehouse and also pays inbound and outbound fees on the property.

The property warehoused by K-Mart consists of large appliances such as refrigerators, stoves, televisions, washers, and dryers and is referred to as "Department 19" merchandise. The property remains in its original form and package while warehoused. The evidence shows that during the years 1978 and 1979 K-Mart shipped the warehoused property ordered by its customers directly to the customers' homes from the warehouse.

In the years 1980-83, Department 19 merchandise was shipped to the K-Mart retail store and then either picked up by the customer or delivered to the customer's home. Some Department 19 merchandise was shipped from the warehouse to K-Mart retail stores without a customer order. Such merchandise was often used in special sales or held as "rain-check" merchandise and for special selling seasons, as at Christmas time. K-Mart did not produce evidence of an accurate breakdown of the percentage of merchandise that was sent on to customers or was held at the retail stores.

K-Mart's applications for exemption were denied by the Mecklenburg County Board of Equalization and Review and its rulings were sustained on appeal by the North Carolina Property Tax Commission and the Court of Appeals.

**[1]** Mecklenburg County first argues that K-Mart had no right of appeal from the decision of the Mecklenburg County Board of Equalization and Review and therefore the Property Tax Commission lacked jurisdiction. The Court of Appeals held, and we agree, that although the decision by the county board to grant or deny an exemption is a discretionary one, N.C.G.S. § 105-282.1(c), it is reviewable by the Property Tax Commission. N.C.G.S. § 105-290 (1985). While it is true that the 1973 amendment to N.C.G.S. § 105-282.1(c) made the decisions of the county boards discretionary, it did not make those decisions unreviewable. Rather, the legislature has placed the *duty* upon the Property Tax Commission to hear appeals from decisions of the county boards arising under the provisions of N.C.G.S. § 105-312 and other sections of Chapter 105. N.C.G.S. § 105-290(b) (1985). This controversy arose under N.C.G.S. § 105-312, "discovered property," controlling situations where the taxpayer fails to list the property, the taxing authority then "discovers" the property and the taxpayer seeks an exemption. *See In re Wesleyan Education Center*, 68 N.C. App. 742, 316 S.E. 2d 87 (1984). We hold that the Property Tax Commission had jurisdiction to hear this appeal.

**[2]** In reviewing appeals from the Property Tax Commission, the whole record test is to be applied. The present statute governing judicial review reads: "Based on the record and the evidence presented to the court, the court may affirm, reverse, or modify the decision or remand the case to the agency for further proceedings." N.C.G.S. § 150B-51 (Cum. Supp. 1985). Although the 1985 amendment of former N.C.G.S. § 150A-51 deleted the phrase "in view of the entire record as submitted," we hold that the amendment maintains the whole record test for judicial review under the Administrative Procedure Act. This is consistent with our interpretation of former N.C.G.S. § 150A-51(5). *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). This Court is bound by the findings of the Commission if they are supported by competent, material, and substantial evidence in view of the entire record as submitted. *Brock v. Property Tax Comm.*,

290 N.C. 731, 228 S.E. 2d 254 (1976); N.C.G.S. § 150B-51 (Cum. Supp. 1985).

**[3]** K-Mart contends that the warehoused property should be exempt from taxation pursuant to N.C.G.S. § 105-275(10):

> The following classes of property are hereby designated special classes under authority of Article V, Sec. 2(2), of the North Carolina Constitution and shall not be listed, appraised, assessed, or taxed:
>
> . . . .
>
> (10) Personal property shipped into this State and placed in a public warehouse as intermediate consignee for the purpose of transshipment in its original form or package to the owner's customers either inside or outside the State. No portion of a premises owned or leased by a consignor or consignee, or a subsidiary of a consignor or consignee, shall be deemed to be a public warehouse within the meaning of this subdivision despite any licensing as such. The purpose of this classification is to encourage the development of the State of North Carolina as a distribution center.

The evidence shows that during 1978 and 1979, K-Mart shipped the warehoused property ordered by customers directly to the customers' homes from the warehouse. This property did not go through the retail K-Mart stores.

The Property Tax Commission found in finding of fact 29:

> (29) Prior to 1980, K-Mart shipped Department 19 items which had been ordered by customers directly to the customers' homes from the warehouse. Some Department 19 items, however, were shipped directly from the warehouse to the retail stores prior to 1980.

The relevant testimony on the years 1978 and 1979 follows:

> Q. Prior to 1980 what was the procedure that was used with respect to delivering out of that warehouse?
>
> A. Prior to 1980, we almost exclusively delivered to the customer's home. The delivery receipt at that time would

have had the customer's name on it, and we would ship all merchandise to the customer's home in most cases. And again, that's a retail outlet, doesn't mean we wouldn't ship to the stores but at that time it was generally a home delivery system which we got out of. We couldn't compete. We were losing too much money on the delivery end of it.

. . . .

A. In 1978 we were in home delivering, just about every location, and therefore, we had a customer's name on the D. R. going out of that warehouse.

Moreover, the exhibits contain questionnaires in the form of affidavits for the years 1978 and 1979 executed by Mr. Nastle, regional property tax manager for K-Mart. Each affidavit states that the subject property was shipped into Mecklenburg County "for transshipment to the owner's customers." We also note an exhibit for the year 1984 listing K-Mart retail *stores* served by warehouse #8264 (the warehouse involved here) but no such listing for the years 1978 and 1979, indicating that the warehouse served *customers* in 1978 and 1979, rather than retail stores. The testimony and exhibits do not contain evidence that any of the warehoused property was transshipped otherwise than to K-Mart's customers at their homes during 1978 and 1979.

Applying the whole record test, we find that the evidence does not support the Commission's finding that some Department 19 items were shipped to the retail stores prior to 1980, but the evidence does support the first sentence of finding of fact 29. We hold that for the years 1978 and 1979 the subject property was placed in the public warehouse "for the purpose of transshipment . . . to the owner's customers," within the meaning of the statute. Therefore, K-Mart is entitled to an exemption for the years 1978 and 1979.

With respect to the denial of K-Mart's applications for an exemption for the years 1980, 1981, 1982, and 1983, the Court is evenly divided, Justice Whichard not participating. Therefore, following the uniform practice of this Court, the decision of the Court of Appeals upholding the Commission's denial of the exemption for the years 1980, 1981, 1982, and 1983 is affirmed, not as precedent but as the decision in this case. *Lynch v. Hazelwood*, 312 N.C. 619, 324 S.E. 2d 224 (1985).

The decision of the Court of Appeals is reversed as to the exemption for 1978 and 1979; otherwise, the decision of the Court of Appeals is affirmed.

It is so ordered.

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

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STATE OF NORTH CAROLINA v. ALTON EUGENE HARRIS, JR.

No. 743A85

(Filed 7 April 1987)

1. **Rape and Allied Offenses § 5; Homicide § 21.6— felony murder—attempted rape—evidence sufficient**

There was sufficient evidence to sustain a conviction for felony murder based on attempted rape where the body of the victim was found on its back; the victim's legs had been spread apart, the victim's sweat pants had been removed and panties were entwined with the sweat pants as if both had been removed at the same time; the victim had multiple stab wounds; and defendant's clothes had on them blood of the same type as the victim.

2. **Criminal Law § 102.6— felony murder—argument from statement not in evidence—no error**

The trial court did not err in a murder prosecution arising from an attempted rape by not intervening *ex mero motu* to stop the prosecutor's argument to the jury that a male voice was heard saying "I don't want to hurt you. I want to show you something" when there was no testimony that any male voice was heard saying "I want to show you something." The jury knew that the prosecutor at that point was reconstructing what could have happened in the victim's apartment and the prosecutor's theory that the statement not in evidence meant that defendant wanted sexual intercourse could just as well have been argued from what had been introduced into evidence.

APPEAL by defendant from judgments entered by *Preston, Judge*, at the 15 October 1985 Session of Superior Court of ORANGE County. Heard in the Supreme Court 12 February 1987.

The defendant was tried for the first degree murder and the attempted rape of Freshteh Golkho. The evidence for the State showed that at 7:15 p.m. on 16 March 1985 several residents of J Building, Royal Park Apartments, Chapel Hill, North Carolina,

heard an argument, screams and what appeared to be a struggle within Apartment J-1. David Smith, who resided in Apartment J-4, testified he heard someone in the apartment say, "I don't want to hurt you" and he heard someone with a female voice say, "Let me see my face."

The police were called, entered the apartment and found the body of Freshteh Golkho on the floor. The body was on its back and disrobed from the waist down. The legs were spread apart. The defendant's wallet was below the legs of the body "and outward a bit." To the left of the wallet were green sweat pants rolled up with panties entangled in them. The body had multiple stab wounds and there was a pool of blood on the floor to the left of the victim's head. To the right of her head was a green army shirt lying on and partially covering a butcher knife.

The defendant was arrested and he told the officers who questioned him that he went to Apartment J-1 to pay money he owed to his girlfriend who lived in the apartment with the victim. His girlfriend was not there. He said that Ms. Golkho and he had an argument and that he was attempting to leave when Ms. Golkho attacked him with a butcher knife which he knocked from her hand. He picked the knife up and Ms. Golkho ran toward him and into the knife. The defendant told the officers he did not remember stabbing Ms. Golkho other than when she ran into the knife, nor did he remember removing any of her clothes.

The investigating officers searched the defendant's residence and found the clothes the defendant was wearing when Ms. Golkho was killed. The clothes had blood on them which was consistent in type with Ms. Golkho's blood. Part of the blood was inside the defendant's pants. The defendant did not offer evidence.

The court charged the jury that they could find the defendant guilty of first degree murder if they found the murder was done with premeditation and deliberation or if they found it was felony murder based on the felony of attempted rape. The jury found the defendant not guilty of murder based on premeditation and deliberation but guilty of felony murder. The jury also found the defendant guilty of attempted rape. They recommended life imprisonment for the murder charge. The court held the attempted first degree rape charge merged with the first degree murder as it was the underlying felony on which the defendant was found

guilty of first degree murder. The defendant was sentenced to life in prison.

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

*Ann B. Petersen, for defendant appellant.*

WEBB, Justice.

**[1]** The defendant first assigns error to the denial of his motion to dismiss made pursuant to N.C.G.S. § 15-173 and N.C.G.S. § 15A-1227(a)(1) on the ground there was not sufficient evidence to sustain a conviction of felony murder. This Court in *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308 (1983), dealt with the sufficiency of the evidence to support a conviction of felony murder based on the underlying felony of attempted rape. In *McDougall* the evidence was that the victim's body was found on its back with the legs spread wide, her feet nearly up to her buttocks, knees raised and apart, and the victim's nightgown drawn up to her upper chest, exposing her left breast. Many of the wounds had been inflicted while the victim was in a prone position. The defendant was arrested shortly after the body was discovered and found to have blood on his clothes which was of the same type as that of the victim. This Court said, "These facts support a reasonable inference that McDougall caught Diane Parker in the yard, knocked or threw her to the ground on her back, pulled her nightgown up over her chest, and parted her legs in an attempt to rape her. She resisted and fought back, and McDougall stabbed her to death. This evidence is sufficient to survive a motion for nonsuit on the theory of murder during an attempted rape."

The salient facts in *McDougall* are remarkably similar to the facts of this case. The body of each victim was found on its back. The legs of each victim had been spread apart. The nightgown of the victim in *McDougall* had been pulled up over the body. The sweat pants of Ms. Golkho had been removed. Panties were entwined within the sweat pants as if the sweat pants and panties were removed at the same time. Both victims had multiple stab wounds. The clothes of both defendants had blood on them of the same type as that of the victims. As in *McDougall* we hold the evidence in this case supports an inference that the defendant knocked or threw Ms. Golkho to the floor, forcibly removed her

sweat pants and parted her legs in an attempt to rape her. It further supports the inference that she resisted and the defendant stabbed her to death. This is sufficient evidence to survive a motion to dismiss.

In order for a person to be found guilty of attempted first degree rape the State must prove that the accused had the intent to commit the first degree rape and committed an act that goes beyond mere preparation, but falls short of actual commission of the offense. *State v. Boone*, 307 N.C. 198, 297 S.E. 2d 585 (1982). The defendant argues that there is not sufficient evidence for the jury to find beyond a reasonable doubt that the defendant intended to engage in vaginal intercourse with the victim by force and against her will. He argues that the only evidence of a sexual assault is the fact that the victim was found unclothed below the waist and her legs were sprawled apart at the time she was discovered. He admits that it is possible to infer that her sweat pants and panties were removed by force and that her legs were forced apart, but he argues these are not the only inferences that may be made. He argues further that in order to convict the defendant the jury has to make inferences on an inference which it cannot do. *See State v. LeDuc*, 306 N.C. 62, 291 S.E. 2d 607 (1982) and *State v. Fair*, 291 N.C. 171, 229 S.E. 2d 189 (1976). These contentions by the defendant were answered in *McDougall*. That case holds that evidence as to the position of the victim's legs and evidence of the removal of clothes from the lower part of the victim's body is sufficient with other evidence to be submitted to the jury on a charge of felony murder when the underlying felony is attempted rape. If we were to sustain this assignment of error we would have to overrule *McDougall*. The defendant's first assignment of error is overruled.

**[2]** The defendant next argues that it was error for the superior court not to intervene *ex mero motu* and stop the prosecuting attorney from making a certain argument to the jury. No objection to the argument was made at the trial. The prosecuting attorney in recounting the evidence said that a male voice was heard saying "I don't want to hurt you. I want to show you something." There was no testimony that any male voice was heard saying "I want to show you something." The prosecutor then argued to the jury what could have happened in the apartment and used the words "I just want to show you something" to argue that

the defendant wanted to show the victim sexual intercourse. Wide latitude is given to counsel in the argument of hotly contested cases. What constitutes an improper jury argument is ordinarily left to the sound discretion of the trial judge. *State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503, *rev'd on other grounds*, 403 U.S. 948, 29 L.Ed. 2d 860, *on remand*, 279 N.C. 338, 183 S.E. 2d 106 (1971). An argument in capital cases is subject to appellate review for the existence of gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982).

In this case the prosecutor argued a sentence, "I want to show you something," which was not in evidence. This sentence was not in itself particularly damaging to the defendant but the prosecutor then argued that it was intended to mean the defendant wanted to show the victim sexual intercourse. The prosecutor could just as well have argued from the statement, "I don't want to hurt you," which was in evidence, that the defendant wanted to have sexual intercourse. The jury knew that the prosecutor at this point in his argument was reconstructing what could have happened in the apartment. It was no more prejudicial for the prosecutor to argue as he did from the statement that was not in evidence than it would have been if he had argued from what had been introduced into evidence. We hold it was not such a gross impropriety that it was an abuse of discretion for the court not to intervene *ex mero motu* and stop this part of the argument. This assignment of error is overruled.

In the judgments of the Superior Court of Orange County we find

No error.

STATE OF NORTH CAROLINA v. JAMES FREDERICK FRAZIER

No. 319A86

(Filed 7 April 1987)

**Criminal Law § 34.8— prior sexual misconduct with victim—relevancy to show common plan or scheme**

In a prosecution for first degree sex offense against defendant's nine-year-old stepson, evidence of defendant's prior sexual misconduct with the victim was admissible pursuant to N.C.G.S. § 8C-1, Rule 404(b) under a common scheme or plan theory to show that defendant was the perpetrator of the offense allegedly committed on the date in question where defendant, on cross-examination of a State's witness, injected the theory that a visitor from Florida, rather than defendant, was the perpetrator of the sexual offenses described by the victim. Furthermore, the trial court did not abuse its discretion in determining that the probative value of evidence of prior sexual misconduct outweighed the danger of undue prejudice to defendant. N.C.G.S. § 8C-1, Rule 403.

APPEAL by defendant pursuant to N.C.G.S. 7A-27(a) from a judgment imposing a life sentence entered by *Sitton, J.*, at the 3 February 1986 Criminal Session of Superior Court, GASTON County. Heard in the Supreme Court 12 March 1987.

*Lacy H. Thornburg, Attorney General, by Jo Anne Sanford, Special Deputy Attorney General, for the State.*

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

WHICHARD, Justice.

The sole issue is whether the trial court erred in allowing evidence of defendant's prior sexual misconduct with the victim. We hold that no error was committed.

Defendant was indicted for two counts of first degree sex offense, one for acts that allegedly occurred in September 1983 and the other for acts that allegedly occurred in May 1984. The victim in both instances was defendant's nine-year-old stepson.

Defendant's first trial ended in a mistrial when the jury was unable to reach a unanimous verdict. Prior to the second trial procedural irregularities forced dismissal of the indictment charging defendant with the 1983 offense. At that time defendant objected

to the State's using evidence of the 1983 offense to procure a conviction on the 1984 charge.

At trial the victim testified that he had lived with his mother and defendant at two locations in the Gastonia area, *viz*, Pearson's Trailer Park and a house on McFarland Street. While living on McFarland Street, defendant forced the victim to perform an act of fellatio. Defendant tied the victim's hands and feet with "big old ropes" in order to accomplish the offense.

Over objection, the victim also was allowed to testify that defendant had perpetrated an act of anal intercourse on him when they lived at Pearson's Trailer Park. The victim then testified at length and in detail about sexual acts defendant committed with him prior to those acts for which defendant was on trial.

Defendant again objected to prior acts testimony when the State sought to present corroborative statements made by the victim to a Gastonia police officer. However, the court allowed the evidence pursuant to N.C.G.S. 8C-1, Rule 404(b) on a common scheme or plan theory, and instructed the jury to consider it only for corroborative purposes. N.C.G.S. 8C-1, Rule 404(b) (1986). According to the officer, the victim gave her a statement alleging that defendant had fondled him in the genital area and forced him to have oral sex when they were living on McFarland Street. The officer also testified concerning portions of the victim's statement that implicated defendant in the uncharged acts.

During cross-examination of the victim's mother (defendant's wife), defendant elicited evidence of an earlier incident of suspected sexual abuse involving the victim. While a friend and her boyfriend were visiting from Florida, the victim's mother discovered the boyfriend in bed with the victim. The victim was naked at the time. On questioning the victim, the mother learned that the boyfriend had rubbed his genitalia against her son's rectum. The mother reported the incident to the local mental health center. The center's report was introduced into evidence.

Defendant was convicted of first degree sex offense and sentenced to life imprisonment. He appeals, contending only that the court erred in admitting the evidence of his prior sexual misconduct with the victim. He "challenges . . . the degree of legitimate probative value of that testimony."

As a general rule, evidence of other crimes is not admissible to show that a defendant acted in conformity therewith on a particular occasion. N.C.G.S. 8C-1, Rule 404(b) (1986). However, 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." *Id.* Both the general rule and its exceptions existed in our law long before the rules of evidence were codified. *See State v. McClain*, 240 N.C. 171, 174-76, 81 S.E. 2d 364, 364-65 (1954).

"Our Court has been very liberal in admitting evidence of similar sex crimes in construing the exceptions to the general rule." *State v. Williams*, 303 N.C. 507, 513, 279 S.E. 2d 592, 596 (1981) (quoting *State v. Green*, 294 N.C. 418, 423, 241 S.E. 2d 662, 665 (1978)). Prior to and after the codification of Rule 404(b) this Court has held that evidence that the defendant committed similar offenses is admissible "when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." *State v. McClain*, 240 N.C. at 176, 81 S.E. 2d at 367. *See State v. DeLeonardo*, 315 N.C. 762, 769-71, 340 S.E. 2d 350, 355-57 (1986); *State v. Effler*, 309 N.C. 742, 747-48, 309 S.E. 2d 203, 206-07 (1983); *State v. Williams*, 303 N.C. at 513, 279 S.E. 2d at 596. Here defendant, on cross-examination of a State's witness, injected the theory that a visitor from Florida, rather than defendant, was the perpetrator of the sexual offenses described by the victim. Thus, evidence of a continuing scheme to commit sexual acts against the victim was relevant to show that defendant was the perpetrator of the offense allegedly committed in May 1984.

Even if evidence is admissible under Rule 404(b), the trial court still must determine whether its probative value outweighs the danger of undue prejudice to the defendant. N.C.G.S. 8C-1, Rule 403 (1986). Defendant argues that the evidence of prior sexual misconduct failed the Rule 403 test because it was misleading to the jury, confused the issues, and was highly prejudicial. In *State v. Mason*, 315 N.C. 724, 731, 340 S.E. 2d 430, 435 (1986), this Court adopted the test currently being applied to Fed. R. Evid. 403 that "[w]hether or not to exclude evidence under [Rule 403] is a matter within the sound discretion of the trial judge." Applying

this test, we find no abuse of discretion here. Defendant's assignment of error is overruled.

No error.

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STATE OF NORTH CAROLINA v. JAMES GAINEY

No. 411A86

(Filed 7 April 1987)

**Rape and Allied Offenses § 9— first degree sexual offense—indictment sufficient**

An indictment for first degree sexual offense which alleged that the victim was "a child under 12 years of age" sufficiently alleged that she was "a child under the age of 13 years" within the meaning of N.C.G.S. § 14-27.4(a)(1) (1986).

ON the defendant's appeal of right under N.C.G.S. § 7A-27(a) from judgment entered by *Pope, J.*, at the 17 February 1986 Criminal Session of Superior Court, CABARRUS County, sentencing the defendant to imprisonment for life upon his conviction by a jury for first-degree sexual offense. Heard in the Supreme Court on 9 March 1987.

*Lacy H. Thornburg, Attorney General, by Edmond W. Caldwell, Jr., Assistant Attorney General, for the State.*

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

MITCHELL, Justice.

The defendant's sole contention on appeal is that the judgment against him must be arrested due to a defect in the indictment against him which alleged in part that the victim was "a child under 12 years of age." As we find no defect in the indictment, we reject this contention.

A complete review of the evidence introduced at trial is unnecessary to an understanding of the issue presented by the defendant. The State offered evidence tending to show that the defendant, James Gainey, permitted and caused the nine-year-old

female victim to perform fellatio upon him on 14 November 1985. The defendant was fifty-eight years old on that date.

At the time the crime charged in this case was committed—just as now—a defendant was guilty of a first-degree sexual offense if he or she engaged in a sexual act with a victim "under the age of 13 years" and the defendant was at least twelve years old and at least four years older than the victim. N.C.G.S. § 14-27.4(a)(1) (1986). The indictment upon which the defendant in the present case was tried and convicted alleged that the defendant engaged in a sex offense with "a child under 12 years of age." The defendant argues that this allegation is not sufficient to allege that the child victim was "under the age of 13 years" as required by the statute. It suffices simply to say that the allegation that the victim was "a child under 12 years of age" sufficiently alleged that she was "a child under the age of 13 years" within the meaning of the statute. *See State v. Ollis*, 318 N.C. 370, 348 S.E. 2d 777 (1986) (allegation that victim was eight years old sufficiently alleged that she was "a child under twelve"). The defendant's assignment in this regard is without merit and is overruled.

No error.

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STATE OF NORTH CAROLINA v. WILLIAM DOUGLAS CONNARD

No. 459A86

(Filed 7 April 1987)

APPEAL by the state pursuant to N.C.G.S. § 7A-30(2) from a decision by a divided panel of the Court of Appeals, 81 N.C. App. 327, 344 S.E. 2d 568 (1986), ordering a new trial in case number 85CRS8429 on defendant's appeal from a judgment entered at the 23 July 1985 session of Superior Court, GASTON County, *Judge Robert D. Lewis* presiding. Heard in the Supreme Court 10 February 1987.

*Lacy H. Thornburg, Attorney General, by John F. Maddrey, Assistant Attorney General, for the state appellant.*

*Dolley and Warshawsky, by Steve Dolley, Jr., for defendant appellee.*

PER CURIAM.

At trial defendant in case number 85CRS8429 was convicted and sentenced for the felonious possession of stolen property, a violation of N.C.G.S. § 14-71.1. The Court of Appeals, after concluding that certain evidence offered against defendant in this case was the product of an unconstitutional search and seizure and that the trial court erred in denying defendant's motion to suppress this evidence, ordered a new trial.

The decision of the Court of Appeals is

Affirmed.

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

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STATE OF NORTH CAROLINA v. MELVIN CECIL MOORE AND BILLY DEAN TRANSEAU

No. 242PA86

(Filed 7 April 1987)

WE granted petitions for discretionary review pursuant to N.C.G.S. 7A-31 on 6 May 1986 (defendant Transeau) and 12 August 1986 (defendant Moore) to review the decision of the Court of Appeals (*Webb, J.*, with *Hedrick, C.J.*, concurring, and *Parker, J.*, concurring in the result) reported at 79 N.C. App. 666, 340 S.E. 2d 771 (1986). The Court of Appeals found no error in defendants' trial by *Wood, J.*, in Superior Court, WILKES County, in which defendants were found guilty of trafficking in marijuana by possession and sentenced to twelve years (defendant Moore) and seven years (defendant Transeau) imprisonment.

*Lacy H. Thornburg, Attorney General, by John H. Watters, Assistant Attorney General, for the State.*

*Dennis R. Joyce for defendant-appellant Melvin Cecil Moore.*

*Vannoy, Moore, Colvard, Triplett & Freeman, by Paul W. Freeman, Jr., for defendant-appellant Billy Dean Transeau.*

PER CURIAM.

Having carefully considered the opinion of the Court of Appeals, the records, briefs, and oral arguments in the case before us, we conclude that our orders of 6 May 1986 and 12 August 1986 allowing defendants' petitions for discretionary review were improvidently allowed.

The writ of supersedeas allowed to defendant Transeau on 6 May 1986 is hereby dissolved.

Discretionary review improvidently allowed.

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

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NORTHWESTERN BANK v. CLARENCE EDWARD ROSEMAN AND WIFE, ANGELA B. ROSEMAN, AND DENTEX, INC.

No. 439A86

(Filed 7 April 1987)

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported at 81 N.C. App. 228, 344 S.E. 2d 120 (1986), which reversed and remanded a final judgment entered by *Hyatt, J.*, on 18 February 1985 and a partial summary judgment entered by *Owens, J.*, on 6 February 1985 (both in MCDOWELL County) in favor of the plaintiff in an action against defendants Clarence Roseman and Dentex, Inc., to recover on an alleged personal guaranty of a note and on defendants' counterclaims for fraud, unfair and deceptive trade practices, and wrongful repossession of collateral. Heard in the Supreme Court 11 March 1987.

*Van Winkle, Buck, Wall, Starnes & Davis, by Albert L. Sneed, Jr., and Michelle Rippon, for plaintiff-appellant.*

*Goldsmith & Goldsmith, by C. Frank Goldsmith, Jr., for defendant-appellees.*

PER CURIAM.

Justices Martin and Webb took no part in the consideration or decision of this case. The remaining members of the Court being divided three to two as to all issues presented 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 MARTIN and WEBB did not participate in the consideration or decision of this case.

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OPAL L. CARROLL v. BURLINGTON INDUSTRIES AND LIBERTY MUTUAL INSURANCE COMPANY AND AMERICAN MOTORISTS INSURANCE COMPANY

No. 416A86

(Filed 7 April 1987)

APPEAL by plaintiff pursuant to N.C.G.S. 7A-30(2), from a divided decision of the Court of Appeals, 81 N.C. App. 384, 344 S.E. 2d 287 (1986), affirming an Opinion and Award of the North Carolina Industrial Commission filed 8 July 1985 and denying plaintiff compensation.

*Frederick R. Stann for plaintiff appellant.*

*Hedrick, Eatman, Gardner & Kincheloe by J. A. Gardner, III, for defendant appellees Burlington Industries and American Motorists Insurance Company.*

*Golding, Crews, Meekins & Gordon by Michael K. Gordon for defendant appellees Burlington Industries and Liberty Mutual Insurance Company.*

PER CURIAM.

Affirmed.

RALEIGH WILBUR HARTMAN v. ELSIE H. HARTMAN

No. 528A86

(Filed 7 April 1987)

APPEAL by defendant pursuant to N.C.G.S. 7A-30(2) from a divided decision of the Court of Appeals, 82 N.C. App. 167, 346 S.E. 2d 196 (1986), insofar as it affirmed an equitable distribution order entered by the FORSYTH County District Court, *Judge Gatto* presiding, on 4 October 1985.

*Morrow, Long and Black by John F. Morrow and Clifton R. Long, Jr. for plaintiff appellee.*

*Petree, Stockton & Robinson by W. Thompson Comerford, Jr. and Jane C. Jackson for defendant appellant.*

PER CURIAM.

Affirmed.

Justices WEBB and WHICHARD took no part in the consideration or decision of this case.

ROBERT W. MCNABB AND WIFE WALLANIA SHELL MCNABB v. TOWN OF BRYSON CITY AND CARL H. ARVEY, IN HIS CAPACITY AS CHIEF OF POLICE

No. 535PA86

(Filed 7 April 1987)

ON discretionary review of the decision of the North Carolina Court of Appeals, 82 N.C. App. 385, 346 S.E. 2d 285 (1986), affirming in part and vacating in part the judgment of *Hyatt, J.*, entered 30 April 1985 out of session and out of county by agreement of the parties. Heard in the Supreme Court 10 March 1987.

*Hunter & Large, by Raymond D. Large, Jr., and William P. Hunter, III, for plaintiff-appellees.*

*Carter & Kropelnicki, by Stephen Kropelnicki, Jr., for defendant-appellants.*

PER CURIAM.

Discretionary review improvidently allowed.

THE NORTH CAROLINA STATE BAR v. EARL WHITTED, JR.

No. 581A86

(Filed 7 April 1987)

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of the Court of Appeals (*Judges Whichard* and *Arnold* concurring, *Judge Johnson* dissenting), reported in 82 N.C. App. 531, 347 S.E. 2d 60 (1986), which affirmed the order of disbarment entered by the Disciplinary Hearing Commission of the North Carolina State Bar entered 6 June 1985. Heard in the Supreme Court 9 March 1987.

*A. Root Edmonson, for plaintiff appellee.*

*Irving Joyner, Hulse & Hulse, by Herbert B. Hulse, for defendant appellant.*

PER CURIAM.

Affirmed.

Justices FRYE and WHICHARD did not participate in the consideration or decision of this case.

**State v. Sanders**

| | | |
|---|---|---|
| STATE OF NORTH CAROLINA | ) | |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| STANLEY SANDERS | ) | |

No. 88A85

(Filed 7 April 1987)

THIS case was heard 9 March 1987 on defendant's appeal from a judgment of death entered at the 4 February 1985 Criminal Session of Superior Court, TRANSYLVANIA County, *Winberry, J.*, presiding. This was defendant's second trial. On defendant's appeal from his first trial, conducted at the 28 June 1982 Criminal Session of Superior Court, TRANSYLVANIA County, this Court summarily vacated the judgments against him and remanded for a new trial because of gross inadequacies in the trial transcript. *State v. Sanders*, 312 N.C. 318, 321 S.E. 2d 836 (1984).

One issue raised on appeal is whether certain items of incriminating evidence offered against defendant at his trial were lawfully taken from defendant's residence on 4 December 1981. The state contends the evidence was seized pursuant to a lawfully executed search warrant issued on probable cause. According to the application for the warrant, a reliable confidential informant advised investigators that he had seen the incriminating evidence in defendant's residence. Defendant contends this informant was a paid agent of the state when he discovered the evidence and the informant actually took the evidence from defendant's residence and delivered it to investigators before the warrant was executed.

Before both trials defendant moved to suppress this evidence on the ground that it was seized unlawfully and in violation of his constitutional rights. Before the first trial defendant also moved that the state be required to reveal the identity of its confidential informant. This motion was denied. On the suppression motion defendant offered the testimony of his sister, who was at home on 4 December 1981, and whose testimony, if believed, would tend to support defendant's contentions. The trial court found her testimony "inherently lacking in credibility" and denied the motion to suppress.

Before his second trial defendant again moved to suppress the evidence taken from his residence. At this time defendant tendered the testimony of Curtis Henry Garten, who by that time had revealed himself as being the confidential informant referred to in the application for the search warrant. The trial court refused to hear the testimony of Garten and summarily denied the motion to suppress on the grounds (1) defendant should have called Garten as a witness at the suppression hearing before his first trial and (2) the trial court's ruling on the suppression motion at that time was the "law of this case . . . [and] *res adjudicata*."

Garten then testified at defendant's second trial. His testimony tends to support defendant's suppression motion contentions. It also tends to corroborate the testimony of defendant's sister offered on the suppression motion before defendant's first trial. Garten testified in substance that he was a paid, confidential informant who, at the request of a detective investigating the charges against defendant, entered defendant's residence on 4 December 1981, located, with the help of defendant's sister, the incriminating property, took it from the residence and delivered it to the detective. Garten said he received some 8400 dollars from investigators for his efforts.

We express no opinion on the credibility of defendant's sister or Garten; but we are satisfied the trial court, before defendant's second trial, should not have determined defendant's suppression motion without taking the testimony of the witness Garten, whom defendant tendered at that time to the court.

Before determination, therefore, of this and other issues in the case, it is ORDERED, in the exercise of the Court's supervisory powers over the trial divisions, that the case be remanded to the Superior Court, Transylvania County, for the sole purpose of hearing defendant's motion to suppress the evidence taken from his residence on 4 December 1981. All witnesses tendered by either the state or defendant having competent testimony to offer on the issues raised in the motion shall be permitted to testify. The trial court shall then make findings of fact and conclusions of law, upon which it shall enter its order. It shall then certify the order together with supporting findings and conclusions to this Court with reasonable dispatch. See *State v. Richardson*, 313 N.C. 505, 329 S.E. 2d 404 (1985).

By Order of the Court in Conference this 7th day of April 1987.

WHICHARD, J.
For the Court

STATE OF NORTH CAROLINA )
)
v. ) ORDER
)
JOHN ROBERT SWANN, III )

No. 181A86

(Filed 7 April 1987)

THIS case was heard 10 March 1987 on defendant's appeal from a judgment including sentences of life imprisonment entered at the 3 February 1986 Criminal Session of Superior Court, BUNCOMBE County, *Ferrell, J.*, presiding. One issue raised on appeal is defendant's allegation of ineffective assistance of counsel.

Before determination of this and other issues in the case, it is ORDERED, in the exercise of the Court's supervisory powers over the trial divisions, that the case be remanded to the Superior Court, Buncombe County, for the sole purpose of a plenary hearing in the nature of a motion for appropriate relief upon defendant's allegations of ineffective assistance of counsel. The trial court shall then make findings of fact and conclusions of law, upon which it shall enter its order. It shall then certify the order together with supporting findings and conclusions to this Court with reasonable dispatch.

By order of the Court in conference, this the 7th day of April, 1987.

WHICHARD, J.
For the Court

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

ASHEVILLE MALL, INC. v. F. W. WOOLWORTH CO.

No. 23P87.

Case below: 83 N.C. App. 532.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

CATES v. WILSON

No. 24PA87.

Case below: 83 N.C. App. 448.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed with review limited to issues of collateral source and physician-patient privilege 7 April 1987.

COLONIAL BUILDING CO., INC. v. JUSTICE

No. 54P87.

Case below: 83 N.C. App. 643.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

DAVIS v. STATE FARM FIRE AND CASUALTY CO.

No. 739P86.

Case below: 83 N.C. App. 343.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

GRAHAM v. JAMES F. JACKSON ASSOC., INC.

No. 140P87.

Case below: 84 N.C. App. 427.

Petition by defendants for temporary stay allowed 2 April 1987.

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

HOCHHEISER v. N.C. DEPT. OF TRANSPORTATION

No. 642PA86.

Case below: 82 N.C. App. 712.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 April 1987 without prejudice to such rights as defendant may have to present such questions for review under Rule of Appellate Procedure 16(a).

IN RE APPEAL OF GENERAL TIRE AND RUBBER CO.

No. 754P86.

Case below: 83 N.C. App. 540.

Petition by Mecklenburg County for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

IN RE ESTATE OF ENGLISH

No. 745P86.

Case below: 83 N.C. App. 359.

Petition by Argle W. Chapman for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

IN RE FORECLOSURE OF ROCHESTER

No. 84P87.

Case below: 84 N.C. App. 147.

Petition by respondents for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

IN RE WILL OF WATT

No. 106P87.

Case below: 84 N.C. App. 457.

Petition by caveators for writ of supersedeas and temporary stay allowed 12 March 1987.

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

INVESTORS TITLE INS. CO. v. HERZIG

No. 756PA86.

Case below: 83 N.C. App. 392.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 April 1987.

JAYNES v. STOUT

No. 25P87.

Case below: 83 N.C. App. 542.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

LAWSON v. LAWSON

No. 72PA87.

Case below: 84 N.C. App. 51.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 April 1987.

LEE v. BARKSDALE

No. 757P86.

Case below: 83 N.C. App. 368.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

LEMMONS v. LEMMONS

No. 759P86.

Case below: 83 N.C. App. 542.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

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

MUSSALLAM v. MUSSALLAM

No. 702PA86.

Case below: 83 N.C. App. 213.

Petition by Board of Education for discretionary review pursuant to G.S. 7A-31 allowed 7 April 1987.

NEESE v. NEESE

No. 51P87.

Case below: 84 N.C. App. 147.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987. Notice of appeal by defendant pursuant to G.S. 7A-30 dismissed 7 April 1987.

NORTH STATE SAVINGS & LOAN CORP. v. CARTER DEVELOPMENT CO.

No. 750P86.

Case below: 83 N.C. App. 422.

Petition by Intervenor for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

RALEIGH-DURHAM AIRPORT AUTH. v. HOWARD

No. 35P87.

Case below: 83 N.C. App. 542.

Petition by defendant (Freddy Ray Jones) for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

SASSE v. CUNNINGHAM

No. 730P86.

Case below: 83 N.C. App. 343.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

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

SMITH v. ALLISON

No. 703P86.

Case below: 83 N.C. App. 232.

Petition by defendant (Allison) for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

STATE v. AMANCHUKWA

No. 127P87.

Case below: 84 N.C. App. 567.

Petition by defendant for writ of supersedeas and temporary stay allowed 23 March 1987.

STATE v. ATKINSON

No. 157P87.

Case below: 84 N.C. App. 701.

Petition by defendant for writ of supersedeas and temporary stay denied 7 April 1987.

STATE v. AVERY

No. 57P87.

Case below: 83 N.C. App. 676.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

STATE v. BAILEY

No. 69P87.

Case below: 84 N.C. App. 312.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

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

STATE v. COMSTOCK

No. 98P87.

Case below: 84 N.C. App. 148.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 April 1987.

STATE v. GRIFFIN

No. 156P87.

Case below: 84 N.C. App. 671.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 8 April 1987. Petition by Attorney General for writ of supersedeas and temporary stay denied 8 April 1987.

STATE v. HALL

No. 6P87.

Case below: 83 N.C. App. 542.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

STATE v. LAMB

No. 136PA87.

Case below: 84 N.C. App. 569.

Petition by Attorney General for temporary stay allowed 25 March 1987. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 7 April 1987. Petition by Attorney General for writ of supersedeas to the North Carolina Court of Appeals allowed 7 April 1987.

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

STATE v. LOCKLEAR

No. 20P87.

Case below: 83 N.C. App. 543.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987. Motion by the State to dismiss appeal for lack of substantial constitutional question allowed 7 April 1987.

STATE v. LUCKEY

No. 33P87.

Case below: 83 N.C. App. 543.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 April 1987.

STATE v. MOORE

No. 5P87.

Case below: 83 N.C. App. 543.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

STATE v. MORRISON

No. 62P87.

Case below: 84 N.C. App. 41.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 April 1987.

STATE v. NORRIS

No. 56P87.

Case below: 84 N.C. App. 148.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

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

STATE v. SHUTT

No. 744P86.

Case below: 83 N.C. App. 344.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

STATE v. SMITH

No. 22P87.

Case below: 83 N.C. App. 676.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

STATE v. TARANTINO

No. 30P87.

Case below: 83 N.C. App. 473.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 7 April 1987 for the limited purpose of remanding the case to the Court of Appeals for further review in light of the U. S. Supreme Court's decision in U. S. v. Dunn (9 March 1987).

STATE v. THORPE

No. 126P87.

Case below: 84 N.C. App. 459.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 23 March 1987.

STATE v. WHITE

No. 88A87.

Case below: 84 N.C. App. 111.

Petition by defendant for stay of execution of judgment of Court of Appeals denied 2 March 1987. Motion by Attorney General to dismiss appeal for failure to show a substantial constitutional question allowed 7 April 1987.

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

STONEWALL INSURANCE CO. v.
FORTRESS REINSURERS MANAGERS

No. 741P86.

Case below: 83 N.C. App. 263.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

STOUT v. STOUT

No. 26P87.

Case below: 83 N.C. App. 543.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

SUMMERS v. HOBBY

No. 758P86.

Case below: 83 N.C. App. 541.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

TAYLOR v. PARDEE HOSPITAL

No. 755P86.

Case below: 83 N.C. App. 385.

Petition by defendant (Insurance Company) for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987.

TOWN AND COUNTRY CIVIC ORGANIZATION v.
WINSTON-SALEM BD. OF ADJUSTMENT

No. 16P87.

Case below: 83 N.C. App. 516.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987. Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 7 April 1987.

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

TREANTS ENTERPRISES, INC. v. ONSLOW COUNTY

No. 746A86.

Case below: 83 N.C. App. 345.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987. Motion by plaintiff to dismiss appeal for lack of substantial constitutional question denied 7 April 1987.

VANDOOREN v. STROUD AND MASTROM, INC.

No. 15P87.

Case below: 83 N.C. App. 541.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 April 1987 for limited purpose of vacating the opinion of the Court of Appeals and remanding the case to the Court of Appeals for further review limited to the questions presented in the briefs as required by Rule of Appellate Procedure 28.

WARD v. PITT COUNTY MEM. HOSP., INC.

No. 752P86.

Case below: 83 N.C. App. 343.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 April 1987. Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 7 April 1987.

WATKINS v. HELLINGS

No. 4PA87.

Case below: 83 N.C. App. 430.

Petition by defendant for discretionary review pursuant to G.S. 7A-32 allowed 7 April 1987.

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

WEST v. BRYAN

No. 111P87.

Case below: 80 N.C. App. 560.

Petition by plaintiffs for writ of certiorari to the North Carolina Court of Appeals denied 7 April 1987.

PETITION TO REHEAR

JACKSON COUNTY v. SWAYNEY

No. 461A85.

Case below: 319 N.C. 52.

Petition denied 7 April 1987.

DORIS ELLIS, ETHEL YOUNG, EUGENE YOUNG, DOROTHY PATTERSON, AND CENTRAL PARK TENANTS ASSOCIATION v. PETER P. WILLIAMS, HENRY D. HAYWOOD, AND ALFRED L. HOBGOOD, JR., D/B/A CENTRAL PARK ASSOCIATES; JOEL M. WHITE AND PERRY C. WALTON

No. 107PA86

(Filed 5 May 1987)

**Appeal and Error § 24— appeal from summary judgment—exceptions and assignments of error not required**

Rule 10(a) of the N. C. Rules of Appellate Procedure does not require a party against whom summary judgment has been entered to place exceptions and assignments of error into the record on appeal even where summary judgment was granted on several different causes of action since the appeal itself is an exception to the entry of summary judgment and presents the question of whether the judgment is supported by the conclusions of law.

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

Justice MEYER dissenting.

ON plaintiffs Ellis, Young, and Patterson's petition for discretionary review of the decision of the Court of Appeals, 78 N.C. App. 433, 337 S.E. 2d 188 (1985), dismissing plaintiffs' appeal from summary judgment filed 21 December 1984 by *Lee, J.*, in Superior Court, WAKE County. Central Park Tenants Association is not a party to this appeal. Heard in the Supreme Court 12 February 1987.

*East Central Community Legal Services, by Celia Pistolis and Augustus S. Anderson, Jr., and Purser, Cheshire, Parker & Hughes, by Gordon Widenhouse, for plaintiff-appellants.*

*Stubbs, Cole, Breedlove, Prentis & Poe, by James A. Cole, Jr. and Terry D. Fisher, for defendant-appellees.*

MARTIN, Justice.

The sole issue before this Court is whether Rule 10(a) of the North Carolina Rules of Appellate Procedure requires a party against whom summary judgment has been entered to place exceptions and assignments of error into the record on appeal. We hold that it does not and accordingly reverse the decision of the Court of Appeals.

Plaintiff-tenants live in a mobile home park in Wake County. Ownership of the park changed hands in 1984, and defendant-purchasers presented plaintiffs with new lease agreements. These new agreements promulgated stricter park rules, required a higher security deposit, and more than doubled the rent charged. After unsuccessfully attempting to negotiate with defendants, plaintiffs brought this action seeking an injunction against enforcement of the lease, a declaratory judgment invalidating certain lease provisions, and damages for unfair business practices. Their complaint alleged, inter alia, that the park was subject to rent-control regulations of the United States Department of Housing and Urban Development and that defendants had engaged in unfair and deceptive trade practices by conspiring to raise rents without federal approval. All parties filed motions for summary judgment.

The trial court granted summary judgment in defendants' favor. Plaintiffs gave notice of appeal but failed to list any exceptions or assignments of error in preparing the record for the Court of Appeals. The Court of Appeals determined that this omission constituted a "flagrant violation" of Rule of Appellate Procedure 10(a) and consequently dismissed the action. Plaintiffs maintain (1) that prior decisions of the Court of Appeals correctly applied Rule 10(a) by holding that the appeal itself is an exception to the entry of summary judgment and (2) that they reasonably relied on these decisions and should be allowed the opportunity to amend their record on appeal should this Court reject the reasoning of the prior cases.

N.C.R. App. P. 10(a) states:

> Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out in the record on appeal or in the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2), and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. No exception not so set out may be made the basis of an assignment of error; and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by

> properly raising them in his brief, the questions *whether the judgment is supported by the verdict or by the findings of fact and conclusions of law*, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, *notwithstanding the absence of exceptions or assignments of error in the record on appeal.*

(Emphases added.)

Plaintiffs contend that their appeal falls within the language of the proviso. They insist that an appeal from the granting of summary judgment automatically raises the issue of "whether the judgment is supported by the . . . conclusions of law." We agree.

The purpose of summary judgment is to eliminate formal trial when the only questions involved are questions of law. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Thus, although the enumeration of findings of fact and conclusions of law is technically unnecessary and generally inadvisable in summary judgment cases, *Wall v. Wall*, 24 N.C. App. 725, 212 S.E. 2d 238, *cert. denied*, 287 N.C. 264, 214 S.E. 2d 437 (1975), summary judgment, by definition, is always based on two underlying questions of law: (1) whether there is a genuine issue of material fact and (2) whether the moving party is entitled to judgment, N.C.R. Civ. P. 56(c); *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). On appeal, review of summary judgment is necessarily limited to whether the trial court's conclusions as to these questions of law were correct ones. It would appear, then, that notice of appeal adequately apprises the opposing party and the appellate court of the limited issues to be reviewed. Exceptions and assignments of error add nothing.

This result does not run afoul of the expressed purpose of Rule 10(a). Exceptions and assignments of error are required in most instances because they aid in sifting through the trial court record and fixing the potential scope of appellate review. *See* Commentary, Drafting Committee Note, N.C.R. App. R. 10(a). We note that the appellate court must carefully examine the *entire record* in reviewing a grant of summary judgment. *See Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972); *Walton v. Meir*, 14 N.C. App. 183, 188 S.E. 2d 56, *cert. denied*, 281 N.C. 515, 189 S.E. 2d 35 (1972). Because this is so, no preliminary "sifting" of

the type contemplated by the rule need be performed. Also, as previously observed, the potential scope of review is already fixed; it is limited to the two questions of law automatically raised by summary judgment. Under these circumstances, exceptions and assignments of error serve no useful purpose. *See Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (thirty-four assignments of error unnecessary in pinpointing the sole question for decision, which was whether the trial judge correctly allowed defendants' motion for summary judgment; the appellate court must review all allegations and evidence in making this determination). Were we to hold otherwise, plaintiffs would be required to submit assignments of error which merely restate the obvious; for example, "The trial court erred in concluding that no genuine issue of material fact existed and that defendants were entitled to summary judgment in their favor." *See, e.g., Lloyd v. Carnation Co.*, 61 N.C. App. 381, 301 S.E. 2d 414 (1983). At best, this is a superfluous formality.

As plaintiffs correctly point out, several prior decisions of the Court of Appeals have reached this conclusion. *See Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 73 N.C. App. 295, 326 S.E. 2d 316 (1985) (N.C.R. App. P. 10(a) requires no exceptions or assignments of error when the sole issue on appeal is whether, on the face of the entire record, the trial court erred in granting summary judgment); *Beaver v. Hancock*, 72 N.C. App. 306, 324 S.E. 2d 294 (1985) (appeal itself complies with Rule 10(a) because it constitutes an exception to the judgment and presents the question of whether the judgment is supported by the conclusions of law); *cf. West v. Slick*, 60 N.C. App. 345, 299 S.E. 2d 657 (1983), *rev'd on other grounds*, 313 N.C. 33, 326 S.E. 2d 601 (1985) (appeal of directed verdict is an exception to the underlying conclusions of law).

The Court of Appeals characterized *West* and *Beaver* as simple single-issue cases in an attempt to distinguish them from the present case. Regardless of whether such characterization is accurate, we are not persuaded by this reasoning. Even where, as here, summary judgment is granted on several different causes of action, the absence of exceptions and assignments of error in the record does not appreciably complicate the appellate process. As to each cause of action, the sole issue brought forth remains the

same—whether the trial court's ruling on summary judgment was supported by the underlying conclusions of law.

Because we find that plaintiffs complied with N.C.R. App. P. 10(a) and are entitled to a hearing of their appeal on its merits, we need not consider exercising our discretion under N.C.R. App. P. 2 to allow an amendment of the record to include exceptions and assignments of error. Accordingly, the decision of the Court of Appeals is reversed. This case is remanded to that court for review on the merits.

It is so ordered.

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

Justice MEYER dissenting.

Believing that the Court of Appeals decided this case correctly, I would vote to affirm that court's opinion. I tend to believe that the proviso of Rule 10(a) upon which the majority relies does not, and was never intended to, apply to summary judgments. The very language of that proviso makes it abundantly clear that the rule does not apply in the case of a summary judgment:

> Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions *whether the judgment is supported by the verdict or by the findings of fact and conclusions of law*, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal.

N.C.R. App. P. 10(a) (emphasis added).

In the case at bar, and indeed in all summary judgments which are properly drafted, there is no *verdict* or *findings of fact and conclusions of law*, with the possible exception of an implied conclusion that "there is no genuine issue of material fact."

Our Court of Appeals has held that:

> A trial judge is not required to make finding[s] of fact and conclusions of law in determining a motion for summary judg-

ment, and if he does make some, they are disregarded on appeal. Shuford, N.C. Practice and Procedure, § 56-6 (1977 Supp.). Rule 52(a)(2) does not apply to the decision on a summary judgment motion because, if findings of fact are necessary to resolve an issue, summary judgment is improper.

*Mosley v. Finance Co.*, 36 N.C. App. 109, 111, 243 S.E. 2d 145, 147, *disc. rev. denied*, 295 N.C. 467, 246 S.E. 2d 9 (1978).

This Court, citing *Mosley*, has said:

[I]t is not a part of the function of the court on a motion for summary judgment to make findings of fact and conclusions of law.

*Tetterton v. Long Manufacturing Co.*, 314 N.C. 44, 47, 332 S.E. 2d 67, 69 (1985).

The order of the trial court contained no findings of fact or conclusions of law; it was, in its entirety, as follows:

ORDER

THIS CAUSE coming on to be heard and being heard before the undersigned Judge of Superior Court on Motion of the Plaintiffs for partial summary judgment, and on Motion of the Defendants for summary judgment as to all matters and claims stated in Plaintiffs' Complaint; and

IT APPEARING TO THE COURT that there is no genuine issue as to any material fact and that Defendants are entitled to a judgment as a matter of law;

IT IS THEREFORE ORDERED that Plaintiffs' Motion for partial summary judgment be and the same hereby is denied; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that summary judgment is granted in favor of Defendants PETER P. WILLIAMS, HENRY D. HAYWOOD, and ALFRED L. HOBGOOD, JR., d/b/a[ ] CENTRAL PARK ASSOCIATES, JOEL M. WHITE and PERRY C. WALTON, and that this action is dismissed with the costs thereof to be taxed against the Plaintiffs.

This 17th day of December, 1984.

In view of the absence of any conclusions of law in the order, it is odd that the majority has remanded this case to the Court of Appeals to determine "the sole issue brought forth . . .—whether the trial court's ruling on summary judgment was supported by the underlying conclusions of law."

The decision of the Court of Appeals in this case correctly distinguished its prior contrary decisions as simple, single-issue cases:

> In both of the cases cited [*West v. Slick*, 60 N.C. App. 345, 299 S.E. 2d 657 (1983), *aff'd in relevant part*, 313 N.C. 33, 326 S.E. 2d 601 (1985), and *Beaver v. Hancock*, 72 N.C. App. 306, 324 S.E. 2d 294 (1985)], however, the appeal was limited to a single ruling on a single contention. Here, plaintiffs seek to appeal rulings not only on a number of separate causes of action but also to argue rulings on their requests for discovery. As defendants correctly point out, an appellant's failure to identify such disparate errors in the record frustrates effective and fair preparation of the record, *see* App. R. 11(b) (proposed record must contain assignments of error required by App. R. 9(a)(1)(xi)), and hinders effective consideration by the appellate courts. *See* App. R. 10, Drafting Committee Note (exceptions and assignments focus issues on appeal).

*Ellis v. Williams*, 78 N.C. App. 433, 434, 337 S.E. 2d 188, 189 (1985).

The majority says that "the absence of exceptions and assignments of error in the record does not appreciably complicate the appellate process." Plaintiffs' notice of appeal in this case presents at least four separate and distinct matters for review. That notice is as follows:

NOTICE OF APPEAL—(Filed: December 27, 3:22 PM 1984)

> Plaintiffs, through their counsel, hereby give notice of appeal to the Court of Appeals of North Carolina from the final judgments and orders issued the 27th day of December, 1984, by the Honorable Thomas H. Lee in the above-captioned matter, *granting defendants' motion for summary judgment* as to all matters and claims stated in plaintiffs' complaint, *denying plaintiffs' motion for partial summary judgment, dismissing plaintiff Central Park Tenants Associa-*

*tions' [sic] motion to join additional parties* as plaintiffs, *and denying plaintiffs' motion to compel the production of the documents* by defendants Peter P. Williams and Joel M. White.

This 27th day of December, 1984.

(Emphases added.) Plaintiffs' brief before the Court of Appeals presented six questions for consideration by that court, only two of which related to the grant of summary judgment. Though the plaintiffs couched each question in terms of summary judgment, most of the questions presented to the Court of Appeals do not in fact relate to the summary judgment.

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING PLAINTIFFS-APPELLANTS' MOTION FOR SUMMARY JUDGMENT ON THE FIRST CAUSE OF ACTION BY FAILING TO DETERMINE THE VALIDITY OF LEASE TERMS FOR LATE FEES, TRANSFER FEES, MAINTENANCE FEES, A RENTAL DISCOUNT AND AN ABANDONMENT PROVISION FOR MOBILE HOME LOTS, PURSUANT TO THE UNIFORM DECLARATORY JUDGMENT ACT?

II. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN FAILING TO DECLARE THAT THE LATE FEES, TRANSFER FEES, MAINTENANCE FEES AND DISCOUNT PROVISION WERE PENALTIES AND NOT LIQUIDATED DAMAGES?

III. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING PLAINTIFFS-APPELLANTS' MOTION FOR SUMMARY JUDGMENT ON THE SECOND CAUSE OF ACTION BY FAILING TO FIND AS A MATTER OF LAW THAT THE LANDLORDS' REFUSAL TO NEGOTIATE CERTAIN LEASE TERMS UNDER THE PARTICULAR CIRCUMSTANCES INVOLVED IN THIS MOBILE HOME PARK IS AN UNFAIR ACT IN VIOLATION OF N.C.G.S. § 75-1.1(a)?

IV. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING PLAINTIFFS-APPELLANTS' MOTION FOR SUMMARY JUDGMENT ON THE THIRD CAUSE OF ACTION BY FAILING TO FIND AS A MATTER OF LAW THAT THE LANDLORDS' REQUIREMENT THAT TENANTS SIGN A NEW LEASE AT A HIGHER RENT WHILE STILL UNDER HUD RENT CONTROLS IS AN UNFAIR ACT IN VIOLATION OF N.C.G.S. § 75-1.1(a)?

V. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT FOR DEFENDANTS-APPELLEES IN THE FIFTH CAUSE OF ACTION SINCE THERE WERE MATERIAL FACTS IN DISPUTE, DISCOVERY HAD NOT BEEN COMPLETED AND SUMMARY JUDGMENT WAS NOT APPROPRIATE UNDER THE CIRCUMSTANCES OF THIS CLAIM?

VI. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IF SUMMARY JUDGMENT ON THE FIFTH CAUSE OF ACTION WAS GRANTED ON THE GROUNDS THAT IT FAILED TO STATE A CLAIM FOR RELIEF[?]

(Emphases added.) Any experienced appellate lawyer would conclude that exceptions and assignments of error are *demanded* in this case. By failing to state any exceptions or assignments of error, plaintiffs' brief is at odds with an appellate rule that requires that "questions presented must be supported by assignments of error which must be supported by exceptions." Commentary, N.C.R. App. P. 10(a).

The reason for requiring assignments of error is to allow the adversary to assess the appropriateness of the record on appeal. Like the rules of notice pleading, which were designed to eliminate surprise and the "sporting theory of justice," the rule requiring that assignments of error be noted in the record was designed to apprise the parties of the possible scope of review, prior to settling the record on appeal. Were there no requirement that exceptions and assignments of error be noted in the record, a party could assent to a record without realizing that it contained a kernel which would later form the basis for a fully developed argument in the appellate court or omitted a kernel which should have formed the basis of an important argument.

Where summary judgment is granted, the nonmoving party may, as here, wish to complain that he was not permitted to complete discovery, or he may argue that certain facts precluded summary judgment, or he may argue that the judge employed an erroneous legal standard in granting summary judgment, or he may argue that while there are genuine issues of material fact, he is entitled to judgment as a matter of law. Whatever the argument, the appellee should be apprised of its basis when the record is settled.

The Court has noted:

> Evidence which may be considered under Rule 56 includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file whether obtained under Rule 36 or in any other way, affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken.

*Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E. 2d 823, 829 (1971).

It is certainly clear that the grounds for excepting may encompass more than a mere allegation that there exists some genuine legal issue as to material facts in issue.

Rule 10(a) is entitled "Functions in Limiting Scope of Review." I fear that the majority's holding today has the potential of expanding the scope of review far beyond that contemplated by the drafters of the appellate rules.

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STATE OF NORTH CAROLINA v. DARRELL JAY LYTTON, JR.

No. 299A86

(Filed 5 May 1987)

1. **Homicide § 28.8— first degree murder—requested instruction on accident—not supported by evidence**

The defendant in a first degree murder prosecution was not entitled to an instruction on the defense of accident where the evidence was uncontroverted that defendant was in a car driving away from the scene when decedent called out; defendant ordered the driver to stop; left the car with a loaded pistol in his hand; approached the defendant; and the pistol was in defendant's hand when three bullets were fired from it, two of which entered the decedent's body. Defendant voluntarily placed himself in a volatile situation and the uncontradicted facts establish at least the crime of involuntary manslaughter.

2. **Homicide § 30.3— first degree murder—failure to submit involuntary manslaughter—error**

A defendant in a first degree murder prosecution was entitled to have the lesser included offense of involuntary manslaughter submitted to the jury where defendant claimed that he fired the first shot at the ground as a warning to decedent to keep his distance; decedent continued to approach defendant and a struggle ensued; the second and third shots were fired during the

struggle; defendant testified that he did not intend to pull the trigger, did not aim the pistol, and did not form the intent to shoot the victim; and events leading up to the shooting progressed very rapidly without a delay between the initial fight and the ultimate shooting. Defendant's conduct demonstrated culpable negligence necessary to support a conviction for involuntary manslaughter, but did not evince either a heart devoid of social responsibility or a depravity of mind and a disregard for human life.

Justice WEBB dissenting.

DEFENDANT appeals as of right from the imposition of a life sentence upon his conviction of second-degree murder at the 13 January 1986 Criminal Session of the Superior Court, GASTON County, before *Burroughs, J.* Heard in the Supreme Court 10 March 1987.

*Lacy H. Thornburg, Attorney General, by Laura E. Crumpler, Assistant Attorney General, for the State.*

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

MEYER, Justice.

The evidence presented in this case tended to show that in the late evening of 2 August 1985, defendant and three of his friends were riding around Gastonia in defendant's car. Rebecca Burgess, defendant's girlfriend, was driving; defendant was riding in the front passenger's seat. At some point during the ride, defendant took his loaded pistol out of the glove compartment of the car and showed it to Ricky Connard, who was riding in the rear. He then placed the pistol on the seat next to him.

Sometime after 11:00 p.m., the car containing defendant was proceeding along Church Street. Decedent Steve Armstrong and his wife Jamie were walking on Church Street heading for their home. Both were walking in the vehicle lanes, the decedent in the right lane, and his wife in the left. As the car driven by Burgess approached the two pedestrians, Steve Armstrong stood in the middle of the pavement facing the car. He had been drinking heavily. The driver, Burgess, yelled an obscenity at Armstrong and told him to move out of the way. Rather than doing so, decedent dropped a twelve-pack of beer he had been carrying and approached the car. As Burgess started to drive off, Armstrong hit

the window of the car. According to Burgess, the defendant then told her to stop the car. She stopped the car and backed up toward Armstrong. At this point, the defendant got out of the car with his pistol and faced the intoxicated decedent, who was moving toward the car. Defendant fired one shot into the ground. Armstrong, who continued to walk toward the car, got to the car and a struggle ensued. Two additional shots were fired, either during the fight or shortly thereafter. Armstrong was killed by two shots which struck him in the abdomen.

The trial judge instructed the jury on first-degree murder, second-degree murder, and voluntary manslaughter, as well as on self-defense. The defendant had requested an instruction on involuntary manslaughter and on the defense of accident. Both of these requests were denied. The jury found defendant guilty of second-degree murder and rejected the defense of self-defense. The trial judge found as an aggravating factor that the defendant had previously been convicted of criminal offenses punishable by more than sixty days confinement and as a mitigating circumstance that the defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process. The court determined that the aggravating factor outweighed the mitigating circumstance and sentenced the defendant to life imprisonment.

Defendant argues that he was entitled to an instruction on the defense of accident and to the lesser included offense of involuntary manslaughter. We hold that there was insufficient evidence to support an instruction on the defense of accident. However, there was evidence which, if believed by the jury, could have resulted in a conviction of involuntary manslaughter. We accordingly reverse the defendant's conviction and remand the case for a new trial.

**[1]** We first consider the defendant's contention that it was error for the trial judge to deny his request for the Pattern Jury Instruction on Accident. This instruction reads:

> Where evidence is offered that tends to show that the victim's death was accidental, and you find that the killing was in fact accidental, the defendant would not be guilty of any crime, even though his acts were responsible for the victim's death. A killing is accidental if it is unintentional, occurs during the course of lawful conduct, and does not in-

volve culpable negligence. A killing cannot be [premeditated] (or) [intentional] (or) [culpably negligent] if it was the result of an accident. When the defendant asserts that the victim's death was the result of an accident, he is, in effect, denying the existence of those facts which the State must prove beyond a reasonable doubt in order to convict him. Therefore, the burden is on the State to prove those essential facts and in so doing, disprove the defendant's assertion of accidental death. The State must satisfy you beyong [sic] a reasonable doubt that the victim's death was not accidental before you may return a verdict of guilty.

*Note Well. Add to final mandate at end:*

Now members of the jury, bearing in mind that the burden of proof rests upon the State to establish the guilt of the defendant beyond a reasonable doubt, I charge that if you find from the evidence that the killing of the deceased was accidental, that is, that the victim's death was brought about by an unknown cause or that it was from an unusual or unexpected event from a known cause, and you also find that the killing of the deceased was unintentional, that at the time of the homicide the defendant was engaged in the performance of a lawful act without any intention to do harm and that he was not culpably negligent; if you find these to be the facts, remembering that the burden is upon the State, then I charge you that the killing of the deceased was a homicide by misadventure and if you so find, it would be your duty to render a verdict of not guilty as to this defendant.

N.C.P.I.—307.10, "Accident (Defense to Homicide Charge, Except Homicide Committed During Perpetration of a Felony)" (Replacement May 1986) (footnote omitted). Defendant points to testimony by some eyewitnesses that the shots were fired as defendant and decedent were struggling with each other and to his own testimony that he did not intend to fire the pistol, and argues that this testimony was sufficient to support such an instruction. We disagree.

The defense of accident is triggered in factual situations where a defendant, without premeditation, intent, or culpable negligence, commits acts which bring about the death of another. *State v. Morgan*, 299 N.C. 191, 261 S.E. 2d 827 (1980). It is not an

affirmative defense, but acts to negate the *mens rea* element of homicide. *State v. Harris*, 289 N.C. 275, 221 S.E. 2d 343 (1976). The jury in the present case found the defendant not guilty of first-degree murder, but guilty of second-degree murder. Thus, while the jury concluded that defendant acted without premeditation and deliberation in order to convict defendant of second-degree murder, it necessarily found that defendant acted intentionally in causing the death of Steve Armstrong. Although, as we discuss below, the jury could have found that defendant acted only with culpable negligence, all of the evidence in the case was that the defendant acted with at least that degree of criminality.

The evidence was uncontroverted that defendant was in a car driving away from the scene when the decedent called out. At that point defendant ordered the driver to stop, left the safety of the car with a loaded pistol in his hand, and approached the decedent. The evidence is also undisputed that the pistol was in the hand of the defendant when three bullets were fired from it, two of which entered the decedent's body. Defendant thus voluntarily placed himself in this volatile situation and under the facts, which are uncontradicted by anything in the record before us, established at least the crime of involuntary manslaughter. The fact that the defendant claims now that he did not intend the shooting does not cleanse him of culpability and thus give rise to a defense of accident. We find no error in the trial court's denial of defendant's request for an instruction on accident.

**[2]** We are persuaded, however, that the defendant was entitled to have the jury consider whether he was guilty only of the offense of involuntary manslaughter. Involuntary manslaughter is the unlawful killing of a human being without premeditation, deliberation, intention, or malice. *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963). An unintentional killing with a firearm resulting from culpable negligence is ordinarily involuntary manslaughter unless the defendant acts with "a heart devoid of a sense of social duty," *id.* at 459, 128 S.E. 2d at 893, or with a "depravity of mind and disregard for human life," *State v. Wilkerson*, 295 N.C. 559, 582, 247 S.E. 2d 905, 919 (1978).

It is reversible error for the trial court not to submit to the jury such lesser included offenses to the crime charged as are

supported by the evidence. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970). *Cf. State v. Johnson*, 317 N.C. 193, 344 S.E. 2d 775 (1986) (no evidence to support lesser included offense). Defendant was charged with first-degree murder. Involuntary manslaughter is a lesser included offense of first-degree murder. *State v. Greene*, 314 N.C. 649, 336 S.E. 2d 87 (1985). Our inquiry, then, is whether there was evidence from which a jury could reasonably have found the defendant guilty only of this lesser offense.

The defendant testified to the events surrounding the firing of the three shots. He claimed that the first shot was fired at the ground as a warning to Armstrong to keep his distance. The warning was apparently to no avail, because the victim continued to approach defendant and a struggle ensued. The second and third shots were, according to defendant, fired during the struggle. As to these shots, defendant testified that he did not intend to pull the trigger, did not aim the pistol, and did not form the intent to shoot Steve Armstrong.

The State first argues that defendant acted intentionally. Although the defendant testified that he did not intend to shoot Armstrong, he did admit that his finger was on the trigger of the pistol when it went off. Moreover, the State points to testimony from eyewitnesses that two of the shots were fired, not during a struggle, but as the victim was "trying to get away." The State argues that we should find the evidence insufficient to show that the killing was unintentional. We disagree. Conflicts in the evidence are for the jury to resolve, not this Court. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979). As there was competent evidence that the killing was unintentional, we cannot say as a matter of law that the killing was otherwise.

The State points to evidence that the defendant was riding around town with a loaded pistol and that he had voluntarily left the car and faced an obviously intoxicated, angry, and much larger man. By placing himself in this situation, argues the State, the defendant showed a "depravity of mind and disregard for human life" that precludes the submission of involuntary manslaughter as a possible verdict. *State v. Wilkerson*, 295 N.C. 559, 582, 247 S.E. 2d 905, 918 (1978). The State argues that in order to gauge the defendant's culpability, we must look not only at the defendant's intentions as the shots were fired, but also at his con-

duct prior to the fatal event. *State v. Wrenn*, 279 N.C. 676, 684, 185 S.E. 2d 129, 134 (1971) (Sharp, J., dissenting).

The State cites *State v. Oxendine*, 300 N.C. 720, 268 S.E. 2d 212 (1980), for the proposition that defendant's conduct evinced a "heart devoid of social duty." In that case, the evidence was that the defendant and the victim engaged in an altercation. The defendant left the scene and returned with a rifle. Another fight broke out, during which two shots were fired from defendant's rifle. Because the defendant had previously fought with the victim and cooled off before "manifesting a desire to resume the affray," *id.* at 724, 268 S.E. 2d at 215, we found sufficient evidence that the defendant had "a heart devoid of a sense of social duty." *Id.* We accordingly affirmed the trial court's decision not to submit involuntary manslaughter to the jury.

We find the case *sub judice* to be distinguishable from *Oxendine*. Unlike the defendant in that case, defendant here testified that he had no intention of firing the shots that killed Armstrong. Moreover, the events leading up to the shooting here progressed very rapidly, without a delay between the initial fight and the ultimate shooting. We conclude under the facts of this case that defendant's conduct demonstrated culpable negligence necessary to support a conviction for involuntary manslaughter. Because the defendant's conduct did not evince either a heart devoid of social responsibility or a depravity of mind and a disregard for human life, we hold that it was error for the trial court not to have submitted involuntary manslaughter to the jury.

This case is similar to *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971). There, we reversed a defendant's conviction of second-degree murder because the trial court did not submit involuntary manslaughter to the jury. The evidence in that case was that the defendant fired three shots during a chase and altercation with his wife. Two shots were intentionally fired, but were intended to and did in fact miss the victim. The third shot, which was, according to the defendant, unintentionally fired during a struggle, killed her. We held that the evidence could have supported a verdict of guilty on a charge of involuntary manslaughter and that the evidence did not show that defendant had "a heart devoid of a sense of social duty." *Id.* at 683, 185 S.E. 2d at 133 (quoting *State v. Foust*, 258 N.C. at 459, 128 S.E. 2d at 893).

We hold that in the present case there was evidence that would have supported a verdict of guilty of involuntary manslaughter. *See State v. Buck*, 310 N.C. 602, 313 S.E. 2d 550 (1984); *State v. Stimpson*, 279 N.C. 716, 185 S.E. 2d 168 (1971). Defendant is therefore entitled to a new trial with the jury properly instructed on involuntary manslaughter. *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129.

New trial.

Justice WEBB dissenting.

I dissent. I do not believe, for the reasons stated in my concurring opinion in *State v. Lane*, 77 N.C. App. 741, 746, 336 S.E. 2d 410, 413 (1986), that the defendant was indicted for involuntary manslaughter. For that reason I would hold it was not error not to submit involuntary manslaughter to the jury.

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STATE OF NORTH CAROLINA v. FRANK EDWARD GRIFFIN, JR.

No. 259A85

(Filed 5 May 1987)

1. **Rape and Allied Offenses § 4— possible cause of urinary infection—testimony not prejudicial**

In a prosecution for first degree sexual offense, attempted first degree rape and taking indecent liberties with a child, the trial court did not err in permitting a physician to testify that vigorous genital and anal stimulation could cause a urinary tract infection where the physician further testified repeatedly that he had no opinion as to any causal connection between the victim's infection and the alleged offenses, and the jury was twice instructed not to associate the victim's infection and the alleged offenses.

2. **Criminal Law § 105.1— introduction of evidence—waiver of prior motion to dismiss**

Under N.C.G.S. § 15-173, a defendant who introduces evidence waives any motion for dismissal or nonsuit made prior to the introduction of his evidence and cannot urge the prior motion as a ground for appeal.

3. **Rape and Allied Offenses § 5— first degree sexual offense against child—sufficient evidence**

Defendant's conviction of a first degree sexual offense under N.C.G.S. § 14-27.4(a)(1) (1986) was supported by evidence that the victim was nine and

defendant was twenty at the time of the offense and the child's corroborated testimony describing defendant's commission of anal intercourse.

4. **Rape and Allied Offenses § 19— taking indecent liberties with child—sufficient evidence**

Defendant's conviction of taking indecent liberties with a child was supported by evidence that the child was nine and defendant was twenty at the time of the offense and the child's corroborated testimony that defendant rubbed his private parts against her until he ejaculated. N.C.G.S. § 14-202.1(a)(1), (2) (1986).

5. **Rape and Allied Offenses § 11— attempted rape of child—sufficient evidence**

The jury could properly find defendant guilty of attempted first degree rape where the evidence established that the victim was nine and defendant was twenty at the time of the offense, and the victim's corroborated testimony tended to show that defendant took her into a bedroom, undressed her, put her on the bed, got on top of her, rubbed his private parts against her private parts, and stopped rubbing his private parts against her only when she started to cry.

6. **Criminal Law § 114.2— statement of evidence—no expression of opinion**

In a prosecution for first degree sexual offense, taking indecent liberties with a child and attempted first degree rape, the trial court's instructions did not unequally weigh the strengths of the State's case against defendant's "contentions" so as to constitute an expression of opinion on the evidence; rather, the instructions of which defendant complains made no attempt to reiterate defendant's "contentions" but restated evenhandedly evidence proffered by the State to the extent necessary to explain the application of the law.

7. **Rape and Allied Offenses § 3— sexual offenses against child—no fatal variance in dates**

Indictments for various sexual offenses against a child were not fatally flawed because they indicated the alleged offenses had occurred "on or about" 7-9 May rather than on 8-10 May as shown by the evidence at trial where defendant's defense consisted simply of a denial that the alleged events had ever occurred, and this defense was unaffected by the variance of a single day between the indictments and proof.

BEFORE *Rousseau, J.*, at the 10 December 1984 Criminal Session of Superior Court, WILKES County, defendant was tried and convicted of the following offenses: one count of first degree sexual offense, three counts of taking indecent liberties with a child, and three counts of attempted first degree rape. He was sentenced to life imprisonment for the sexual offense, nine years for the three counts of taking indecent liberties with a child, and eighteen years for the three counts of attempted first degree rape, the latter to run at the expiration of the life term. Defendant appeals from the life sentence of right pursuant to N.C.G.S.

7A-27(a). This Court allowed defendant's motion to bypass the Court of Appeals on the other charges on 15 May 1986. Heard in the Supreme Court 13 April 1987.

*Lacy H. Thornburg, Attorney General, by James B. Richmond, Special Deputy Attorney General, for the State.*

*Kurt R. Conner and Mitchell McLean for defendant-appellant.*

WHICHARD, Justice.

The victim, a child of nine at the time of the offenses, testified that the day after her mother was hospitalized with appendicitis, defendant, her stepfather, sent her two younger brothers outside to play, locked the door of the trailer, and took her to the back bedroom. He then took off her clothes, made her get on the bed, kissed her, got on top of her, touched her on her "private parts," rubbed her with his own, and eventually ejaculated on her. The child testified that defendant repeated these actions the next day. On the third day defendant stuck his private parts "up [her] butt." The child testified that these actions caused her pain and that she had cried each time, after which defendant had stopped.

The child's testimony was corroborated by that of her mother and of the physician who examined her on 20 May 1984. Hospital records revealed the child's mother had been admitted to the hospital on 7 May 1984. The offenses occurred on 8, 9, and 10 May. The child told no one about them until the following week, when she went with her mother and brothers to her aunt's house in Fayetteville. She was examined shortly afterwards.

The physician performed a vaginal and a rectal examination and found no signs of trauma. The physician testified that the absence of injury to either the child's hymen or her rectum would not have been inconsistent with the abuse she had described.

The physician also testified that urinalysis revealed that the child had a urinary tract infection. When asked whether the infection could have been caused by the "vigorous genital contact" the child had described, he responded that "vigorous, combined genital anal rectal stimulation could, in fact, cause a urinary tract infection[,] and this is known to happen on occasion. I cannot say that this urinary tract infection was caused by these episodes."

The trial court then directly asked the physician whether he had an opinion based upon his medical experience "as to whether that caused it or not." The physician responded, "Not really." The court immediately instructed the jury to "disregard anything about the urinary tract infection being related in any way to what might or might not have taken place on those occasions. Disregard anything about that from your deliberations." In the trial court's subsequent charge to the jury, the admonition was repeated: "The doctor examined her and . . . found everything to be within normal limits other than some urinary tract infection which he said had absolutely nothing to do with this offense."

**[1]** Defendant first contends that the trial court erred in permitting the physician to testify regarding the possible cause of the child's urinary tract infection. Defendant reasons that the mere suggestion of causation was so inflammatory that the jury was predisposed to find him guilty of the alleged offenses.

Defendant's contention is meritless. The physician repeatedly testified that he had no opinion as to any causal connection between the infection and the alleged offenses. It is inconceivable that such responses could have prejudiced the jury against defendant. Further, the jury was told twice not to associate the infection and the alleged offenses. Even assuming error, *arguendo*, the court's prompt instruction and its later charge removed any possibility of prejudice. *See State v. Pruitt*, 301 N.C. 683, 688, 273 S.E. 2d 264, 268 (1981).

**[2]** Defendant next contends that the trial court erroneously denied defendant's motions to dismiss all charges, at the close of the State's evidence and at the close of all the evidence, on the grounds that the evidence was insufficient as to each essential element of the offenses charged. A motion to dismiss for insufficiency of the evidence is tantamount to a motion for nonsuit under N.C.G.S. 15-173. *State v. Greer*, 308 N.C. 515, 519, 302 S.E. 2d 774, 777 (1983). Under N.C.G.S. 15-173, a defendant who introduces evidence waives any motion for dismissal or nonsuit made prior to the introduction of his evidence and cannot urge the prior motion as ground for appeal. N.C.G.S. 15-173 (1983); *State v. Bruce*, 315 N.C. 273, 280, 337 S.E. 2d 510, 515 (1985); *see also* N.C.R. App. P. 10(b)(3). Because defendant offered evidence following denial of his motion to dismiss at the close of the State's evidence, the denial of that motion is not properly before us for review. *Id.*

In determining whether to grant a motion to dismiss at the close of all the evidence, the trial court must view all the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference that may be drawn therefrom supporting the charges against the defendant. *State v. Quesinberry*, 319 N.C. 228, 233, 354 S.E. 2d 446, 449 (1987). If the court determines as a matter of law that the State has offered substantial evidence of each element of the charged offenses sufficient to convince a rational trier of fact beyond a reasonable doubt of defendant's guilt, then defendant's motion to dismiss is properly denied. *See State v. Thompson*, 306 N.C. 526, 532, 294 S.E. 2d 314, 318 (1982).

**[3]** Under the circumstances of this case, the elements essential to the proof of first degree sexual offense are that (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 least twelve years old and four or more years older than the victim. N.C.G.S. 14-27.4(a)(1) (1986); *State v. Ludlum*, 303 N.C. 666, 667, 281 S.E. 2d 159, 160 (1981). A "sexual act" includes anal intercourse, N.C.G.S. 14-27.1(4), which requires penetration of the anal opening by the penis. *State v. DeLeonardo*, 315 N.C. 762, 764, 340 S.E. 2d 350, 353 (1986). The testimony of the child, her mother, and defendant established that the child was nine and defendant was twenty at the time of the offense. The child's testimony describing defendant's commission of anal intercourse, corroborated by that of her mother and the examining physician, is sufficient competent evidence supporting proof of the essential elements of first degree sexual offense.

**[4]** A conviction for the offense of taking indecent liberties with a child is sustained by proof that the defendant is sixteen years of age or more and at least five years older than the child and that he either

> (1) Willfully [took] or attempt[ed] to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commit[ted] or attempt[ed] to commit any lewd or lascivious act upon or with the body or any part or

> member of the body of any child of either sex under the age of 16 years.

N.C.G.S. 14-202.1(a)(1), (2) (1986). Again, evidence in the record satisfies the statutory age requisites of this offense. The corroborated testimony of the child that defendant rubbed against her until he ejaculated is sufficient evidence to permit the jury to find beyond a reasonable doubt that defendant took indecent liberties with her for the purpose of gratifying his sexual desire. *See State v. Ludlum*, 303 N.C. at 674, 281 S.E. 2d at 163.

**[5]** The essential elements of attempted first degree rape under the facts presented by this case are that the victim was less than thirteen years of age, that the perpetrator was at least twelve years of age and at least four years older than the victim, that the defendant had the intent to engage in vaginal intercourse with the victim, and that the defendant committed an act that went beyond mere preparation but fell short of actual commission of intercourse. N.C.G.S. 14-27.2(a)(1) (1986); N.C.G.S. 14-27.6 (1986); *State v. Boone*, 307 N.C. 198, 210, 297 S.E. 2d 585, 592 (1982). Again, except for defendant's intent, there was direct evidence in the child's testimony and elsewhere in the record as to all of these elements.

This Court has noted many times that "[i]ntent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence[;] it must ordinarily be proven by circumstantial evidence, *i.e.*, by facts and circumstances from which it may be inferred." *State v. Hudson*, 280 N.C. 74, 77, 185 S.E. 2d 189, 191 (1971), *cert. denied*, 414 U.S. 1160, 39 L.Ed. 2d 112 (1974), quoting *State v. Gammons*, 260 N.C. 753, 756, 133 S.E. 2d 649, 651 (1963). *See also State v. Whitaker*, 316 N.C. 515, 519-20, 342 S.E. 2d 514, 517-18 (1986). The child testified that defendant stopped rubbing his "private parts" against her own when she started to cry. In *State v. Mehaffey*, 132 N.C. 1062, 1065, 44 S.E. 107, 108 (1903), Chief Justice Clark observed:

> Whether he desisted for that reason, . . . or because he did not intend to have intercourse with her by force, was a matter for the jury alone, and was properly left to them in connection with all the other evidence in the case. [Citations omitted.] It is true, he desisted, that is to say, he did not suc-

> ceed in having sexual intercourse with the girl. . . . But his failure is not conclusive of the absence of intent . . . .

*See State v. Hudson*, 280 N.C. at 77, 185 S.E. 2d at 191-92. Whatever the actual reason for defendant's stopping short of intercourse, the jury was free to draw every reasonable inference from the evidence of his behavior, including an inference of his intentions. We hold that evidence of defendant's actions with the child was sufficient to support the jury's verdict that defendant was guilty of attempted first degree rape.

**[6]** Defendant also assigns error to the trial court's charge to the jury that if it found from the evidence beyond a reasonable doubt that

> defendant took [the child] into the bedroom, undressed her, undressed himself, put her on the bed, got on top of her, rubbed his private parts against her private parts, which in the ordinary course of events would have resulted in vaginal intercourse by the defendant with [the child] had not the defendant been stopped or prevented from completing his apparent course of action, it would be your duty to return a verdict of guilty as charged. However, if you do not so find or have a reasonable doubt as to one or more of those things, it would be your duty to return a verdict of not guilty.

Defendant complains that the charge, as exemplified in this concluding passage, unequally weighed the strengths of the State's case against defendant's "contentions." Defendant suggests it would have been better for the trial court to have offered the jury a "simple explanation of the effect of the plea of not guilty," as in "a case where the State's evidence seems to establish defendant's guilt conclusively, and the judge must strain credulity to state any contrary contention for defendant . . . ." *State v. Douglas*, 268 N.C. 267, 271, 150 S.E. 2d 412, 416 (1966).

We find no error in either the content or the tenor of this charge. First, this passage is in no way akin to the charge in *Douglas* in which the trial court's sarcastic summary of defendant's evidence "tended to ridicule, and thus impair, the effect of [his] plea of not guilty." *Id.*

Second, the quoted portion of the charge makes no attempt to reiterate defendant's "contentions," nor does the trial court

have any duty to do so. *E.g., State v. Rinck*, 303 N.C. 551, 563, 280 S.E. 2d 912, 922 (1981). The charge appears to restate evenhandedly evidence proffered by the State to the extent necessary to explain the application of the law. There is no indication in the charge of the court's opinion whether a fact had been proved. The law requires no more. *See* N.C.G.S. 15A-1232 (1983). *See also State v. Johnson*, 317 N.C. 343, 385, 346 S.E. 2d 596, 619-20 (1986).

Third, the portion of the trial court's charge quoted above was preceded by the court's admonishing the jury that

> by no means have I attempted to summarize all the evidence in all its detail; but, when you go to make up your verdicts, it is your duty to consider all the evidence in this case, whether I have called it to your attention or not; for all the evidence is important and should be considered by you in arriving at your verdicts.

Both this admonition and the part of the charge of which defendant complains reveal that the trial court took scrupulous care to instruct the jury to consider the evidence according to its own recollection and to weigh it carefully and independently. We discern no evidence of partiality either in the trial court's summary of the evidence or in its accompanying instructions.

**[7]** Finally, defendant contends that the indictments were fatally flawed because they indicated the alleged offenses had occurred "on or about" 7-9 May, rather than on 8-10 May, as revealed in the evidence at trial. This Court has held 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. Ramey*, 318 N.C. 457, 472, 349 S.E. 2d 566, 575 (1986). We have repeatedly recognized this allowance in cases involving offenses committed against young children. *See, e.g., State v. Wood*, 311 N.C. 739, 742, 319 S.E. 2d 247, 249 (1984). However, such license may not be used to "ensnare" a defendant and "deprive him of the opportunity to adequately defend himself." *State v. Ramey*, 318 N.C. at 472, 349 S.E. 2d at 575.

Defendant's defense consisted simply of a denial that the alleged events had ever occurred. This defense was unaffected by the variance of a single day between the indictment and the proof. We therefore hold that the variance had no prejudicial ef-

fect upon the outcome of defendant's trial and that consequently this contention, too, is without merit.

No error.

STATE OF NORTH CAROLINA v. JIMMY OTHA STOCKS

No. 543A86

(Filed 5 May 1987)

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

The trial court did not err by failing to dismiss a charge of first degree murder for insufficient evidence of premeditation and deliberation where the evidence showed that defendant invited the victim and two other men to his trailer in the early morning hours to talk and drink liquor; defendant had not seen the victim for some time but had lived with him in Atlanta sixteen years earlier and had learned that the victim became violent when he drank; after a time defendant and the victim began to argue over which of them had the better dog; the victim threatened to kill both defendant and his dog; the victim had no weapon when he made that statement; the victim tried to poke defendant in the eyes and picked defendant up and slammed him down on the stove; defendant went to the bathroom and on his way back looked behind his recliner for his axe handle but found his shotgun instead; according to defendant he picked up the shotgun thinking the victim would leave on seeing the gun; defendant told the victim to get out or to go for a gun on the kitchen table; the victim went for the gun; two other men grabbed the victim's arm and held it until a second before the shot, when it was released in anticipation of the shot; defendant shot the victim at a range of about six feet; and defendant testified that he believed the victim would have killed him had he not shot first.

2. **Criminal Law § 128.1— first degree murder—defendant ill—no mistrial**

The trial court did not abuse its discretion in a first degree murder prosecution by denying defendant's motion for a mistrial where defendant testified that he knew he was sick during jury selection; he did not communicate this to the court until after the jury was empaneled and the State had rested its case; the trial was recessed when the court learned of defendant's illness to allow him to rest and recuperate; and, prior to the resumption of cross-examination, defendant took the stand and indicated that he felt fine and was ready to proceed.

3. **Criminal Law § 111— first degree murder—written instruction on self-defense—no error**

The trial judge did not err in a prosecution for first degree murder by giving the jury written instructions on self-defense where the jury foreman

asked after several hours of deliberation if the jury could have a written copy of the description of the verdict; the court refused to give written instructions, but read a description of the possible verdicts and the law on self-defense; in response to complaints that the jurors were taking notes during the additional instructions, the court also gave the jury written instructions on the issue of self-defense; defendant objected to the wording of the written charge, but not to the procedure and did not ask that other parts of the written instructions be provided to the jury; the charge was favorable to defendant's case; and the trial court twice admonished the jury to take the additional instructions in conjunction with those it had previously given.

Justice MARTIN concurring.

APPEAL by defendant pursuant to N.C.G.S. 7A-27(a) from a judgment imposing a life sentence entered by *Brannon, J.*, at the 28 April 1986 Regular Criminal Session of Superior Court, WAKE County. Heard in the Supreme Court 14 April 1987.

*Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, and William N. Farrell, Jr., Special Deputy Attorney General, for the State.*

*C. D. Heidgerd for defendant-appellant.*

WHICHARD, Justice.

Defendant was convicted of first degree murder and sentenced to life imprisonment. Evidence pertinent to the arguments presented is set forth *infra*. We find no error.

**[1]** Defendant contends the trial court erred in failing to dismiss the first degree murder charge, at the close of the State's evidence and all of the evidence, for insufficient evidence of premeditation and deliberation. A motion to dismiss for insufficiency of the evidence is tantamount to a motion for nonsuit under N.C.G.S. 15-173. *State v. Greer*, 308 N.C. 515, 519, 302 S.E. 2d 774, 777 (1983). Under N.C.G.S. 15-173, a defendant who introduces evidence waives any motion for dismissal or nonsuit made prior to the introduction of his evidence and cannot urge the prior motion as ground for appeal. N.C.G.S. 15-173 (1983); *State v. Bruce*, 315 N.C. 273, 280, 337 S.E. 2d 510, 515 (1985); *see also* N.C.R. App. P. 10(b)(3). Because defendant offered evidence following denial of his motion to dismiss at the close of the State's evidence, the denial of that motion is not properly before us for review. *Id.*

Defendant did not renew the motion to dismiss at the close of all the evidence. N.C.G.S. 15A-1446(d)(5) provides that errors based upon insufficiency of the evidence may be the subject of appellate review even though no objection, exception or motion has been made in the trial division. N.C.R. App. P. 10(b)(3), however, provides that a defendant "may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial." To the extent that N.C.G.S. 15A-1446(d)(5) is inconsistent with N.C.R. App. P. 10(b)(3), the statute must fail. *State v. Bennett*, 308 N.C. 530, 535, 302 S.E. 2d 786, 790 (1983); *State v. Elam*, 302 N.C. 157, 160-61, 273 S.E. 2d 661, 664 (1981). While we thus are not compelled to do so, we have nevertheless reviewed the evidence in our discretion, *State v. Fikes*, 270 N.C. 780, 781, 155 S.E. 2d 277, 278 (1967), and we conclude that it sufficed to take the case to the jury.

On a motion to dismiss the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it. *State v. Williams*, 319 N.C. 73, 79, 352 S.E. 2d 428, 432 (1987) (quoting *State v. Young*, 312 N.C. 669, 680, 325 S.E. 2d 181, 188 (1985)). If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied. *Id.*

This Court has said, with regard to premeditation and deliberation:

> Premeditation means that the act was thought out beforehand for some length of time, however short . . . . *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980). Deliberation means an intent to kill carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982). . . .
>
> Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circum-

> stantial evidence. *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975). Among other circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. [Citations omitted.] We have also held that the nature and number of the victim's wounds is a circumstance from which premeditation and deliberation can be inferred.

*State v. Williams*, 319 N.C. at 80, 352 S.E. 2d at 433 (quoting *State v. Brown*, 315 N.C. 40, 58-59, 337 S.E. 2d 808, 822-23 (1985)).

The evidence at trial showed that defendant invited the victim and two other men to his trailer in the early morning hours of 11 May 1985 to talk and drink liquor. Defendant had not seen the victim for some time but had lived with him in Atlanta sixteen years earlier. Through their prior acquaintance defendant had learned that the victim became violent when he drank.

After some time defendant and the victim began to argue over which of them had the better dog. During the argument the victim threatened that he would kill both defendant and his dog. He had no weapon when he made that statement. The victim also tried to "poke" defendant in the eyes and "picked [defendant] up and slammed [him] down on the stove."

Immediately after this incident defendant went to the bathroom. On his way back defendant looked behind his recliner for his axe handle so he could "go up against [the victim's] hard head," but he found his shotgun instead. According to defendant he picked up the shotgun, not intending to kill the victim but thinking the victim would leave on seeing the gun. As he came into the kitchen with the shotgun, defendant said to the victim: "Get the hell out, . . . [o]r you can go for that gun." Defendant was referring to a pistol defendant had placed on the kitchen table when he first entered his trailer. The victim went for the pistol. The other two men grabbed his arm, and it was held until

"just a second before the shot" when it was released in anticipation of the shot. Defendant raised the shotgun and shot the victim at a range of about six feet. Defendant testified that he believed the victim would have killed him had he not shot first.

Viewed in the light most favorable to the State, as required, the foregoing evidence establishes that defendant returned from the bathroom after having time to think. By his own testimony he planned to hit the victim with an axe handle but later decided to shoot him, although not to kill him. Defendant clearly challenged the victim to a duel in which defendant had the upper hand and then proceeded to shoot him in the head at close range. The victim's arm was held by the other two men until "just a second before the shot" and was released only in anticipation of the shot. Although defendant testified that he was initially glad to see the victim after so many years, the jury could infer that defendant developed the intent to kill the victim as a result of the ill-will that arose during the argument over the dogs. The premeditation and deliberation issue thus was correctly submitted to the jury.

**[2]** Defendant next assigns as error the trial court's denial of his motion for mistrial. During cross-examination of the defendant he became nauseated and had to leave the court. He returned, however, and continued to testify until the lunch recess. At this recess defendant's attorney moved for a mistrial on the ground that defendant continued to feel ill. The court held a hearing and had the jail nurse take defendant's temperature, which was one degree above normal. The nurse also testified that defendant expressed symptoms of the flu. Although the court denied defendant's motion for mistrial, it recessed until the next day. The next day defendant indicated that he "[felt] fine and [was] ready to go forward." Defendant now contends that he did not receive a fair trial because his illness interfered with his ability to testify convincingly on the issue of self-defense.

Whether to grant a motion for mistrial is in the trial court's discretion. *State v. King*, 311 N.C. 603, 619, 320 S.E. 2d 1, 11 (1984). *See also State v. Calloway*, 305 N.C. 747, 754, 291 S.E. 2d 622, 627 (1982). Mistrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict. *Id.; State v. McCraw*, 300 N.C. 610, 620, 268 S.E. 2d 173, 179 (1980). Here defendant testified that he knew

he was sick during jury selection. He did not communicate this to the court, however, until after the jury was impaneled and the State had rested its case. When the court learned of defendant's illness, the trial was recessed to allow him to rest and recuperate. Prior to the resumption of cross-examination of the defendant, he took the stand and indicated that he felt fine and was ready to proceed. Clearly the court did not abuse its discretion in denying a mistrial under these circumstances. This assignment of error is thus overruled.

**[3]** Finally, defendant contends the court erred in submitting written instructions to the jury on the law of self-defense. After several hours of deliberation, the jury foreman inquired:

> We had some question—our memories are a little foggy from yesterday as to the descriptions of each of the verdicts and in an effort not to make a mistake, we were wondering if we could have a written copy of the legal descriptions of the verdicts.

While the trial court refused to give the jury written instructions, it did read a description of the possible verdicts and the law on self-defense. Although the foreman said that his questions were answered by the oral instructions, the court also gave the jury written instructions on the issue of self-defense in response to complaints that jurors were taking notes during the additional instructions.

Defendant now argues that the court erred in giving the jury written instructions on one issue without giving it written instructions on all issues. He contends that this procedure served to highlight the self-defense charge and may have confused the jurors as to other issues before them. Defendant did not object to this procedure at trial, however, and did not ask that other parts of the written instructions be provided to the jury. He merely objected to the wording of the written charge. We perceive no possible prejudice to defendant by a highlighting of the self-defense charge. *See* N.C.G.S. 15A-1443(a) (1983). The charge was favorable to his case. Further, the trial court twice admonished the jury to take the additional instructions in conjunction with those it had previously given. *See State v. Lyles*, 298 N.C. 179, 189, 257 S.E. 2d 410, 416 (1979). We thus find no merit in this assignment of error.

No error.

Justice MARTIN concurring.

I concur fully with the well-written opinion of Justice Whichard and write only to express my views with respect to the incident of the jurors taking notes of the trial judge's instructions. In response to a question by the jury, the trial judge read further instructions to the jury, after which counsel approached the bench. Both counsel objected to the jurors having taken notes during these instructions. Thereafter, the trial judge told the jurors to put away any notes they had made and that they should not refer to them during their deliberations.

The cause of this incident is N.C.G.S. § 15A-1228:

> Jurors may make notes and take them into the jury room during their deliberations. Upon objection of any party, the judge must instruct the jurors that notes may not be taken.

Were the constitutionality of this statute before us, serious question would arise as to whether it is unconstitutional both as a violation of separation of powers and as an unconstitutional delegation to parties to litigation of the authority of the court to control the trial of cases.

The statute does not establish a rule of practice or procedure but purports to control how the trial judge should carry out his duty in the trial of cases. It is very much like a rule that court should open, recess, and close at definite times each day. The internal, day-to-day operation of the courts and trial of cases is best left to the judges, not the legislature.

Since 1874, this Court has held that it is proper, and often commendable, for jurors to make notes of the evidence. *Cowles v. Hayes*, 71 N.C. 230 (1874). In *State v. Shedd*, 274 N.C. 95, 161 S.E. 2d 477 (1968), we wrote that the general authority in the United States is that the making and use of trial notes by the jury is not misconduct but is proper, and may even be desirable. In *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334, *cert. denied*, 337 U.S. 978, 12 L.Ed. 2d 747 (1964), this Court approved the trial judge's giving note pads and pencils to the jury for note-taking. *See Juror Note Taking & Conduct*, 47 N.C.L. Rev. 511 (1969).

The above decisions of this Court clearly hold that the trial court has the power to control the taking of notes by the jury. The statute purports to delegate this authority to the parties in the case. Under the statute, if any party objects the jurors may not take notes even though the trial judge might think that they should, as in *Goldberg*. I find this delegation of control over the trial of cases to the parties (in practice, their counsel) may conflict with article IV, section 1 of the Constitution of North Carolina, which invests the judicial power of the state in the General Court of Justice. Parties to lawsuits are not a part of the General Court of Justice. Placing this authority in the hands of parties who are adverse to each other opens the door for counsel to exercise the authority for the benefit of their clients, not in the interest of justice. One party may want the jury to take notes while the other party is opposed to it. The statute clearly gives an unfair veto to the party opposing the taking of notes. Only the trial judge can properly resolve such issues. This power should reside solely in the trial judge, who is unbiased and neutral in the case.

Further, to demonstrate the ineptitude of the statute, what should the trial judge do if the jury has been taking notes and thereafter counsel objects? What should be done with the notes already taken? The statute says that the jurors may take their notes into the jury room during deliberations. The trial judge in this case did not allow the jurors to do so. The statute also creates an *unnecessary* dichotomy in the trial of civil and criminal cases as it only applies to criminal cases. The statute creates many questions but resolves none.

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STATE OF NORTH CAROLINA v. MICHAEL LEE PARKER

No. 362A86

(Filed 5 May 1987)

**1. Criminal Law § 138.33— mitigating factors—passive participant—not found—*no error***

The trial court did not err in a second degree murder prosecution by not finding that defendant was a passive participant or played a minor role in the commission of the murder where there was evidence that defendant did not attempt to dissuade his codefendants from the crime and participated to the ex-

tent that he was a lookout, covered up blood in the road, disarmed the victim after the stabbing when the victim gained control of the knife, and left the victim to die. Prior opinions have discussed attempts to dissuade codefendants or the failure to do so as evidence to be considered in determining whether defendant was a passive participant in the crime, but it has not been made the controlling factor. N.C.G.S. § 15A-1340.4(a)(2)(c).

2. **Criminal Law § 138.14— one aggravating factor—several mitigating factors—enhanced sentence—no abuse of discretion**

The trial court did not abuse its discretion by finding that the one aggravating factor of prior convictions outweighed several mitigating factors where the convictions were for two counts of misdemeanor breaking or entering, misdemeanor larceny, and one count of damage or injury to personal property, all arising from the same episode. N.C.G.S. § 15A-1340.4(a)(1)o.

APPEAL by defendant pursuant to N.C.G.S. § 15A-1444(a1) and N.C.R. App. P. 4(d) from a life sentence imposed by *Battle, Judge*, at the 17 February 1986 Session of Superior Court, ORANGE County. This Court allowed the defendant's petition to bypass the Court of Appeals for sentences of less than life which were imposed. Heard in the Supreme Court 12 February 1987.

Defendant pled guilty on 7 February 1984 to second degree murder, first degree kidnapping, and robbery with a dangerous weapon. He was sentenced to life in prison on his murder plea. The charges of kidnapping and robbery were consolidated for sentencing and a forty year sentence was imposed to commence at the expiration of the life sentence. Defendant appealed and this Court ordered a new sentencing hearing, 315 N.C. 249, 337 S.E. 2d 497 (1985).

A resentencing hearing was held and the evidence was substantially the same as that adduced at the first hearing. The evidence was that on 7 July 1983 the defendant was riding with his brother James Parker and Mark Bethea in an automobile being driven by Edwin Williams, Jr. on Highway 15-501. Michael Parker pointed a starter's pistol, incapable of firing, at Williams. Williams was forced to drive onto a dirt road where the automobile was stopped. Thereafter James Parker and Bethea pulled Williams from the vehicle and James Parker stabbed him with a knife. Williams managed to pull the knife from his body and the defendant kicked the knife from Williams' hand. The defendant went back to Highway 15-501 to act as a lookout while James Parker and Bethea tied Williams to a tree where he subsequently

bled to death. Michael Parker returned to the scene, did not inquire about Williams, but helped James Parker and Bethea cover the blood spattered in the area.

The defendant and the other two men then drove to Chapel Hill where they visited with some friends. After a short period of time they left Chapel Hill and drove to Durham and bought beer. The defendants were dividing money taken from Williams and were planning to go to New Jersey when they were arrested before they were able to leave this state.

The court found as to the murder plea one factor in aggravation, that the defendant had prior convictions for criminal offenses punishable by more than sixty days' confinement. The court found as mitigating factors that (1) defendant was suffering from a mental condition that was insufficient to constitute a defense but reduced culpability for the offense, (2) defendant's immaturity at the time of the offense reduced culpability, (3) defendant voluntarily acknowledged wrongdoing in connection with the offense at an early stage in the criminal process, and (4) defendant comes from an economically deprived home and did not receive proper parental direction.

Judge Battle found the aggravating factor outweighed the mitigating factors and sentenced the defendant to life in prison on the murder charge, eighteen years on the armed robbery charge, and twelve years for the kidnapping. The sentence for robbery is to commence at the expiration of the sentence for murder and the sentence for kidnapping is to commence at the expiration of the sentence for robbery.

*Lacy H. Thornburg, Attorney General, by John F. Maddrey, Assistant Attorney General, for the State.*

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

WEBB, Justice.

**[1]** The defendant first assigns error to the trial court's failure to find as a mitigating factor that he was a passive participant or played a minor role in the commission of the second degree murder. He contends that in our first decision in this case and in *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1981), this Court ig-

nored the plain meaning of N.C.G.S. § 15A-1340.4(a)(2)c which provides for this mitigating factor. He argues that this Court has made the determination of this mitigating factor depend on whether the defendant attempted to dissuade his codefendant from committing the crime. He asks us to overrule *Jones* and our first opinion in this case. In *Jones* the defendant pled guilty to second degree murder. The evidence showed that he had participated in an armed robbery. After he and his codefendant were in an automobile and preparing to escape his codefendant said he would return to the store and kill the clerk because the clerk knew the codefendant. The defendant tried to persuade his codefendant not to do so and then waited in the automobile while his codefendant went inside and killed the clerk. This Court held it was error not to find as a mitigating factor that the defendant was a passive participant or played a minor role in the commission of the offense because there was uncontradicted credible evidence to support this finding.

In our first opinion in this case Chief Justice Exum, writing for the Court at 315 N.C. 254, 337 S.E. 2d 500, said that defendant did not so disassociate himself from the murder so that *Jones* controls. The defendant argues that this Court has misinterpreted N.C.G.S. § 15A-1340.4(a)(2)c by requiring that a defendant must have attempted to dissuade his codefendant from committing the crime in order to have this mitigating factor found. We do not agree with the defendant's interpretation of this rule. It is true that Chief Justice Exum said, in our first opinion for the Court, that in *Jones* the defendant implored his codefendant not to kill the clerk and that Michael Parker's failure to do so was a distinguishing fact in this case. However, neither case holds that an attempt to dissuade the codefendant from committing the crime is necessary for a finding of this mitigating factor. In *Jones* not only did the defendant implore his codefendant not to commit the murder, but he remained in the automobile while the codefendant did so. In the first opinion in this case Chief Justice Exum pointed out that in addition to the evidence that he did not attempt to dissuade his codefendants, "Michael did participate in the murder to the extent that he was a lookout, covered up blood in the road, disarmed Williams after the stabbing when Williams had gained control of the knife, and left Williams to die." *State v. Parker*, 315 N.C. at 256, 337 S.E. 2d at 501.

Although this Court in our previous opinion in this case and in *Jones* discussed the attempt to dissuade a codefendant and the failure to do so as being evidence to be considered in determining whether the defendant was a passive participant in the crime, neither case makes this the controlling factor. We hold it was not error for the court in this case not to find the defendant was a passive participant or played a minor role in the commission of the murder.

**[2]** The appellant next assigns error to the court's enhancing his sentence on his murder plea. He argues that based on the aggravating factor and the mitigating factors found, the decision to enhance his sentence was "manifestly unsupported by reason." The appellant contends that the one aggravating factor that the defendant had prior convictions of criminal offenses punishable by more than sixty days' confinement is based on his being convicted some time in 1983 of two counts of misdemeanor breaking or entering, misdemeanor larceny, and one count of damage or injury to personal property. He says that all of these convictions arose from the same episode and were relatively minor offenses. The defendant argues that on the other hand the mitigating factors found were substantial and were material to the defendant's culpability.

The General Assembly has determined that a conviction of a criminal offense punishable by more than sixty days' confinement shall be an aggravating factor. N.C.G.S. § 15A-1340.4(a)(1)o. If we were to hold that such a factor should be of small weight in imposing a sentence if we determined the crime for which the defendant was convicted is a minor offense we would be substituting our judgment for the judgment of the Legislature, which we cannot do. It is well established that one aggravating factor may outweigh several mitigating factors. *See State v. Penley*, 318 N.C. 30, 347 S.E. 2d 783 (1986), and our first opinion in this case. We cannot say the court abused its discretion in this case by finding the aggravating factor outweighed the mitigating factors.

The judgments of the superior court are

Affirmed.

ERNEST C. PEARSON v. JAMES G. MARTIN, IN HIS CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA; LACY H. THORNBURG, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; JOYCE A. HAMILTON; DONALD W. OVERBY; FRED M. MORELOCK; AND THOMAS W. STEED, JR., IN HIS CAPACITY AS PRESIDENT OF THE WAKE COUNTY BAR ASSOCIATION

No. 643PA86

(Filed 5 May 1987)

**Appeal and Error § 9— district court judgeship—political party—action to declare statute unconstitutional—mootness**

Plaintiff's action to have the requirement of N.C.G.S. § 7A-142 that persons nominated by the Bar to fill a vacancy for district court judge be "members of the same political party as the vacating judge" declared unconstitutional for the purpose of permitting him to be included in the selection process for a candidate to succeed to the judgeship vacated by a specified person is dismissed as moot where the Bar meeting that plaintiff seeks to participate in had been held prior to the time plaintiff filed his complaint.

ON discretionary review prior to a determination by the Court of Appeals granted by this Court ex mero motu pursuant to N.C.G.S. § 7A-31(a) and Rule 15(e)(2) of the North Carolina Rules of Appellate Procedure. Plaintiff appealed from summary judgment in favor of defendants by *Herring, J.*, at the 15 September 1986 session of Superior Court, WAKE County. Heard in the Supreme Court 13 April 1987.

*Hunter, Hodgman, Greene, Donaldson, Cooke & Elam, by Robert N. Hunter, Jr., for plaintiff-appellant.*

*Lacy H. Thornburg, Attorney General, by Jean A. Benoy, Senior Deputy Attorney General, and Isham B. Hudson, Jr., Special Deputy Attorney General, for defendant-appellees.*

MARTIN, Justice.

Plaintiff filed his complaint on 29 August 1986 in the Superior Court of Wake County. The pertinent allegations of the complaint are:

> 20. On or about August 4, 1986, District Court Judge NARLEY CASHWELL resigned his office as District Court Judge of the 10th Judicial District, said vacancy to be effective on September 1, 1986.

21. Pursuant to said resignation, THOMAS W. STEED, as President of the Wake County Bar Association, called a meeting of the 10th Judicial District Bar to nominate three (3) candidates for appointment to fill the vacancy, which meeting was held on August 25, 1986. A copy of the notice calling for this meeting is attached hereto as Exhibit A and incorporated herein by reference as if fully set forth verbatim.

22. NARLEY CASHWELL was elected to the office of District Court Judge as the nominee of the Democratic party. At the meeting of the 10th District Bar, only nominations of Democratic candidates were sought or received. Pursuant to the provisions of N.C. Gen. Stat. § 7A-142, other resident attorneys affiliated with other political parties or not affiliated or registered to vote would not be eligible for nomination.

23. Plaintiff, as a licensed attorney registered as a Republican was ineligible by virtue of N.C. Gen. Stat. § 7A-142 to be considered as a candidate for nomination.

. . . .

26. As a direct result of the aforesaid judicial nomination process, plaintiff has been denied his right to be eligible for office as guaranteed by the Constitution of North Carolina.

. . . .

WHEREFORE, plaintiff prays the Court:

1. That the Court grant a temporary restraining order restraining defendants, their agents, assigns and successors, from any further action under N.C. Gen. Stat. § 7A-142 as it pertains to the judicial vacancy alleged herein until such time as the Court may hear plaintiff's application for a preliminary injunction;

Further, plaintiff swears in his affidavit:

I was a candidate for and interested in the District Court vacancy created as a result of the resignation of the Honorable Narly [sic] Cashwell. However, in accordance with North Carolina General Statute 7A-142 and the following language contained in the notice from the Tenth District Bar, I was precluded from the selection process.

Summary judgment for defendants was entered on 17 September 1986.

Plaintiff seeks to have the requirement of N.C.G.S. § 7A-142 that the persons nominated by the Bar to fill a vacancy for district court judge be "members of the same political party as the vacating judge" declared unconstitutional only for the purpose of permitting him to be included in the selection process for a candidate to succeed to the seat vacated by Judge Narley Cashwell, and for no other reason.

When plaintiff filed his complaint on 29 August 1986, the Bar meeting that he seeks to participate in had been held on 25 August 1986. This Court's determination of this appeal cannot grant plaintiff the relief he seeks. The action was moot when it was filed 29 August 1986 and must be dismissed.

> That a court will not decide a "moot" case is recognized in virtually every American jurisdiction. . . . In state courts the exclusion of moot questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint. . . .
>
> Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law. . . .
>
> Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action.

*In re Peoples*, 296 N.C. 109, 147-48, 250 S.E. 2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L.Ed. 2d 297 (1979) (citations omitted). That this action was brought as a declaratory judgment action does not alter this result. Under the Declaratory Judgment Act, jurisdiction does not extend to questions that are altogether moot. "The statute does not require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to

be used if and when occasion might arise." *Tryon v. Power Co.*, 222 N.C. 200, 204, 22 S.E. 2d 450, 453 (1942).

This decision is in accord with the decisions of the Supreme Court of the United States. *See, e.g., Murphy v. Hunt*, 455 U.S. 478, 71 L.Ed. 2d 353 (1982) (prisoner's action challenging pretrial bail provisions of state constitution held moot where plaintiff already convicted of crime); *Weinstein v. Bradford*, 423 U.S. 147, 46 L.Ed. 2d 350 (1975) (prisoner's action for procedural parole rights held moot when plaintiff had been released from parole system); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 21 L.Ed. 2d 474 (1969) (court does not sit to decide abstract, hypothetical, or contingent questions). Plaintiff's action is moot and this appeal is hereby dismissed.

The judgment of the Superior Court of Wake County is vacated, and this action is remanded to that court for the entry of an order dismissing this action as moot.

Appeal dismissed; vacated and remanded.

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STATE OF NORTH CAROLINA v. GEORGE DANIELS

No. 318A86

(Filed 5 May 1987)

**Criminal Law § 138.14— finding that one aggravating factor outweighed seven mitigating factors—no abuse of discretion**

In sentencing defendant for second degree murder, the trial court did not abuse its discretion in finding that the single aggravating factor that defendant shot the victim with premeditation and deliberation and with specific intent to kill outweighed the seven mitigating factors found by the court.

DEFENDANT appeals as of right under N.C.G.S. § 15A-1444(a1) and N.C.R. App. P. 4(d) from a life sentence imposed pursuant to a plea of guilty of second-degree murder at the 9 December 1986 Criminal Session of the Superior Court, ROCKINGHAM County, *Judge Anthony Brannon* presiding. Heard in the Supreme Court on 14 April 1987.

*Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State.*

*Daniel K. Bailey for defendant-appellant.*

MEYER, Justice.

The sole issue presented on this appeal is whether the trial judge abused his discretion in weighing the aggravating and mitigating factors in arriving at his sentencing decision. We find no abuse of discretion and affirm the trial court's judgment.

Pearline Hairston was shot and killed on the afternoon of 24 July 1985 as she worked at City Dry Cleaners in the Town of Draper. A witness to the incident testified that defendant, an employee of the cleaners and a co-worker of decedent, entered the cleaners at about 3:00 p.m., walked quickly to the decedent, pointed a pistol at her head, and fired. After the victim fell to the floor, defendant pointed the pistol at the onlookers, threatening them, and then ran out of the door.

Defendant was taken into custody shortly thereafter, and gave a statement to the police admitting the shooting. Ms. Hairston died from the gunshot wound. There was evidence that the defendant had previously threatened to kill the decedent and had gone home from work on the day of the killing to get his pistol.

Defendant pled guilty to second-degree murder. A sentencing hearing was held pursuant to N.C.G.S. § 15A-1340. At this hearing, both the State and the defendant presented evidence. The evidence for the defendant concerned his past mental problems, including testimony from Dr. Barry Blumenthal that defendant was suffering from psychotic schizophrenia at the time of the killing and may have been incapable of premeditation and deliberation at the time. There was also testimony concerning defendant's good work habits, friendliness, and lack of previous criminal conduct.

The State presented evidence to rebut Dr. Blumenthal's testimony. Dr. James Groce, a staff psychiatrist at Dorothea Dix Hospital, testified that in his opinion defendant was not legally insane on the day of the shooting. He found there to be insufficient data to support Dr. Blumenthal's diagnosis of schizophrenia.

At the close of all the evidence, the trial court found as statutory mitigating factors that the defendant had no criminal record, that the defendant committed the offense while under threat that was insufficient to constitute a defense but significantly reduced his culpability, that the defendant was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced his culpability, that the defendant's limited mental capacity at the time of the offense significantly reduced his culpability for the offense, that the defendant had been a person of good character or has had a good reputation in his community, and that the defendant acknowledged his wrongdoing at an early stage. The court also found the nonstatutory mitigating factor that the defendant was a good worker and provider for his family. The judge found as a nonstatutory aggravating factor that defendant shot Ms. Hairston with premeditation and deliberation and with specific intent to kill. The trial court found that the aggravating factor outweighed the mitigating factors, and sentenced the defendant to life imprisonment. Defendant assigns this weighing as error.

We have repeatedly held that a trial judge's weighing of mitigating and aggravating factors will not be disturbed absent a showing that the judge abused his discretion.

> Upon a finding by the preponderance of the evidence that aggravating factors outweigh mitigating factors, the question of whether to increase the sentence above the presumptive term, and if so, to what extent, remains within the trial judge's discretion.
>
> The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. 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.

*State v. Melton*, 307 N.C. 370, 380, 298 S.E. 2d 673, 680 (1983) (citations omitted).

In *State v. Parker*, 315 N.C. 249, 337 S.E. 2d 497 (1985), one of the issues raised on appeal was whether the trial court erred by concluding that one factor in aggravation outweighed three factors in mitigation. Rejecting the contention, this Court noted, "a sentencing judge properly may determine in appropriate cases that one factor in aggravation outweighs more than one factor in mitigation and vice versa." *Id.* at 258, 337 S.E. 2d at 502. *See also State v. Hinnant*, 65 N.C. App. 130, 308 S.E. 2d 732 (1983), *cert. denied*, 310 N.C. 310, 312 S.E. 2d 653 (1984) (trial court's determination that one aggravating factor outweighed two mitigating factors found to be proper).

In this case, defendant points only to the seven mitigating factors found by the judge and argues that the single aggravating factor could not outweigh them. He has not shown, nor have we found, any abuse of discretion. We therefore affirm the trial court's judgment.

Affirmed.

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PAUL W. NEWTON v. ROBERT J. WHITAKER AND WIFE, ELLEN RUTH WHITAKER; WILFRED S. TEMPLETON; GENERAL MOTORS ACCEPTANCE CORPORATION; AND GENERAL MOTORS CORPORATION

No. 686A86

(Filed 5 May 1987)

APPEAL by defendant-appellants General Motors Acceptance Corporation and General Motors Corporation from a decision of a divided panel of the Court of Appeals reported at 83 N.C. App. 112, 349 S.E. 2d 333 (1986), vacating a judgment dismissing the complaint, and remanding for further proceedings. Heard in the Supreme Court 15 April 1987.

*Hall and Brooks, by John E. Hall, for plaintiff-appellee.*

*Petree Stockton & Robinson, by Jackson N. Steele, for defendant-appellants.*

PER CURIAM.

Justice Webb took no part in the consideration or determination of this case. The remaining members of this Court are divided three to three as to the result and thus there is no majority voting either to affirm or to reverse. The decision of the Court of Appeals is thus left undisturbed and stands without precedential value.

Affirmed.

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

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ROBERT M. CALLOWAY v. DILINDA PATTERSON AND PAULETTA M. PATTERSON

No. 738A86

(Filed 5 May 1987)

APPEAL of right by defendants pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 83 N.C. App. 343, 350 S.E. 2d 178 (1986). Heard in the Supreme Court 16 April 1987.

*Stephen L. Barden, III, for plaintiff-appellee.*

*Robert G. McClure, Jr.; and Roberts, Stevens & Cogburn, P.A., by Glenn S. Gentry, for defendant-appellants.*

PER CURIAM.

Defendants' motion to amend the record on appeal to include the issue sheet submitted to the jury and signed by the jury foreperson is allowed.

The decision of the Court of Appeals is affirmed.

Affirmed.

JAMES A. DEAN, EMPLOYEE, PLAINTIFF v. CONE MILLS CORPORATION, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 742A86

(Filed 5 May 1987)

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 83 N.C. App. 273, 350 S.E. 2d 99 (1986), which affirmed the opinion and award of the Industrial Commission denying workers' compensation benefits to plaintiff. Heard in the Supreme Court 14 April 1987.

*Charles R. Hassell, Jr. for plaintiff.*

*Maupin Taylor Ellis & Adams, P.A., by Richard M. Lewis and Steven M. Rudisill, for defendants.*

PER CURIAM.

Affirmed.

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

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

BRYANT v. SHORT

No. 107P87.

Case below: 84 N.C. App. 285.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

CAMPBELL v. PITT COUNTY MEMORIAL HOSP.

No. 133A87.

Case below: 84 N.C. App. 314.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) of issues in addition to those presented as basis for dissenting opinion allowed 5 May 1987 as to expert witness fee and prejudgment interest issues only.

GRAHAM v. JAMES F. JACKSON ASSOC., INC.

No. 140PA87.

Case below: 84 N.C. App. 427.

Petition by defendants for discretionary review allowed 5 May 1987. Petition by defendants for writ of supersedeas allowed 5 May 1987.

HED, INC. v. POWERS, SEC. OF REVENUE

No. 112P87.

Case below: 84 N.C. App. 292.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

HORTON v. RIVENBARK

No. 164P87.

Case below: 84 N.C. App. 567.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

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

IN RE WILL OF WATT

No. 106P87.

Case below: 84 N.C. App. 457.

Petition by caveators for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987. Petition by caveators for writ of supersedeas denied and temporary stay dissolved 5 May 1987.

KWAN-SA YOU v. ROE

No. 81P87.

Case below: 84 N.C. App. 147.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

LA NOTTE, INC. v. NEW WAY GOURMET, INC.

No. 48P87.

Case below: 83 N.C. App. 480.

Motion by defendant and third-party plaintiffs to dismiss appeal by plaintiff and third-party defendant for failure to comply with the Rules of Appellate Procedure allowed 7 April 1987. Petition by plaintiff and third-party defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 April 1987.

SHEPPARD v. COMMUNITY FED. SAV. AND LOAN

No. 99P87.

Case below: 84 N.C. App. 257.

Petition by defendant (Judy Hovey) for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987. Petition by defendant (Community Savings) for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

SPARKS v. LOWE'S

No. 100P87.

Case below: 84 N.C. App. 312.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

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

STATE v. ATKINSON

No. 157P87.

Case below: 84 N.C. App. 701.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

STATE v. BORDERS

No. 77P87.

Case below: 84 N.C. App. 148.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

STATE v. BROWN

No. 206P87.

Case below: 85 N.C. App. 583.

Petition by defendant for temporary stay of the execution of judgment of the Court of Appeals allowed 7 May 1987 on condition $30,000 secured appeal bond remains in effect.

STATE v. GILES

No. 31P87.

Case below: 83 N.C. App. 487.

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 May 1987. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

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

STATE v. HICKS

No. 121PA87.

Case below: 84 N.C. App. 237.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 May 1987.

STATE v. JENNINGS

No. 214P87.

Case below: 85 N.C. App. 349.

Petition by Attorney General for temporary stay allowed 8 May 1987 pending timely filing of petition for discretionary review and decision thereon.

STATE v. JONES

No. 55P87.

Case below: 83 N.C. App. 593.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

STATE v. KNOLL

No. 119PA87.

Case below: 84 N.C. App. 228.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 May 1987.

STATE v. LIVELY

No. 19P87.

Case below: 83 N.C. App. 639.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

STATE v. McLENDON

No. 97P87.

Case below: 84 N.C. App. 458.

Motion by Attorney General to dismiss appeal for lack of significant public interest allowed 5 May 1987. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

STATE v. MIDDLETON & KORNEGAY

No. 147P87.

Case below: 76 N.C. App. 345.

Petition by defendant (Kornegay) for writ of certiorari to the North Carolina Court of Appeals denied 5 May 1987.

STATE v. NEELY

No. 169P87.

Case below: 84 N.C. App. 703.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 May 1987.

STATE v. OLIVER

No. 204P87.

Case below: 85 N.C. App. 1.

Petition by defendant for temporary stay allowed 29 April 1987.

STATE v. PHILLIPS

No. 105P87.

Case below: 84 N.C. App. 302.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

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

STATE v. RIDDICK

No. 148P87.

Case below: 84 N.C. App. 458.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 May 1987.

STATE v. ROARY

No. 79P87.

Case below: 84 N.C. App. 148.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

STATE v. SOUTHARD

No. 123P87.

Case below: 84 N.C. App. 568.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

STATE v. STURGILL

No. 58P87.

Case below: 84 N.C. App. 148.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

STATE v. SWINK

No. 82P87.

Case below: 84 N.C. App. 149.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

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

STATE v. WARREN

No. 120PA87.

Case below: 84 N.C. App. 235.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 May 1987.

THE AMERICAN MARBLE CORP. v. CRAWFORD

No. 80P87.

Case below: 84 N.C. App. 86.

Petition by defendant (Ronald Lee Crawford) for discretionary review pursuant to G.S. 7A-31 denied 5 May 1987.

STATE OF NORTH CAROLINA v. PHILLIP THOMAS ROBBINS, JR.

No. 599A83

(Filed 2 June 1987)

**1. Kidnapping § 1.2— evidence not sufficient**

The evidence was insufficient to support a kidnapping charge in a prosecution for robbery, kidnapping, and murder where the record was barren of evidence indicating how or why defendant got up with the victim; under what circumstances they went to Durham from Raleigh; or what occurred between the time defendant and the victim left the apartment where they were last seen in Durham and the time the victim was shot. Moreover, there was testimony indicating that the victim was left outside the apartment, apparently alone and in possession of his car keys, for five minutes; that the victim sat quietly on a sofa in the apartment and made no effort to leave while defendant was in the bathroom with the door closed; that the victim did not appear to be afraid or nervous; and that there was no apparent reason that the victim could not have left the apartment. N.C.G.S. § 14-39.

**2. Criminal Law § 162; Jury § 7.14— racial discrimination in use of peremptory challenges—no objection at trial—appellate review**

The Supreme Court considered defendant's argument that the evidence established a prima facie case of purposeful racial discrimination in the selection of the petit jury under *Batson v. Kentucky*, 476 U.S. ---, even though defendant neither objected to the district attorney's use of peremptory challenges to remove black jurors nor made a challenge to the petit jury before the jury was empaneled, because defendant was on trial for his life and because an objection would have been futile under the law as it then existed.

**3. Jury § 7.14— discrimination in use of peremptory challenges—prima facie showing**

In order to make out a prima facie showing of discrimination in a prosecutor's challenge to potential jurors when the issue is raised for the first time after the jury is empaneled, the defendant must show that he or she is a member of a cognizable racial group victimized by discrimination; that the prosecutor used peremptory challenges to exclude members of defendant's race; and that the facts and circumstances set out in the record raise an inference of racially discriminatory intent on the part of the State.

**4. Jury § 7.14— discrimination in use of peremptory challenges—prima facie case not established**

The defendant in a prosecution for first degree murder, armed robbery, and kidnapping did not establish a prima facie case of purposeful discrimination in the prosecutor's use of peremptory challenges where, although the defendant was a member of a cognizable racial group and peremptory challenges lend themselves to discriminatory use, the facts and attendant circumstances surrounding the prosecution's exercise of peremptory challenges did not raise the necessary inference of racial discrimination.

**5. Constitutional Law § 75— right to silence—not invoked**

The trial court did not err in a prosecution for kidnapping, murder, and robbery by refusing to suppress incriminatory statements defendant made to law enforcement officers where defendant neither raised the theory nor argued in the trial court that he had manifested his desire that all questioning cease, and his statement to a detective that "I told you everything I know" did not indicate a desire that all questioning cease and was not an invocation of the Fifth Amendment right to remain silent.

**6. Criminal Law § 66.16— photographic identification—not unnecessarily suggestive—in-court identification—independent origin**

In a prosecution for kidnapping, robbery and murder, the trial court did not err by admitting a photographic and in-court identification of defendant by a precious metals dealer who had purchased a class ring which had belonged to a victim where there was substantial evidence supporting the trial court's finding of fact and conclusion of law that the pretrial identification procedures were not unnecessarily suggestive and conducive to irreparable misidentification, and that the witness's in-court identification was of independent origin.

**7. Criminal Law § 73.1— hearsay—admission not prejudicial**

In a prosecution for kidnapping, robbery and murder, the admission of testimony by a detective that a resident of the area where one body was found had pointed out to him the place she had found the victim's glasses was harmless error because defendant opened the door for the State and there was considerable evidence of defendant's guilt.

**8. Criminal Law § 33— behavior of other suspects in other crimes—irrelevant**

In a prosecution for armed robbery, kidnapping, and murder, testimony by an investigator that other suspects in the past had told him that someone else had committed the crime, though totally irrelevant, incompetent, and lacking in probative value, was not prejudicial because it was completely irrelevant.

**9. Homicide § 15— testimony concerning character of victims—not prejudicial**

Testimony in a prosecution for armed robbery, kidnapping, and murder about the general characteristics of the victims, given in response to questions about their appearance, was not prejudicial because similar testimony was admitted without objection elsewhere, the questions did not necessarily call for a response regarding character, and defendant did not move to strike one of the answers.

**10. Criminal Law § 102.1— closing argument—purpose of felony murder rule—not improper**

In a prosecution for kidnapping, robbery, and murder, there was no error in the prosecutor's closing argument that the felony murder rule was aimed at criminals who eliminate witnesses against them because one of the reasons for the enactment of the felony murder rule is that often criminals do kill potential witnesses in the course of the commission of a felony; moreover, the prosecution advised the jury that it would receive instructions from the trial court, the trial court instructed the jury to apply the laws given by the court, the

court instructed the jury completely and accurately on the felony murder rule, and there was no reasonable possibility that a different result would have been reached had the argument not been made.

**11. Robbery § 5.2— instructions—intent to steal at time of threat**

The trial court did not err in a prosecution for kidnapping, robbery, and murder by giving the pattern jury instruction on armed robbery rather than defendant's requested instruction that, to convict defendant of armed robbery, the jury must find that defendant intended to steal the victims' property at the time he threatened or endangered their lives. The evidence was sufficient to find that defendant had formed the intent to steal one victim's car either before or immediately after killing her and that defendant intended to steal and took possession of the other victim's automobile and class ring either before, immediately after, or shortly after the victim was killed.

**12. Homicide § 8.1— voluntary intoxication—instruction not warranted**

The evidence in a prosecution for robbery, kidnapping, and murder did not warrant an instruction on the effect of voluntary intoxication on the element of specific intent to kill where there was no evidence that defendant's capacity to think and plan was affected or impaired by intoxication and the trial judge included in his summary of the evidence most of the testimony which defendant requested.

**13. Criminal Law § 117.2— interested witness—instruction not given**

The trial judge in a prosecution for kidnapping, robbery, and murder did not err by not giving defendant's requested instruction that a particular person might be an interested witness, based on testimony that the witness may have been the perpetrator of the crimes with which defendant was charged, where the court gave general instructions on interested witnesses and the weight to be afforded the testimony of any witness whom the jury might find to be biased or to have any interest in the trial's outcome. There was no credible evidence to support defendant's allegation that the witness was either the perpetrator or an accomplice, there was no evidence that the witness was charged with any offense relating to the crimes, that he was testifying pursuant to a plea bargain with the State or a grant of immunity from the State, and interested witness instruction related to a subordinate feature of the case.

**14. Homicide § 18.1— premeditation and deliberation—evidence sufficient**

The evidence was sufficient to support a reasonable inference of premeditation and deliberation where both victims, who had been shot multiple times, were found in isolated areas of north Durham County, autopsies revealed that both had close or contact wounds to the back, neck, face, and head behind the left ear, and there was no evidence of provocation by either victim.

**15. Homicide § 21.4— murder—evidence that defendant murderer—sufficient**

There was substantial evidence in a prosecution for first degree murder that defendant was the murderer of both victims where both victims were last seen alive in defendant's company; defendant and one victim arrived at an apartment where defendant asked a person there to accompany him to

Greensboro; defendant and the victim left and defendant returned alone and driving the victim's car; defendant said that a gun was warm because he had just shot it; defendant was identified as the person who represented himself as the victim and sold the victim's class ring in Greensboro; one victim's car was abandoned at North Hills Shopping Mall in Raleigh, and the car belonging to the other victim, whose destination had been the same shopping center, was abandoned in Hillsborough; defendant led officers to one body, the site of some of the victims' belongings, and to one car, and told them where to find the other car; defendant's palm and fingerprints were found on both cars; defendant sold the murder weapon; and defendant made incriminating statements to officers.

**16. Robbery § 4.3— armed robbery—evidence sufficient**

The evidence was sufficient to support a verdict of guilty in an armed robbery prosecution where the evidence showed that both victims had cashed their employment checks and had last been seen with defendant on the days they were killed; defendant had been seen rummaging through one victim's handbag earlier in the day; defendant was driving the other victim's car on the morning of the killing after having said that the victim was going to let him borrow it; defendant's prints were later found on several items inside a victim's car and on the car itself, which had been left in the same location from which the other victim likely disappeared; the left rear pocket of one victim's trousers and the other pocket had been turned inside out, and his wallet and class ring were missing; and defendant sold that victim's high school ring in Greensboro and led officers to a location where they found several items which had been in his wallet.

**17. Perjury § 5— contention that conviction obtained by perjured testimony—no showing that testimony was false, material, and knowingly used to obtain conviction**

In a prosecution for robbery, kidnapping, and murder where defendant contended that the State obtained his murder conviction and death sentence by the knowing use of perjured testimony by the Chief Medical Examiner based on inconsistencies concerning the number of wounds in the victims' bodies in this case and his testimony in an earlier sentencing hearing, the defendant did not carry his burden of showing that the testimony was in fact false, material, and knowingly and intentionally used to obtain his conviction.

**18. Constitutional Law § 63— death qualification of jury—constitutional**

The constitution does not prohibit the death qualification of jurors.

**19. Constitutional Law § 60; Grand Jury § 3.3; Jury § 7.4— unrepresentative jury pool—no error**

The Supreme Court declined to reconsider its opinion in *State v. Avery*, 325 N.C. 1, regarding a motion to quash the bills of indictment because of systematic exclusion of nonwhites from the grand jury and petit jury pools.

**20. Constitutional Law § 80— death penalty—constitutional**

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

**21. Criminal Law § 135.7— murder—sentencing hearing—instructions on aggravating and mitigating factors**

The trial court did not err in a murder prosecution by instructing the jury that it would be the jury's duty to return a sentence of death if the mitigating factors were insufficient to outweigh the aggravating circumstances and the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty.

**22. Criminal Law § 135.7— murder—sentencing hearing—instruction on burden of proof**

The trial court did not err in a murder prosecution by failing to instruct the jury that the State had the burden of proving the nonexistence of each mitigating circumstance beyond a reasonable doubt and in placing the burden on defendant to prove each mitigating circumstance by a preponderance of the evidence.

**23. Criminal Law § 135.10— murder—sentencing hearing—aggravating factor of robbery and kidnapping—kidnapping reversed—death sentence vacated**

Where the jury in a prosecution for murder, kidnapping, and robbery found the aggravating circumstance that one of the murders was committed while defendant was engaged in a robbery and kidnapping, and the kidnapping conviction was reversed for insufficient evidence, the death sentence was vacated because there was a reasonable possibility that the consideration by the jury of the kidnapping charge might have contributed to the recommendation of the death penalty.

**24. Criminal Law § 135.4— murder—sentencing hearing—consideration of eligibility for parole**

North Carolina's death penalty statute is not unconstitutional because it prohibits the jury from considering defendant's eligibility for parole. Even assuming that defendant had properly preserved the issue for appeal, due process does not require an instruction on parole procedures out of concern that a jury may have misconceptions about parole eligibility.

**25. Criminal Law § 135.4— murder—sentencing hearing—consideration of parole eligibility**

The Supreme Court declined to modify the rule of *State v. Conner*, 241 N.C. 468, to adopt the minority view and require the trial court to not only admonish the jury to disregard parole but to also instruct the jury as to the truth regarding parole.

**26. Criminal Law § 135.4— murder—sentencing hearing—prosecutor's closing arguments**

A prosecutor's remarks during closing arguments in the sentencing phase of a death case were not improper taken in context; may have been legally inaccurate but were not prejudicial; were not objected to at trial; were supported by the evidence; and were not so grossly improper as to require action by the trial judge.

**27. Criminal Law § 135.8— murder—sentencing hearing—submission of aggravating factor that murder committed while engaged in robbery—no error**

There was no error in a prosecution for two murders, kidnappings, and robberies in the submission of armed robbery as an aggravating factor for the murders where there was no error in the armed robbery convictions. N.C.G.S. § 15A-2000(e)(5).

**28. Criminal Law § 138.40— armed robbery and kidnapping—voluntary acknowledgment of wrongdoing at early stage—no error in not finding**

The trial court in a prosecution for murder, kidnapping, and robbery did not err by failing to find as a mitigating factor for armed robbery and kidnapping that defendant voluntarily acknowledged wrongdoing at an early stage where the kidnapping conviction was vacated on other grounds, and defendant waived appellate review of the issue on the robbery conviction by failing to make a timely motion requesting the circumstance and by failing to object despite being given ample opportunity to do so. Although defendant did acknowledge the murder of one victim on the night he was taken into custody and did take officers to the other body, he did not acknowledge the robberies and later equivocated, gave conflicting and contradictory accounts of the murders, and moved to suppress the statements. N.C.G.S. § 15A-1340.4(a)(2)(1) (1983).

**29. Criminal Law § 135.10— murder—death sentence—proportionality review**

A sentence of death imposed for a first degree murder was not disproportionate where the two aggravating factors found by the jury were supported by the evidence; there was no indication that the sentence was influenced by passion, prejudice, or any other arbitrary factor; the evidence was that defendant on successive nights took his victims to isolated areas of Durham County where he shot them multiple times in the head, back, face, and chest; according to the medical examiner, not all of the wounds were fatal, raising a reasonable inference that the victims could have consciously suffered before dying; the bodies were hidden in ditches; shortly after leaving an apartment with one victim, defendant returned and acknowledged that he had just fired a pistol, which was still warm; the evidence was that the pistol was used to kill both victims; defendant stole the automobiles of both victims; and the evidence supported the motive of elimination of witnesses. N.C.G.S. § 15A-2000(d)(2).

Justice MEYER concurring in part and dissenting in part.

APPEAL by defendant from judgments sentencing defendant to death for each of two convictions of murder in the first degree and to consecutive terms for convictions of robbery with a firearm and kidnapping in the first degree, said judgments imposed by *Hobgood (Robert), J.*, at the 24 October 1983 session of Superior Court, DURHAM County. Heard in the Supreme Court 10 February 1987.

*Lacy H. Thornburg, Attorney General, by Barry S. McNeill, Assistant Attorney General, for the state.*

*Malcolm Ray Hunter, Jr., Appellate Defender, and Louis D. Bilionis, Assistant Appellate Defender, for defendant.*

MARTIN, Justice.

For purposes of this opinion the evidence may be summarized as follows. Additional evidence is set forth with respect to the various issues.

The state's evidence tends to show: In early June 1982, Ernest Thompson owned a .22-caliber nine-shot pistol. He kept it with bullets on his bedside table beside the telephone. Thereafter, defendant, Phillip Thomas Robbins, Jr., who went by the name of "Jackie," visited Thompson in his home. When Thompson got up to go to the bathroom, defendant said that he was going to get another six-pack of beer. When Thompson came out of the bathroom, defendant was gone. Thompson then discovered that his gun was missing from its holster.

According to Earlie Mae Williams, at about 12:30 p.m. on 17 June 1982, Anna Quick, Ms. Williams' longtime friend and coworker, drove to the Dobbs House Restaurant at Raleigh-Durham Airport to pick up the women's paychecks. After Mrs. Quick returned to Durham, she went by the liquor store and purchased a bottle of Smirnoff vodka, and she and Ms. Williams went over to Mrs. Quick's house to talk and have dinner. Later, at about 6:30 p.m., they went to Ms. Williams' sister's house. They sat on the porch and talked and drank with Ms. Williams' sister and some other people. While they were sitting on the porch, Mrs. Quick said, "That's him." Ms. Williams, not recognizing defendant as he approached, inquired, "Him, who?" and Mrs. Quick replied, "That's Jackie Robbins, Beverly's [Quick's daughter] boyfriend." Defendant said, "Hey, Mrs. Quick," and joined the conversation. Mrs. Quick and defendant then went to sit in Mrs. Quick's black-over-red Dodge Dart and continued their conversation. Later, after Mrs. Quick had gone into the house to use the bathroom, Ms. Williams came out and saw defendant, who was seated in the backseat, going through Mrs. Quick's green pocketbook. Ms. Williams testified that Mrs. Quick kept "money, that little bit of money she had and other little items that she had" in her pocket-

book. When Ms. Williams asked defendant what he was looking for, defendant said he was looking for a cigarette, so Ms. Williams took the bag and gave him a cigarette and a match from it. Then Ms. Williams, Mrs. Quick, and defendant left in Mrs. Quick's car and proceeded to the ABC store at Lakewood Shopping Center to buy some more liquor. When they arrived at the liquor store, Mrs. Quick asked defendant to go in to buy the bottle, and she gave him some money from her pocketbook. At that point, Ms. Williams testified, defendant got out of the car, hesitated, said that he "couldn't go in like this," and pulled a "long gun" out of his belt and threw it into the front seat between Ms. Williams and Mrs. Quick. Defendant then went into the liquor store. Defendant returned with a pint of Relska vodka. They then went to Ms. Williams' home. At about 8:30 p.m., after defendant had poured some of the vodka into a plastic cup for Ms. Williams, he and Mrs. Quick got back in Mrs. Quick's car. Ms. Williams said she "talked to Anna about drinking and driving, because, you know, the police were kinda hot, so I told her to go home, you know and, of course, she said she was." Mrs. Quick told Ms. Williams, "I got to take him home and I'm going to get Bernard to wash my uniforms and I'm going back." Defendant said, "You ain't got to take me home. I can get out anywhere." "They drove off," Ms. Williams testified, "and that was the last time I seen her."

The next day, Friday, 18 June 1982, Mrs. Quick was supposed to pick up Ms. Williams as they were scheduled to be at work between 4:30 and 5:00 a.m. When Mrs. Quick, who had been late several times but who had failed to show up altogether only once in over ten years, did not arrive at Ms. Williams' house, Ms. Williams had her sister take her by Mrs. Quick's house. When they got there at about 4:45 a.m., they saw that the front-porch light was on and Mrs. Quick's car was gone. Ms. Williams testified, "it was a strange feeling, you know, and we went on to work and I told my bossman about it." At around 3:00 p.m., Ms. Williams went by Mrs. Quick's house. The house was neat. Mrs. Quick's youngest son, Bernard, who lived there, said he had not seen any sign of his mother. Ms. Williams contacted Mrs. Quick's cousin in an effort to locate her friend, but no one had seen her. In response to a telephone call she received from a cousin early on Saturday, 19 June, Anna Quick's daughter, Phyllis Melton, began

searching for her mother. She was unable to locate her and on 19 June Ms. Melton called in a missing persons report to the Durham Police Department. She described her mother and the red 1975 automobile with a black top which one Clarence Holland had loaned Mrs. Quick.

At about 8:00 a.m. on Monday, 21 June 1982, Marvin Mangum was performing general road maintenance and cleaning ditches on Wilkins Road in north Durham County. In an isolated area about a mile and a half north of the Bahama and Wilkins Roads intersection he came across a body of a black female, which was lying generally face down on its left side, in a ditch on the west side of the road. Mangum walked up to the body, ascertained that she was dead, and immediately called the sheriff's department. Investigators who arrived at the site discovered a partial dental plate underneath weeds in the ditch, under the head of the partially decomposed body. Other physical evidence at the scene included an empty pint bottle of Relska vodka.

An autopsy performed on the body of Anna Quick on 21 June 1982 by Dr. Page Hudson, Chief Medical Examiner for the state of North Carolina, revealed that Mrs. Quick had been shot five times. In his opinion, Anna Quick died of multiple gunshot wounds. In addition to the three bullets which Dr. Hudson recovered from the body, a loose bullet found in the victim's clothing was recovered at the time of the autopsy and turned over to the state as evidence.

The evidence presented by the state also tended to show that on Friday, 18 June 1982, eighteen-year-old Darryl Wade Williams left his house between 8:15 and 8:30 p.m. in his light blue 1970 Plymouth Duster with gold racing stripes. At the time he was last seen by his father, an analytical chemist, Darryl was wearing brown slacks, a white shirt, a brown necktie, brown shoes, a tie clip from Garner High School which he had received for being manager and statistician of the basketball team, a Garner High School ring with the initials "D.W.W." engraved inside, and a gold watch. He had just been paid that afternoon and had deposited some of his earnings in the bank. His father estimated that Darryl had between $30 and $80 in his wallet, in which he also carried his driver's license, his high school identification card, his Social Security card, and some photographs of his two sisters. Darryl

was described by his father at trial as "quiet . . . religious, mannerable, and just a good kid. He had an interest in drama, sports, church, religion and stuff like this." Mr. Williams testified that he had instructed Darryl and his two daughters that "if they were ever confronted by anyone with a knife or a handgun or any type weapon that could do them some harm that they should obey the orders that were given. Their life was more important than a car, money or whatever." Mr. Williams said he had last told Darryl that about two months previously.

On the late night of 18 June 1982 and the early morning of 19 June, Leonard Hawes and his girlfriend were visiting Hawes' sister, Cynthia Webb, and her boyfriend at Ms. Webb's apartment in Durham County. Hawes and Ms. Webb had known the defendant since childhood. Between midnight and 12:30 a.m. according to Ms. Webb, Jackie Robbins arrived at Webb's apartment. They invited him in, and he was given a beer. About five minutes later, defendant went back outside and returned with a "young dude" who was neatly dressed and wearing tinted glasses. The stranger was offered a seat and, after thanking them, he sat down. Then defendant told Hawes he wanted to talk to him, and the two men went into the bathroom. At that time, defendant pulled a black .22-caliber nine-shot target pistol out of his belt and showed it to Hawes. When Hawes asked defendant if he wanted to sell the gun, defendant said no, that it was hot, and he returned the gun to his belt. Defendant also asked Hawes if he wanted to go to Greensboro with him. Hawes asked defendant how he was going to get to Greensboro, and defendant told Hawes that "the guy was going to loan him his car." Hawes replied that he was too high to drive to Greensboro but that he would go with defendant the next morning. Defendant came out of the bathroom, announced that he would be back, and he and the young man left. Ms. Webb testified that during the fifteen to twenty minutes defendant and the young man were in her apartment, the young man had a set of keys in his hand. Hawes testified that the young man did not appear to be either frightened or nervous while he was there.

According to Ms. Webb, at about 2:30 a.m. defendant returned, alone. He and Hawes again went into the bathroom to talk. Defendant told Hawes that it was important that he go to Greensboro the next morning if he didn't go that night. Defendant and Hawes looked at the gun again; Hawes decided to unload it,

and he removed four bullets from the gun. When he took the bullets out, he noticed that the gun was warm. Hawes testified, "Yeah, I asked him about it. He said he had just shot it." They drank beer a while longer, and Hawes finally said he had to go home to get some sleep. Defendant, Hawes, and Hawes' girlfriend went outside and got into a Plymouth Duster which defendant was driving. Hawes testified that the young man who had been with the defendant earlier was not in the car. Defendant drove them in the Duster to Hawes' residence and then to Hawes' girlfriend's home to spend the night. Defendant slept on the sofa. When Hawes got up sometime between 10:00 and 11:00 a.m. on Saturday morning, defendant was gone.

Though Darryl's parents customarily stayed awake until their children got home, Mr. Williams fell asleep the night of 18 June. At about 4:30 a.m., his wife wakened him to say that Darryl was not home. Darryl had never before stayed out all night and had never failed to call his parents when he was going to get home later than he had planned. Mr. Williams got up, rode out to North Hills and to Darryl's friends' houses looking for Darryl's car, returned home, and then went to the police station to file a report.

On Saturday morning, 19 June 1982, defendant sold the 1982 Garner High School ring belonging to Darryl Williams to Joe Campbell, who was in the business of buying and selling antique and used furniture, secondhand goods, and gold and silver at his store, General Headquarters, in downtown Greensboro. This transaction will be discussed in detail later in this opinion.

Dwight Abrams testified that he saw defendant walking down Dorothy Drive about 8:00 or 9:00 a.m. on Tuesday, 22 June. Defendant was dressed in "an old dirty jacket, I think it was brown or rust colored or something. I don't know what kind of pants. He didn't have on no shirt." Abrams asked defendant where he was going, defendant replied that he was going to the store, and Abrams asked defendant to buy him a beer. Abrams then invited defendant into Sheila Dove's apartment. Once inside, defendant told Abrams he wanted to sell a pistol and asked him if he knew of anyone who wanted to buy it. Abrams said he informed defendant, yes, anybody would buy a pistol if it was some

good, and the two went to find Kenneth Ray Holloway whom Abrams thought might buy the gun.

At about 9:30 a.m. on Tuesday, 22 June, Kenneth Ray "Turf" Holloway was in his taxicab at the corner of Ridgeway and Simon Streets in Durham talking to two friends. While he was sitting there, defendant and Dwight Abrams approached the cab. Abrams told Holloway, "We got something to show you," so Holloway told them to get in the cab. Holloway's friends stepped back from the cab and defendant got in the passenger seat and Abrams sat in the back. Holloway testified that defendant "had on a jacket with no shirt zipped about halfway up. The jacket was real dirty-like." Defendant then pulled a .22-caliber gun from his pants and asked Holloway if he wanted to buy it. Holloway described the gun as "a 22 long and shoot nine times. It was built on the 45 frame, a real long gun. . . . It didn't look like a normal 22, a target gun more or less." When Holloway asked the price, defendant said $25. Holloway said he could give him $18, plus $2 in change, right then and would pay defendant the rest later. Defendant took the money, handed Holloway the gun, and reached into his pocket and took out about five or six bullets which he also gave to Holloway. Holloway testified that "some of [the bullets] were dark and some of them were gold, about two of them in gold." Defendant and Abrams got out of the cab and proceeded to a store where Abrams bought a quart of beer and defendant bought some wine.

Abrams and defendant returned to Sheila Dove's apartment where they sat and drank the beer and wine. Abrams went out to look for his cousin while defendant and some other people went back to the store to buy some more beer and wine. When Abrams got back to Dove's apartment, defendant tossed him the car keys and told him to move the car to a parking lot in the back of the apartment complex. Abrams got in the car, started it, and began to back up. Meanwhile, defendant had come out into the yard, pointed at a police car which was coming up the street, and began running back into the apartment. Abrams pulled back in the driveway to let the police car drive by. As Abrams again started out, the first police car had turned around, several more police cars had arrived, and the officers, with guns drawn, ordered Abrams out of the car. They made Abrams lie down in the street and searched him. Durham County Sheriff's Department In-

vestigator C. J. Dobies asked Abrams why he was driving that vehicle, and Abrams said that he was just moving it for a friend. When Dobies asked him what friend, Abrams replied, "Jackie." Dobies then showed him a photograph of the defendant and asked, "is this who you're talking about?" Abrams responded, "yeah, Jackie Robbins." Abrams told them that he had been with defendant since that morning, that he had had a few drinks with defendant, that he had gone with defendant to sell a gun to "Turf" Holloway, and that defendant was in Dove's apartment. Officers searched the apartment and surrounding area but did not find defendant. Abrams did not see defendant again that day. Abrams then accompanied officers to retrieve the gun from Holloway.

The officers, with Abrams in the car, later stopped Holloway in his cab. Dobies approached Holloway and asked him if he had bought a gun, and Holloway told him that he had. Dobies asked Holloway if he could get the gun, and Holloway said he could and told him it was under the front seat of the cab. Dobies reached under the seat and got the gun.

Defendant was taken into custody on 22 June by Durham law enforcement officers on an Orange County warrant for another murder for which he was later convicted. (See *State v. Robbins*, 309 N.C. 771, 309 S.E. 2d 188 (1983).) Dobies testified that at about 10:30 p.m. while he and defendant were in the magistrate's office, Dobies reminded defendant that he had been advised of his rights and that defendant had executed a written waiver of his rights regarding the Orange County warrant. Dobies then told defendant that he wanted to talk to him about Anna Quick. Dobies informed defendant that the body of Anna Quick had been found on Wilkins Road and that she had been shot. Defendant pointed to the Orange County warrant and said, "I didn't do this," and when Dobies asked, "What about Anna Quick?" defendant said, "I did that." The magistrate then called for defendant, who was processed. Later, defendant was taken into the ID room, where he was fingerprinted by Durham Crime Scene Investigator Michael Byers. While Byers was rolling defendant's fingerprints, defendant said, "I know where's one at they don't know about yet." Byers inquired, "One what?" and defendant replied, "Another body." Byers said nothing more to defendant at that point, nor did defendant volunteer any further information. Shortly before

midnight on that day, Orange County Deputy Sheriff Charles Gentry and Deputy Investigator Liner arrived in Durham to pick up defendant on the outstanding warrant. Liner and Gentry began talking with some of the Durham County Sheriff's Department personnel and, Gentry testified, "in the course of events Jackie said that he would carry us to a car that Durham was looking for in Raleigh." Liner and Durham County Sheriff's Department Investigator Clarence Gooch got in the front seat of the Orange County car while Gentry and defendant got in the backseat, and they started towards Raleigh on Roxboro Road, followed by a Durham police vehicle occupied by Dobies and Detective McCorkle. When the cars were almost at Interstate 85, defendant said, "While we're out, we might as well go get the other body." Liner stopped the car and talked to defendant. Gooch went back and notified Dobies of the new development. Dobies approached the Orange County car, asked defendant, "[w]hat about this other body," and defendant replied, "there is another body in Durham County." Defendant subsequently directed them to Bivins and Umstead Roads. Liner positioned the Orange County car with the headlights shining across a field to the rear in which defendant said the body could be found. Dobies testified that as soon as he got out of the car, he detected an odor of a decomposed body. Pursuant to defendant's directions, Gooch and Liner went into a field and came across the body of a young black male, fully clothed and lying face down in a drainage ditch. The body was later identified as that of Darryl Williams. While defendant and the officers were still in the Bivins Road area, defendant admitted to killing one woman and said, "but I didn't do the others. Somebody else did." Defendant acknowledged that he was present but denied having killed Annie Carroway in Orange County. However, he never indicated who allegedly killed Carroway.

After notifying other units from Durham, Gooch, Liner, Gentry, and defendant proceeded to Raleigh and, at defendant's direction, went to the post office parking lot behind the movie theatre at North Hills Shopping Center where they found the black-overred Dodge Dart belonging to Anna Quick. While in Raleigh, defendant said that there was another car involved and that it was behind the "Station," a night spot in Hillsborough. The officers radioed the Hillsborough Police Department and asked Lieutenant Larry Biggs to proceed to that location. Biggs did so, pur-

suant to defendant's directions, and found Darryl Williams' Plymouth Duster on McAdams Road. Upon their return to Durham, defendant directed the officers to Lakeland Road and to other areas from which they recovered various items of evidence, such as Anna Quick's pocketbook and an identification card belonging to Darryl Williams.

The Greensboro Police Department contacted Joe Campbell about Darryl Williams' high school ring on Tuesday, 22 June. Detective J. R. Evans with the Raleigh Police Department subsequently came to Campbell's store to pick up the ring. When Evans arrived, Campbell gave him the Garner High School ring and described the person who had sold him the ring. Among other things, Campbell said that the man was "unruly looking at the time. He was actually dirty, his hair was not combed in any fashion at all and he had a beard and somewhat of a mustache." The ring was introduced into evidence at trial and Campbell identified the ring as the one the customer sold him on that date. Also from the witness stand, Campbell identified the defendant as that customer.

On 26 June 1982, Mrs. Pat Walker, a resident of Bivins Road, found the tinted prescription eyeglasses belonging to Darryl Williams in some heavy undergrowth on Bivins Road about five yards east of where Williams' body had been found and turned them in to Dobies.

Dr. Page Hudson performed an autopsy on the body of eighteen-year-old Darryl Wade Williams on 23 June 1982. The clothing on the body consisted of a short-sleeve shirt and a necktie, boxer shorts and brown pants, tan loafers and dark socks. There were, in the medical examiner's opinion, five gunshot entrances to the body. Dr. Hudson determined that Darryl Williams died of a gunshot wound to the back.

On redirect, Dr. Hudson testified to the similarities in the wound patterns on the bodies of Anna Quick and Darryl Williams. Dr. Hudson responded, "They each had a cl--a very close-up contact wound in the back of the head. Each had a shot in the side of the face, and each had a perforating wound in the upper part of the chest or lower neck, and each had a shot in the back."

State Bureau of Investigation Special Agent Steven Thomas Carpenter, an expert in the field of firearm identification, testified that in his opinion one bullet taken from the body and another bullet taken from the body or clothing of Anna Quick were fired by the nine-shot .22-caliber Harrington and Richardson revolver which was seized from the taxicab of "Turf" Holloway. Carpenter also examined the four bullets and some bullet fragments recovered from the body of Darryl Williams. Three of these bullets did not contain sufficient markings to enable Carpenter to make comparisons with test bullets, and the bullet fragments were similarly unidentifiable, but Carpenter testified that in his opinion one bullet was fired by the revolver which defendant sold to Holloway. No latent fingerprints of comparative value were recovered from the gun itself.

On 23 June, SBI Special Agent Steven R. Jones processed both Anna Quick's and Darryl Williams' automobiles for prints and other evidence. From Quick's Dodge Dart, he obtained forty-eight fingerprint lifts from the car itself, and he also obtained fourteen fingerprint lifts off a Wild Irish Rose wine bottle found in the car. He submitted these lifts to SBI Agent Richard L. Crivello, who testified as an expert in the field of identification and comparison of fingerprints. Of the prints he received, Agent Crivello determined that one print from the wine bottle was made by the right index finger of the defendant. A latent right palm print on the bottle and another latent right palm print on the automobile were also determined to have been made by defendant. In addition, a latent palm print on one paper bag and a latent fingerprint on another bag found in the car were, in Crivello's opinion, made by defendant's left palm and left ring finger, respectively. Agent Crivello found no fingerprints or palm prints of John Dwight Abrams from the latent lifts taken from Quick's car and submitted by Agent Jones. From the Duster, Jones obtained thirty-seven latent print lifts, including four latent lifts which were on the outside left front door glass on the driver's side. Of these four latent prints, one lift was pointed downward on the top edge of the outside of the driver's door window. Agent Crivello testified that this print matched the left index fingerprint on an inked impression card of the defendant. Agent Crivello further testified that there were no prints of value taken from the Duster in which he could identify the known impressions of John Dwight Abrams; all of his identifications were of the prints of the defendant.

Defendant presented two witnesses in his behalf at trial. The defense first presented the testimony of Investigator Gooch to the effect that upon Gooch's suggestion to defendant's brother that defendant surrender himself, defendant turned himself in to the sheriff's department on 22 June at 8:30 p.m., and that defendant was cooperative with law enforcement officers in volunteering to show them, and in directing them to, Quick's and Williams' cars and to the I-40 crossover where Williams' identification card was found. Gooch further testified that at first defendant admitted that he had shot Anna Quick and that Dwight Abrams had shot Darryl Williams, but later that same night defendant said that he had shot Darryl Williams and Dwight Abrams had shot Anna Quick. Defendant also called Martha Trice as a witness. Ms. Trice testified that she had known the defendant for ten to fifteen years. She said that about a week before she heard of defendant's arrest, defendant and another man whom she had never seen before came to visit her at her house and that they stayed for fifteen to twenty minutes. She identified John Dwight Abrams, who was seated in the courtroom, as that other man. The defendant did not take the stand.

On 9 November 1983, the jury found defendant guilty of murder in the first degree of both Darryl Wade Williams and Anna Quick on the basis of premeditation and deliberation as well as under the felony murder rule in each case. The jury also found defendant guilty of kidnapping in the first degree of Darryl Williams and guilty of armed robbery of both Darryl Williams and Anna Quick.

In the sentencing phase of the trial, defendant offered the testimony of Clarence Dunn, his stepfather. Dunn testified that defendant was "a good boy . . . until he met this young lady, then he started goin' down." He related a drastic behavior change in defendant beginning about six months before defendant was arrested; Dunn told the jury that defendant "started drinking a lot, runnin' around with a bad crowd . . . stopped going to church." Dunn said that he knew defendant "was kind of off a little bit and needed help." He also said that he knew that defendant's father had mental problems and had been "in and out of" the state hospital at Butner. James Robbins, defendant's half brother, testified that defendant's natural father "was sort of a violent type person" who had drinking problems. James said that when de-

fendant's father got angry, "he'd just started beatin' on the first person he got to" and that he himself had left home when defendant was about ten or eleven years old because he got tired of being physically beaten. He said that in 1982 he saw defendant every day, and echoed Dunn's testimony that defendant's behavior began to change. James testified that defendant started "drinkin', runnin' around, wouldn't stay at home. . . . He just didn't take the responsibility for nothin', hangin' out. . . . He just let himself go." James told the jury that defendant became "raggedy, dirty . . . [h]e didn't shave or he didn't change clothes or he didn't care how he looked or wouldn't work." He said that defendant started acting "weird" and withdrawn, and that James and his mother discussed the problems and the possibility of getting help for defendant; in fact, he said, he even considered taking defendant to Butner. Shortly before he knew of the charges against defendant, James testified, he went looking for defendant and saw defendant walking up the road. Although it was about eighty or ninety degrees that day, he remarked, defendant "was walking down the road and he just stopped and he was staring up in the air with a leather coat on and an umbrella, and that's the way he had been out there, for a week like that." He said that when defendant saw his car, defendant ran into the woods and he could not catch him. One afternoon a few days later, Gooch and another man came to serve a warrant on defendant. James agreed to help find his half brother. When he finally found defendant, he described him as being "[j]ust like a wild man." James first took defendant to Butner, but it was after hours and defendant could not be admitted, he said, so James finally persuaded defendant to accompany him to the sheriff's department. Alberta Dunn, a longtime friend of defendant, described him as a "very intelligent, very nice person." Karen McQuaig testified that in mid-1982, defendant had "changed" in that he had "started drinking, sleeping in the truck, not taking a bath, not caring about hisself." Betty Satterfield, defendant's half sister, also testified that beginning about May 1982, defendant, who had previously been well-dressed and neat, had started drinking and began to neglect himself. He became withdrawn and kept to himself.

The state offered evidence at the sentencing hearing that defendant had pleaded guilty to the crime of rape in 1967 in Durham County.

As to the murders of Darryl Williams and Anna Quick, the jury found the following circumstances in aggravation: the defendant had been previously convicted of a felony involving the use of threat of violence to the person, N.C.G.S. § 15A-2000(e)(3), and the murder of Darryl Williams (Anna Quick) was committed while defendant was engaged in the commission of robbery with a firearm of Darryl Williams (Anna Quick). N.C.G.S. § 15A-2000(e)(5) (1983). The following circumstances were submitted to the jury to be considered in mitigation in each case:

> (1) The murder of Darrel [sic] Wade Williams (Anna Quick) was committed while Phillip Thomas Robbins, Jr. was under the influence of mental or emotional disturbance.
>
> (2) The capacity of Phillip Thomas Robbins, Jr. to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.
>
> (3) Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

The jury found at least one of these circumstances to exist but did not specify which one(s). Upon unanimously finding beyond a reasonable doubt that the mitigating circumstance(s) were insufficient to outweigh the aggravating circumstances and that the circumstances in aggravation were sufficiently substantial to call for the imposition of the death penalty, the jury recommended a sentence of death in each case. Judgments of execution were entered on 11 November 1983. Defendant was also sentenced to a term of imprisonment for eighteen years for the armed robbery of Anna Quick, eighteen years for the armed robbery of Darryl Williams, and twenty years for the kidnapping in the first degree of Williams, all sentences to run consecutively.

## I. GUILT-INNOCENCE PHASE

**[1]** Defendant first argues that the trial court erred in denying his motion to dismiss the kidnapping charge at the close of all the evidence. It was alleged in the indictment on this charge that defendant kidnapped Darryl Williams "by unlawfully confining him, restraining him, and removing him from one place to another, without his consent and for the purpose of facilitating the com-

mission of the following felonies; robbery with a dangerous weapon and murder." *See* N.C.G.S. § 14-39 (1986). The trial judge instructed the jury that in order to find defendant guilty of kidnapping Darryl Williams, it must find that defendant "unlawfully restrained Darryl Wade Williams by use of a twenty-two caliber pistol or carried Darryl Wade Williams from North Hills Shopping Center in Raleigh to Bivins Road in Durham County, and that Darryl Wade Williams did not consent to this restraint or removal . . . ." Defendant contends that the state failed to prove that he restrained or removed Darryl Williams by force or fraud against his will. We agree that the evidence was insufficient to support a kidnapping charge, and for this reason we reverse the kidnapping conviction.

The evidence in the record tends to show that Darryl Williams left his house at 8:30 p.m. on the night of 18 June to go to see a movie at North Hills Shopping Center. Anna Quick's black-over-red Dodge Dart, in which defendant had been seen earlier, was subsequently found in that same shopping center. Later on that night, Williams and defendant appeared at Cynthia Webb's apartment in Durham. The evidence is somewhat conflicting on whether, when defendant first came to Ms. Webb's door, Williams was with him or not. State's witness Webb testified that defendant came over to her apartment sometime after midnight on 18 June 1982, and she thereafter testified as follows:

> Q. And did [defendant] have any one with him?
>
> A. He had Darryl Williams, a young guy with him.
>
> Q. At that time did you know who Darryl Williams was?
>
> A. No, I didn't.
>
> Q. Go ahead in your own words, if you would, and describe what happened when this defendant came in with Darryl Williams.
>
> A. They came in and Jackie and my brother went in the rest room and talked and—. . . And we offered Darryl a seat and he sat down and they talked in the bathroom for about fifteen minutes and then [defendant] came out and said he was leaving, but he was going to come back and that he was coming back.

However, Leonard Hawes, Ms. Webb's brother, testified on direct examination by the state that defendant knocked at the door, came in, sat down, asked for a beer, began drinking it, told Hawes he wanted to talk with him for a minute, and the two men went into the bathroom. Hawes was then asked, "Now, at this time, before you went in the bathroom, was anybody else in—was anybody else with Mr. Robbins?" Hawes answered, "No." Soon thereafter, Hawes was asked:

Q. Was there another person there with him at the house?

A. Yes.

Q. All right, now, when did that person come in the house?

A. Before we went into the bathroom.

Q. Before you went into the bathroom?

A. Yes.

. . . .

Q. [D]id that person come through the door or did Mr. Robbins go get him or how did he get in the house?

A. He went back outside and got him.

Q. When you say, "he went back outside," who are you referring to?

A. Jackie went back outside and got him.

Even taking the evidence in the light most favorable to the state, that is, that defendant and Williams initially entered the apartment at the same time, there is nothing in this testimony to indicate that Darryl was forced or tricked into the apartment. Cynthia Webb also testified that Darryl was offered a seat and that he sat down while defendant and Hawes talked in the bathroom. She said that the bathroom door was within eyeshot of the living room where Darryl and the others were sitting, but that she believed the bathroom door was closed while the two men were in there. Webb could not remember Darryl having said anything at all while he was there, except possibly that he thanked them after they invited him to sit down. On cross-examination Webb testified that of the fifteen to twenty minutes Darryl and

defendant were there, defendant and Hawes spent "almost the whole time" talking in the bathroom. She went on to testify on cross-examination as follows:

> Q. And during the time that he [defendant] was in the bathroom with your brother, Mr. Williams was seated on the couch in your living room?
>
> A. Yes.
>
> Q. And other people were seated around there talking?
>
> A. Right.
>
> Q. Do you know what kind of car they arrived in?
>
> A. Well, when I opened the door for them I didn't see the—I saw the shape of the car, but I didn't see the color or anything like that, because it was at night and it was late.
>
> Q. And I believe at that time Darryl Williams had the car keys, is that correct?
>
> A. Right.
>
> Q. And during the time that Darryl Williams was seated in your living room he did not appear to be frightened or scared, upset or anything like that?
>
> A. No. He just sat there.
>
> Q. And he was quiet?
>
> A. Right.
>
> Q. To your knowledge, was there any reason he could not have gotten up and left the apartment after that time?
>
> A. No, I don't think—He could have left, I guess, you know, if he wanted to.

Our holding is supported by our decision in *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983). In *Jackson*, the defendant, intending to rob the victim, feigned engine difficulty as a ruse to get the victim to give him a ride in his automobile. Jackson, who was armed with a pistol, got into the victim's car and they drove away. The victim was later found in his car on a side road. He had been robbed and shot twice in the head. We held in that case that

the evidence supported only a mere conjecture that Jackson used the misrepresentation to confine, restrain, or remove the victim against his will from the time the defendant entered the victim's car until the time the victim was shot. The state failed to prove beyond a reasonable doubt that the defendant had confined, restrained, or removed the victim within the meaning of N.C.G.S. § 14-39. Similarly, in the present case the record is barren of evidence indicating how or why defendant got up with Williams, under what circumstances they went to Durham, or what occurred between the time Williams and defendant left Webb's apartment and the time Williams was shot. Indeed, we *do* have testimony indicating that Williams was left outside Webb's apartment, apparently alone and in possession of his car keys, for five minutes; that Williams sat quietly on Webb's sofa and made no effort to leave while defendant was in the bathroom with the door closed; that Williams did not appear to be afraid or nervous; and that there was no apparent reason that Williams could not have left the apartment. Any determination that defendant restrained or removed Williams by force or fraud against his will would be based on mere speculation. Thus, we conclude that the state failed to prove beyond a reasonable doubt that defendant restrained, confined, or removed Darryl Williams within the meaning of N.C.G.S. § 14-39. The conviction of defendant on the charge of kidnapping is reversed.

Defendant also argues that his being convicted and sentenced for both murder in the first degree and kidnapping in the first degree placed him in double jeopardy. *See State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35 (1986). Because we have reversed the conviction on the kidnapping charge, this assignment of error is moot.

**[2]** The defendant next argues that the evidence in this case establishes a prima facie case of purposeful racial discrimination in selection of the petit jury under the standards enunciated in *Batson v. Kentucky*, 476 U.S. ---, 90 L.Ed. 2d 69 (1986). Although the case *sub judice* was tried prior to the date the rule in *Batson* was announced, the applicability of *Batson* to this case has since been settled by *Griffith v. Kentucky*, 479 U.S. ---, 93 L.Ed. 2d 649 (1987), which mandates that the rule has retrospective application to all cases pending on direct appeal or which were not yet

final when *Batson* was decided. Thus, the rule in *Batson* applies to this case.

Initially we note that whereas in *Batson* the defendant entered a timely objection at trial to the prosecutor's removal of all black persons on the venire, defendant here neither objected to the use of the district attorneys' peremptory challenges to remove black jurors nor made a challenge to the petit jury before the jury was empanelled. Normally, failure to object at trial would preclude our consideration of this issue. N.C.G.S. §§ 15A-1446(a), (b) (1983 & Cum. Supp. 1985); *see State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983); *Miller v. State*, 237 N.C. 29, 74 S.E. 2d 513, *cert. denied*, 345 U.S. 930, 97 L.Ed. 2d 1360 (1953). However, defendant claims that any such objection would have been futile under the law of North Carolina as it existed at the time. Although the futility of presenting an objection at trial cannot alone constitute cause for a failure to object, *Engle v. Isaac*, 456 U.S. 107, 130, 71 L.Ed. 2d 783, 802 (1982), we find it difficult to hold that defendant has waived a right which he did not know existed at the time of trial. Moreover, where the defendant was, as here, on trial for his life, we ordinarily feel compelled to consider his argument.

**[3]** In *Batson*, the Supreme Court held that a prosecutor's challenges to potential jurors solely on account of their race or on the assumption that jurors of defendant's race would be partial to the defendant is violative of the equal protection clause. U.S. Const. amend. XIV, § 1. Specifically, the Court held that a defendant may establish a prima facie case of invidious discrimination upon evidence concerning the prosecutor's use of peremptory challenges at trial. The assessment standards were set out by the Court as follows:

> To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida, supra*, at 494, 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, supra*, at 562. 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. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

476 U.S. at ---, 90 L.Ed. 2d at 87-88. In its holding, the Court directed that "all relevant circumstances" should be considered by the trial court in determining whether the defendant has raised the required inference of discriminatory purpose. These circumstances may include, but are not limited to, such things as a "pattern" of strikes against jurors in the venire who are of the same race as the defendant, or questions and statements made by the prosecutor during voir dire examination and in exercising his peremptories which may either lend support to or refute an inference of discrimination. If a defendant is able to make the necessary showing, the burden then shifts to the state to come forward with a neutral explanation of its challenges to those jurors. Such explanation "need not rise to the level justifying exercise of a challenge for cause," *id.* at ---, 90 L.Ed. 2d at 88, but the prosecutor may not rebut the prima facie case simply by denying any discriminatory motive or by saying that he challenged those jurors on a hunch—a "feeling in his bones"—that they might be biased in favor of the defendant because they were of defendant's race; rather, the prosecutor must actually "articulate a neutral explanation related to the particular case to be tried." *Id.*

Our task is to decide whether defendant has made out a prima facie case under the ruling in *Batson* which would require the state to go forward and produce neutral reasons for the challenging of the jurors. Under the facts of this case, we are constrained to view the jury at the time of empanelling.[1]

1. We emphasize here that we are not articulating the applicable rule in a case where the defendant has objected on the grounds of alleged *Batson* violations at trial during the selection of the jury and prior to its being empanelled, nor are we commenting on the procedures to be followed by the trial court when such an objection is raised; the United States Supreme Court in *Batson* expressed no view on such procedures and expressly declined to formulate any such procedures. 476 U.S. at --- n.24, 90 L.Ed. 2d at 90 n.24.

In *Batson*, the Supreme Court did not specify the showing necessary to establish a prima facie case of discrimination, stating, "We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." 476 U.S. at ---, 90 L.Ed. 2d at 88. We have looked to the applicable case law in the federal courts and other state jurisdictions which have applied the *Batson* rule to determine whether a prima facie case has been made. *See, e.g., Clay v. State*, 290 Ark. 54, 716 S.W. 2d 751 (1986); *People v. Cannon*, 150 Ill. App. 3d 1009, 502 N.E. 2d 345 (1986); *People v. Lester*, 145 Ill. App. 3d 720, 495 N.E. 2d 1278 (1986); *Wilder v. State*, 498 N.E. 2d 1295 (Ind. Ct. App. 1986); *State v. Newman*, 491 So. 2d 174 (La. App. 1986); *State v. Gilmore*, 103 N.J. 508, 511 A. 2d 1150 (1986); *Commonwealth v. McKendrick*, 356 Pa. Super. 64, 514 A. 2d 144 (1986), *appeal denied*, 522 A. 2d 558 (Pa. 1987). We conclude that the defendant must show the following in making out his prima facie case when the *Batson* issue is raised for the first time *after* the jury has been empanelled, as in this case: First, that the defendant is a member of a cognizable racial group victimized by discrimination. This criterion is clearly met here, as blacks have been held to be such a group, *Batson; Castaneda v. Partida*, 430 U.S. 482, 51 L.Ed. 2d 498 (1977), and the defendant in the case before us is black. Second, that the prosecutor used peremptory challenges to exclude members of defendant's race. In the present case, the prosecution peremptorily challenged seven black persons. Third, that these and other relevant facts and circumstances, as they are set out in the record, raise an inference of racially discriminatory intent on the part of the state. Such "relevant circumstances," or special facts and circumstances, may be, but are not limited to, the following: the fact that peremptory challenges are prone to discriminatory use, *Batson*, 476 U.S. at ---, 90 L.Ed. 2d at 89; *United States v. Erwin*, 793 F. 2d 656 (5th Cir. 1986), *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 590 (1986); an intentional, regular, and repeated use of peremptory challenges to blacks which would tend to establish a "pattern" of strikes against blacks in the venire (*see United States v. Hunter*, 459 F. 2d 205 (4th Cir. 1972), *cert. denied*, 409 U.S. 934, 34 L.Ed. 2d 189, *reh'g denied*, 413 U.S. 923, 37 L.Ed. 2d 1045 (1972), for a definition of "pattern"); the prosecution's use of a disproportionate number of peremptory

challenges to strike black jurors in a single case; questions and remarks by the prosecutor during the examination of the jurors and the exercise of his peremptory challenges, *Batson*, 476 U.S. at ---, 90 L.Ed. 2d at 88; *see State v. Gilmore*, 103 N.J. 508, 511 A. 2d 1150 (assistant prosecutor's explanation that he exercised his peremptory challenges to exclude all seven black venirepersons from the petit jury because he assumed that they were predominately Baptists was a belatedly contrived excuse for acts of both racial and religious group discrimination); the fact that the victim(s) and the defendant(s) are of different races, *see, e.g., Turner v. Murray*, 476 U.S. ---, 90 L.Ed. 2d 27 (1986); *United States ex rel. Kyles v. O'Leary*, 642 F. Supp. 222 (N.D. Ill. 1986) (held: prima facie case under *Batson* had been demonstrated); where racial issues are inextricably bound up with the conduct of the trial, *e.g., Ham v. South Carolina*, 409 U.S. 524, 35 L.Ed. 2d 46 (1973); "systematic exclusion [of cognizable racial group] in case after case over an extended period of time," *Gilmore*, 103 N.J. 508, 536, 511 A. 2d 1150, 1165. A finding of invidious discriminatory intent may be raised either by direct or circumstantial evidence. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266, 50 L.Ed. 2d 450, 465 (1977); *Clark v. City of Bridgeport*, 645 F. Supp. 890 (D. Conn. 1986). Even a single act of invidious discrimination may form the basis for an equal protection violation.

**[4]** We have closely scrutinized the record and transcript of the jury voir dire in order to determine this issue. From the evidence as we have reviewed it, we have concluded that defendant has failed to establish a prima facie case of purposeful discrimination. Although defendant, a black, has clearly met the first criterion of the *Batson* test, that is, that he is a member of a cognizable racial group, and while we have borne in mind the Supreme Court's admonition that peremptory challenges lend themselves to be used in a discriminatory fashion by those inclined to do so, we are not convinced that these facts and the attendant circumstances surrounding the prosecution's exercise of peremptories raise the necessary inference of racial discrimination.

Our examination of the record in this case reveals that the trial jury was composed only of white persons. One of the two alternate jurors was black. Of the seventy-six potential jurors, who were individually questioned on voir dire in order to fill a

total of fourteen seats, twenty-one were black. Of these, ten were successfully challenged for cause by the state under N.C.G.S. § 15A-1212(8) due to their unequivocal opposition to the death penalty (one after the first twelve jury panel members had been selected); two were excused for cause by the court on its own motion: Dennis Harris, because he and victim Anna Quick's sons were "school buddies," and Wanda Kendall, because she apparently was aware from publicity that defendant had been charged with another murder which occurred in Orange County (*see Robbins*, 309 N.C. 771, 309 S.E. 2d 188); seven were peremptorily challenged by the state; one who was considered as an alternate was passed by the state but was peremptorily challenged by the defendant; and defendant requested but was denied an additional challenge to another black who was ultimately seated as the second alternate juror.

Turning to the state's use of its peremptory challenges, we discern from the transcript that the prosecution exercised a total of thirteen such challenges, seven against blacks and six against whites. The first black to be peremptorily challenged by the state was the thirty-fourth person examined. In selecting the panel of twelve, the prosecution exercised five peremptory challenges against persons who expressed serious reservations about their ability to return a recommendation of death; three of these persons were white and two were black. One black female was a relative of two of the defendant's witnesses; one elderly white woman was excused after she stated she wasn't sure she could sit through a protracted trial; and two blacks were dismissed by the state after being questioned, as were the other potential jurors, about their exposure to pretrial publicity, their personal backgrounds, and their feelings about the death penalty. Nothing in the prosecutor's questions or statements in the exercise of any of these challenges evinced any discriminatory motive.

In selecting the two alternate jurors, the state used three peremptory challenges against persons who expressed opposition to the death penalty, one being black and two being white, and Assistant District Attorney (now Judge) Orlando Hudson, himself black, peremptorily challenged one additional black male after some questioning.[2] The state passed John Rowland, a black male,

2. As the state notes in its brief to this Court, "it was District Attorney Orlando Hudson, himself a black, who exercised two of the State's peremptory challenges to excuse two black jurors during the selection of the alternate jurors. It cannot in

but the defendant struck him peremptorily after Rowland indicated that he had lived two houses down from Investigator Gooch for ten years, that he had read newspaper accounts of the case and had discussed it with various persons, and that he believed in the death penalty. Clarence Walker, a black male, was passed by the state and ultimately seated as the second alternate juror. Not only did the state pass to the defendant for approval two black jurors during the selection of the alternate jurors, we also perceive nothing in the prosecutors' questions or statements to any of these potential jurors which would indicate that they were peremptorily challenged pursuant to a discriminatory intent.

We have carefully scrutinized and considered the evidence in this case in order to discern whether there is any indication whatsoever that the prosecutors exercised peremptory challenges to strike blacks from the petit jury because of their race. In addition to the facts set out above, we note that the victims were black, as is defendant. We also take notice of the facts that the first black to be peremptorily challenged by the state was the thirty-fourth person examined and that defendant had used only eleven of the fourteen peremptories allotted him at the time he accepted a white male to fill the twelfth seat on the petit jury. The jurors in this case were selected one at a time, upon individual voir dire. The record indicates that the venire was kept in the grand jury room and potential jurors were brought into the courtroom one at a time, so neither the state nor the defendant knew how many blacks were present in the venire or which juror would be examined next and whether he or she was black or white. The state's examination of each potential juror was conducted in the same format: introduction of the district attorney and assistant district attorney; summary of the charges against the defendant; questions seeking general information about the examinee (employment, education, family, memberships in organizations, and so forth); questions to determine if the juror was familiar with the defendant, the victims, or any of the witnesses in the trial; questions about exposure to pretrial publicity; a general explanation of the law to be applied in capital cases, followed by death-qualification; questions about the juror's prior experience with

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good faith be argued by the Defendant that Assistant District Attorney Hudson is 'of a mind to discriminate' against members of his own race."

the judicial system; questions concerning whether the juror had ever been a victim of a crime. The state posed essentially the same questions to all seventy-six potential jurors examined and asked those questions in virtually the same order. In the exercise of each peremptory challenge, both prosecutors employed basically the same language: "Your Honor, without further questions and with thanks of the State we would excuse [juror's name]," or "Your Honor, for the purposes of this trial the state would excuse this juror." No reasonable inference can arise on these facts that the state was racially motivated in striking any of the black jurors.

As Justice White wrote in his concurring opinion in *Batson*, "it is not unconstitutional, without more, to strike one or more blacks from the jury." 476 U.S. at ---, 90 L.Ed. 2d at 91. *Accord United States v. Ratcliff*, 806 F. 2d 1253 (5th Cir. 1986), *cert. denied*, --- U.S. ---, --- L.Ed. 2d --- (1987). This was echoed by Justice O'Connor in her concurrence to the denial of certiorari in *Brown v. North Carolina*, --- U.S. ---, 93 L.Ed. 2d 373 (1986), where she wrote:

> *Batson* does not touch, indeed, it clearly reaffirms . . . the ordinary rule that a prosecutor may exercise his peremptory strikes for any reason at all.

--- U.S. ---, 93 L.Ed. 2d at 374. She went on to note that prosecutors may "take into account the concerns expressed about capital punishment by prospective jurors, or any other factor, in exercising peremptory challenges . . . ." *Id.* We detect nothing in the prosecutors' questions or comments to any of the blacks peremptorily challenged to give rise to an inference of discriminatory purpose. There were no intentional, regular, and repeated challenges to blacks which would tend to establish a "pattern of strikes" against black jurors included in the particular venire. No other factors or circumstances either support or refute the notion that black jurors were challenged pursuant to a racially discriminatory purpose. Defendant gives us no specific examples in his brief of instances of the discriminatory use of peremptories on the part of the prosecution, nor does he present us with any evidence of discriminatory intent. The mere naked allegation of constitutional infirmity asserted by defendant—that prospective black jurors were excluded from the petit jury by the state's se-

lective use of its peremptory challenges in violation of *Batson*, evidenced by the fact that the panel of twelve in defendant's case was composed entirely of whites—is not enough. Merely showing that defendant is of a cognizable racial group, that members of his race were peremptorily challenged, and that no members of his race sat on the panel of twelve does not establish a prima facie case, *see Esquivel v. McCotter*, 791 F. 2d 350 (5th Cir. 1986) (defendant Mexican-American). The defendant should have articulated "other relevant circumstances," if any such circumstances were present, which raise an inference of discriminatory intent. *See United States v. David*, 803 F. 2d 1567 (11th Cir. 1986). Moreover, when the twelfth juror was accepted by defendant, he had not exhausted all of his peremptory challenges. He has therefore failed to show prejudice. *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985). The defendant has failed to satisfy us that the circumstances concerning the prosecutors' use of peremptory challenges create a prima facie case of discrimination against black prospective jurors. As he has failed to meet his evidentiary burden, this assignment of error is overruled.

**[5]** The next argument advanced by defendant is that the trial court erred in refusing to suppress the incriminatory statements defendant made to law enforcement officers because defendant had invoked his right to silence.

On the evening of 22 June, defendant appeared at the Durham County Sheriff's Department and executed a waiver of rights form. Investigator Gooch then commenced asking defendant about the Orange County homicide of Annie Carroway for which a warrant had already been issued. He also questioned defendant about the Anna Quick murder. Defendant denied any knowledge of the Quick case. At that point, Gooch began escorting defendant to the magistrate's office to execute the Orange County warrant. En route, defendant stated, "I told you everything I know." Defendant contends that this statement was equivalent to an assertion of his right to remain silent and that any questioning after this statement was made was in violation of his fifth amendment rights.

Defendant filed a motion to suppress the statements obtained from him on the night of 22 June, alleging that his rights waiver

was invalid because he had consumed a large amount of alcohol and had exhibited "unusual and bizarre behavior" prior to being questioned. After an evidentiary hearing on the suppression motion, the trial judge made findings of fact and conclusions of law and overruled the defendant's motion to suppress. In both his motion to suppress and at the suppression hearing in the trial court, the defendant argued that his statements were inadmissible on the grounds that he was intoxicated and not mentally competent to make the statements to the officers. As evidence of the claim that defendant was drunk and disoriented and that his signature on the rights waiver form was ineffective, defendant points to the fact that he misspelled his own name when he signed the form. Judge Hobgood found as a fact that defendant never stated that he did not want to answer any further questions, nor did he at any time request the presence of an attorney, and denied defendant's motion to suppress, specifically concluding that at the time defendant waived his rights, he was not so intoxicated or mentally incompetent as to render the waiver involuntary. Defendant neither raised the theory nor argued in the trial court that by telling Gooch he had told him everything he knew, he had manifested his desire that all questioning cease, thereby invoking his right to remain silent. Because the fifth amendment theory of inadmissibility was not presented to the trial court and has been raised for the first time on appeal, it is not properly before us. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983); *State v. Hunter*, 305 N.C. 106, 286 S.E. 2d 535 (1982). For this reason, we reject defendant's contention.

Even were we to assume, arguendo, that defendant had not waived his right to attack the admissibility of his statements on the fifth amendment theory he now advances, we do not consider the defendant's statement, "I told you everything I know," to have been an indication of his desire that all questioning cease and thus an invocation of his fifth amendment right to remain silent under *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378 (1981), and *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966). We do not accept defendant's argument that his assertion suggests that defendant felt he had said all that he had to say and all that he wished to say; although the statement may well have conveyed the message that defendant had nothing else to tell, the

remark could not reasonably be interpreted as indicating that he had said all he wished to say. We also disagree with defendant that the statement was ambiguous. The case on which defendant relies in support of this contention, *State v. Klimczak*, 159 Conn. 608, 268 A. 2d 372 (1970), is inapposite. In that case, the defendant, when asked by law enforcement officers whether he knew either of the alleged perpetrators of a theft, replied, "Don't bother me." The Connecticut Supreme Court held defendant's comment to be "equivalent to an assertion of the fifth amendment privilege." Such is not the situation here. In contradistinction to the Connecticut case in which the defendant's words were susceptible of being interpreted as meaning, "Leave me alone," or "Don't say anything else to me," and thereby effecting his right to have further questioning cease, defendant's words here, "I told you everything I know," mean what they say and nothing more; they do not preclude further conversation or questioning. This assignment of error is without merit.

**[6]** Defendant next maintains that the admission of the identification of defendant by Joe Campbell ran afoul of both the federal and state constitutions, thereby violating his right to due process of law. *Manson v. Brathwaite*, 432 U.S. 98, 53 L.Ed. 2d 140 (1977); *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401 (1972); *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199 (1967). He charges that the pretrial photographic lineup procedure was "extremely suggestive and unnecessarily designed to ensure that Campbell selected the defendant," and that because of the alleged suggestibility, it created a substantial likelihood of irreparably mistaken identification and thus was inadmissible. *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247 (1968); *State v. Thompson*, 303 N.C. 169, 277 S.E. 2d 431 (1981). He also contends that the in-court identification made of defendant by Campbell did not comport with due process standards, *State v. Corbett*, 309 N.C. 382, 307 S.E. 2d 139 (1983), arguing that there was not competent evidence that Campbell's in-court identification of the defendant was of independent origin from the pretrial procedures which he challenges, *State v. Grimes*, 309 N.C. 606, 308 S.E. 2d 293 (1983).

Following a voir dire hearing on the admissibility of Campbell's identification of defendant, Judge Hobgood made extensive findings of fact. From these findings of fact, he concluded that the

pretrial identification procedure with respect to the photographic lineup was not "so unnecessarily suggestive and conducively irreparable with respect to identification as to violate the defendant's right to due process of law." He also determined that "based on clear and convincing evidence, the in-court identification of the defendant, Phillip Thomas Robbins, by the witness, Joe Campbell, is of independent origin, based solely upon what the witness saw in viewing the male customer in his business on June 19, 1982, and is not tainted by any pretrial identification procedure in any form or fashion." The trial judge further concluded "that none of the pretrial identification procedure was so unnecessarily suggestive and conducive to irreparable [*sic*] with respect to identification as to constitute a denial of due process of law." We find no error in the trial court's rulings.

Joe Campbell testified that on Saturday, 19 June, a young black male in his early thirties, who "looked sort of rough; not clean by any means," came into Campbell's place of business shortly before 11:00 a.m. It had been a slow morning and the man was the only customer in Campbell's shop. The customer browsed around for about three or four minutes, then approached the counter and inquired as to whether Campbell bought rings and things. When Campbell replied affirmatively, the man produced a gold ring. After Campbell had weighed it and told the man that he could pay $28 for it, the man said that he had paid much more for the ring. Campbell responded that he did not resell class rings but, instead, sent them to be melted down and that was all he could give for it. When the man "didn't seem very pleased with the price," Campbell referred him to a nearby pawnshop. The customer, who had been in the store for a total of about ten minutes, exited. Ten to fifteen minutes later, the same man returned, went up to the counter, stood about three feet away from Campbell and directly across from him, and said he would like to go ahead and sell the ring. He handed Campbell the ring, which was a ten-karat white gold 1982 class ring and was engraved inside with the initials "D.W.W." Campbell asked the customer if he had identification, and the man produced an identification card and a blood donor card. The name on the identification card was Darryl Williams. There was no photograph on the card. Campbell used this information, along with the person's description, name, address, the item sold, the amount paid, and

the date and time of the transaction, in filling out a precious metal transaction sheet which he was required by law to complete and turn in to the Greensboro Police Department. While Campbell was filling out the transaction sheet, he noticed that the date on the class ring was inconsistent with the apparent age of the customer. Campbell questioned the man about the obvious discrepancy, and the man said, "well, this is my class ring and it's my ring." Since the identification and the initials on the ring matched, Campbell decided to go ahead and purchase the ring for $28. The customer signed the form in the name of Darryl W. Williams. Campbell paid the man in cash, and the man again left the store. On this second occasion, the customer remained in the store from five to seven minutes. At all times during the business transaction, the customer stood only three feet away from Campbell, who was able to get a full and complete view of him. Campbell turned in the precious metal transaction sheet to the Greensboro Police Department on Monday, 21 June.

On either Tuesday or Wednesday, Raleigh Police Detective J. R. Evans approached Campbell about the ring. Evans had just taken a photograph of defendant on the previous day, and upon finding out that a ring matching the description of Darryl Williams' class ring was being held in Greensboro, Evans had five additional photographs taken of black male inmates of the Wake County Jail. The trial court examined these photographs and found the following: that these men were photographed, as was defendant, from the chest up, barechested and standing against a cinder-block wall; that the defendant and four other men had facial hair; that the defendant and three others had similar body size; and that the defendant and two others had an Afro haircut, while the other three had hair "which is not exceptionally short"; that all photographs were frontal views. Evans placed these photos in a manila folder and numbered them from one to six. Campbell testified on voir dire that he first gave Evans a general description of the man from whom he'd bought the ring. Evans then asked Campbell if he thought he could pick out the picture of the person who had sold the ring if he were to see it, and Campbell replied affirmatively. Campbell also testified that Evans told him that there were six pictures in the photographic lineup and "that one of the pictures there should contain the person that I did buy the ring from." Evans thereupon presented the folder to

Campbell, and Campbell identified in "a matter of a few seconds" the person in photograph number five—the picture of the defendant—as the man who had sold him the ring. Evans then told Campbell that that was the individual he had hoped Campbell would select. Campbell was again shown the photo lineup on the morning of 4 November 1983, before he testified at defendant's trial. Campbell once more selected the photograph of the defendant. At the voir dire hearing, in open court Campbell pointed to the defendant and said that he recognized him as the man from whom he purchased the ring on 19 June 1982. Judge Hobgood found that Campbell's in-court identification of the defendant was made in a "positive unequivocal manner," and also that Campbell "testified in a positive unequivocal manner that he recognized the defendant as being the same person who sold him the ring without regard to any photographs which he might have seen between the date of the purchase [19 June 1982] and today [4 November 1983]."

Our review of the record confirms the trial court's findings. Campbell testified that there were similarities between the black males in the pictures in the folder but said, "I pinpointed the picture as the person who did business in my shop right away." He further said, "I looked at [the other photographs] but I immediately recognized the person." He testified that he premised his identification on the fact that "the person himself was very unruly looking at the time. He was actually dirty, his hair was not combed in any fashion at all and he had a beard and somewhat of a mustache." He also based his selection on "the actual hair, facial expression of the person. . . . [T]he person looked very much that day like they did the day that they entered my shop." Campbell went on to say, "plus also the facial expression is one that I didn't forget either. Sort of a troubled look." Campbell further commented, "I had a very good recollection of the person who sold me the ring." Moreover, after Campbell pointed to defendant in court, he stated, "I recognize the man here as the person who sold me the ring." Campbell also denied that having seen a photograph after his initial encounter with the defendant influenced his identification in any way.

We find substantial evidence supporting the trial court's findings of fact and the conclusion of law that the pretrial identification procedures were not unnecessarily suggestive and conducive

to irreparable misidentification. We also find that the trial judge's determination that Campbell's in-court identification of defendant was of independent origin was based on substantial evidence. Defendant's assignment of error is wholly without merit.

**[7]** The trial court overruled defendant's objections to certain testimony at trial which defendant alleges was irrelevant, inadmissible, and prejudicial. Because of the trial judge's rulings on this evidence, defendant contends he is entitled to a new trial. Defendant first challenges the admission of the following testimony of Investigator C. J. Dobies, to whom Mrs. Pat Walker, a resident of the Bivins Road area, turned over Darryl Williams' glasses:

> Q. [Mr. Stephens] Did she tell you where she got those glasses?
>
> A. She showed me.
>
> Q. She showed you?
>
> A. Yes, sir.
>
> Q. Where was that?
>
> A. It was at—Bivins Road runs north and south from Umstead, and the body was laying in the—
>
> MR. CHANEY: Your Honor, I believe I'll object to anything she told him.
>
> COURT: Sustained as to anything she said.
>
> Q. (Mr. Stephens) Did you go out to the location?
>
> A. We went to the location, and these glasses were—the area where these glasses were found were pointed out to me just east—
>
> MR. CHANEY: (Interposing) Objection.
>
> COURT: Overruled.
>
> A. —just east of where the body was lying about—about five yards in some heavy undergrowth.

Defendant maintains that Mrs. Walker's conduct in pointing to the location where she found the glasses constituted a verbal act,

or assertive nonverbal conduct, and thus Dobies' testimony was inadmissible nonverbal hearsay. *E.g., State v. Suits*, 296 N.C. 553, 251 S.E. 2d 607 (1979). He claims that he was prejudiced because the admission of the testimony that Williams' glasses were found some distance from the body buttressed the state's theory that Williams was first robbed and then shot as he walked away and supported the state's insistence on findings of a robbery as well as of premeditation and deliberation.

Even assuming for the sake of argument that Dobies' testimony was properly objected to and constituted inadmissible hearsay, defendant has failed to show prejudice. *State v. Powell*, 306 N.C. 718, 295 S.E. 2d 413 (1982). Defendant did not object to or move to strike the testimony that Williams' glasses were recovered from a location about five yards from which his body had been found. Moreover, the state did not question Dobies about the glasses on direct examination. Rather, on cross-examination of this witness, defense counsel asked a series of questions relating to the search for evidence conducted by officers at the crime scene on Bivins Road. Defense counsel then asked, "So you . . . looked quite thoroughly at that time?" Dobies replied, "Yes, sir, on both sides of the adjacent road and up and down the road several hundred feet." "And didn't find any evidence?" defense counsel inquired. "No, sir," Dobies answered. Defense counsel then asked, "Did you find any glasses?" to which the witness replied, "I didn't find any glasses." Thus, it was only after defense counsel asked the question about the glasses on cross-examination that the door was opened for the state, on redirect, to elicit the testimony as to how and where Darryl Williams' prescription eyeglasses were found. Defendant can hardly assert that he was prejudiced by admission of testimony that Mrs. Walker pointed out the location of the glasses to Dobies. Finally, given the considerable evidence of defendant's guilt, we do not believe that there is a reasonable possibility that the outcome of the trial would have differed had the evidence complained of not been admitted. *Id.*; N.C.G.S. § 15A-1443(a) (1983).

**[8]** Defendant also assigns as error the admission of certain testimony by defense witness Investigator Gooch. On direct examination, Gooch testified that on the night of 22 June 1982, the defendant made statements indicating that John Dwight Abrams had been a participant in the crimes. Defendant at one point said

that Abrams had killed Quick but that he had killed Williams, and at another time, defendant said it was the other way around. On cross-examination of Gooch, the following transpired:

> Q. Now, that night with Mr. Robbins, that's not the first time, is it, that someone's ever told you that somebody else did it?
>
> MR. CHANEY: Objection.
>
> COURT: Overruled.
>
> A. No, sir, it's not the first time.
>
> Q. You've had suspects and people charged with crimes before tell you that somebody else did it, haven't you?
>
> MR. CHANEY: Objection.
>
> COURT: Overruled.
>
> A. Yes, sir.
>
> Q. Is that fairly usual?
>
> MR. CHANEY: Objection.
>
> COURT: Sustained.
>
> Q. (Mr. Stephens) But it has happened before, thought [sic], hasn't it?
>
> MR. CHANEY: Objection.
>
> COURT: Overruled.
>
> A. Yes, sir.

Defendant contends that this testimony was totally irrelevant, lacked any probative value, and constituted an improper attempt to impeach the defendant's implication of Dwight Abrams as a perpetrator of the crimes and that the testimony prejudiced him.

Defendant correctly characterizes this line of questioning as totally irrelevant, incompetent, and lacking in probative value. However, assuming arguendo that the trial court committed error in permitting these questions and answers, we fail to see how their admission could have influenced the jury's verdict in any way for the very reason that they were completely irrelevant to

the case. We do not find, therefore, that the testimony at issue was prejudicial to the defendant.

**[9]** The last segment of testimony to which the defendant objects involves questions and answers concerning the physical appearance and disposition of both Anna Quick and Darryl Williams. Anna Quick's daughter, Phyllis Melton, was asked by the district attorney, "Could you describe [Anna Quick's] physical appearance and her nature and mannerisms?" After defendant's objection to this question was overruled, the witness responded, "She had a very mild manner and very nice and respected and she had lots of friends." Later in the trial, A. L. Williams, Darryl's father, was asked whether he could use a photograph to illustrate his testimony as to how Darryl appeared. The district attorney then asked, "Does that depicts [sic] him as happy, contented, rather a nice young man?" The trial court also overruled defense counsel's objection to this question. The district attorney did not wait for Mr. Williams to answer and instead went on to ask a different question. Defendant insists that such evidence of a victim's general character is immaterial and incompetent and was prejudicial. *E.g., State v. Stevens*, 295 N.C. 21, 243 S.E. 2d 771 (1978); N.C.R. Evid. 404(a)(2). We disagree. First, Mr. Williams never answered the district attorney's question. Further, by failing to object to earlier testimony by Mr. Williams that Darryl was "very religious, mannerable, and just a good kid," defendant is deemed to have waived his objection to the testimony complained of here. *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450; *State v. Maccia*, 311 N.C. 222, 316 S.E. 2d 241 (1984). In a similar vein, the district attorney's request to Ms. Melton was for a description of her mother's physical appearance, nature, and mannerisms which did not necessarily call for a response regarding Ms. Quick's good character; moreover, defendant did not move to strike Ms. Melton's answer. We do not find that defendant was prejudiced by these questions and answers. These assignments of error are overruled.

**[10]** By his next assignment of error, defendant challenges a segment of the prosecutor's closing argument which he contends amounted to a violation of his right to a fair trial. Defendant alleges that he is entitled to a new trial because the prosecutor, during his jury argument at the close of the guilt phase, was allowed to distort the law on felony murder in a manner calcu-

lated to prejudice the defendant. Specifically, defendant excepts to the following comments by the district attorney:

> There were two witnesses during that time. They are both dead, Anna Quick and Darryl Williams. And that's the reason we've got the felony murder rule in this State, because criminals sometime take care of their witnesses so they will not be around—
>
> MR. CHANEY: Objection.
>
> COURT: Overruled.
>
> MR. STEPHENS: So they will not be around to testify. You know, if you kill a witness, then you don't have—you don't have an eyewitness, and so sometimes you have to rely on circumstantial evidence to prove a case. So, under our law, if you kill a witness in the perpetration of a felony, then you're guilty of first degree murder. . . . You're not going to have a police officer in a uniform with white socks and black shoes taking notes it [sic] every crime scene. You have to work with what you have, and that circumstantial evidence points unerringly to the guilt of a defendant, as it does in this case, and it's your duty as jurors to find him guilty.

Defendant complains that the argument was inaccurate as a matter of law, was unsupported by the evidence, and was calculated to provoke the jurors to find defendant guilty under the felony murder rule because the state's evidence against defendant was weak. Defendant maintains that the theme that this defendant was a "cold-blooded witness-eliminator" was "rife with prejudice," and that he is entitled to a new trial. We are unpersuaded by defendant's argument. Arguments of counsel are largely within the control and discretion of the trial judge, and counsel is to be afforded wide latitude in argument, particularly in cases which are strongly contested. *E.g., State v. Riddle*, 311 N.C. 734, 319 S.E. 2d 250 (1984); *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1984). Counsel is entitled to argue all reasonable inferences which may be drawn from the facts presented. *E.g., State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (1984); *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984); *State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980). However, counsel may not argue facts finding no support in the evidence, *e.g., State v. Williams*, 317 N.C. 474, 346

S.E. 2d 405 (1986); *Lynch*, 300 N.C. 534, 268 S.E. 2d 161, and counsel may neither make erroneous statements of law, *State v. Cole*, 241 N.C. 576, 86 S.E. 2d 203 (1955), nor argue principles of law not relevant to the case, *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976); *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975).

We conclude that the objected-to argument does not fall within the aegis of *Williams*, 317 N.C. 474, 346 S.E. 2d 405; rather, here the district attorney was arguing to the jury the reasons for the felony murder rule. It is a fact that one of the reasons for the enactment of the felony murder rule is that often criminals do kill potential witnesses in the course of the commission of a felony. Within the context of the whole argument, then, we do not find the prosecutor's remarks to have been so egregious as to have resulted in prejudice to the defendant. Moreover, we note that early in his closing argument the prosecutor advised the jury that it would receive instructions from the trial court in the charge. Subsequently, in its charge to the jury, the trial court directed the jury that it must decide the facts from the evidence and "apply the law which I am about to give you to those facts." The trial judge further instructed, "It is absolutely necessary that you understand and apply the law as I give it to you, and not as you think it is, or as you might like it to be." Judge Hobgood later instructed completely and accurately on the felony murder rule. Further, we cannot say that there is a reasonable possibility that had the argument not been made, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1983). Nor do we find that the argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Darden v. Wainwright*, --- U.S. ---, 91 L.Ed. 2d 144 (1986); *Donnelley v. DeChristoforo*, 416 U.S. 637, 40 L.Ed. 2d 431 (1974). We hold that the failure to sustain the defendant's objection to this argument was not prejudicial error.

**[11]** Defendant's next several assignments of error relate to alleged errors in the trial court's instructions. The first of these concerns the trial court's denial of his request to instruct the jury that in order to find defendant guilty of the armed robbery charges the jury must find that at the time defendant endangered or threatened the lives of Darryl Williams and Anna Quick he did so with the intent to steal their property. The trial court instead gave the pattern jury instructions on armed robbery. Defendant

contends that there is no direct evidence that he had formed the intent to steal at the time he shot his victims and that the jury should have been required to make such a finding in order to find defendant guilty of the armed robbery offenses.

We rejected this argument in *State v. Fields*, 315 N.C. 191, 337 S.E. 2d 518 (1985). In that case, we held that

> when the circumstances of the alleged armed robbery reveal defendant intended to permanently deprive the owner of his property and the taking was effectuated by the use of a dangerous weapon, it makes no difference whether the intent to steal was formulated before the use of force or after it, so long as the theft and the use or threat of force can be perceived by the jury as constituting a single transaction.

*Id.* at 203, 337 S.E. 2d at 525. It was also settled in *State v. Wooten*, 295 N.C. 378, 245 S.E. 2d 699 (1978), that if a person kills another with the intent to rob the victim and takes property from the victim's person or presence immediately after the killing, the defendant has committed armed robbery regardless of the fact that the taking of the property occurred after the death of the victim. In the case of Anna Quick, defendant was caught rummaging through her purse, where she kept her money. The last time Quick was seen alive, defendant was in her car with her in Durham. Quick's body was found in Durham, but her automobile was found in Raleigh. The evidence is sufficient to support a finding by the jury that defendant had formed the intent to steal Quick's car either before or immediately after killing her. The evidence is even stronger in the case of Darryl Williams. In the early morning hours of 19 June, defendant requested that Leonard Hawes go to Greensboro with him and he told Hawes that Williams was going to loan him his car. Defendant left Webb's apartment with Williams. A few hours later, defendant returned, alone, in Williams' car. The next day, defendant sold Williams' ring in Greensboro. Again, there is sufficient evidence on which to base a reasonable inference that defendant intended to steal and took possession of Williams' automobile and ring either before, immediately after, or shortly after Williams was killed. Pursuant to our holdings in *Fields* and *Wooten*, then, the jury was not required to find as an element of armed robbery that the defendant

formulated the intent to steal from his two victims before shooting them. This assignment of error is overruled.

**[12]** Defendant next complains that the trial court erred in refusing his request that the jury be instructed to consider the evidence of defendant's alleged intoxication and its bearing on the essential element of specific intent to kill in the charges of murder in the first degree. The trial court denied defendant's written requests that the evidence tending to show intoxication be summarized and that the jury be instructed that if it found that the defendant was intoxicated, it "should consider whether this condition affected his ability to formulate the specific intent." Defendant now argues that because of the alleged error in instructions regarding intoxication, the verdicts finding defendant guilty of murder in the first degree on the basis of premeditation and deliberation cannot stand. We find no error in the trial court's failing to instruct the jury concerning the effect of voluntary intoxication upon the element of the specific intent to kill. We do not find that the evidence was sufficient to warrant such a charge. In *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), the defendant argued that the trial court erred in failing to instruct the jury on the effect of voluntary intoxication upon the elements of premeditation, deliberation, and intent. Although there was evidence that Goodman had been drinking before the murder was committed, no evidence was offered showing that his capacity to think and plan was affected by the inebriation. We held that under the circumstances the trial court was not required to instruct on the defense of intoxication. In the present case, the only evidence offered relating to alcoholic beverages was that Anna Quick asked defendant if he wanted a drink and defendant said yes; that defendant purchased a pint bottle of Relska vodka with Quick's money and that defendant poured some of this vodka in a plastic cup for Earlie Mae Williams at her house; that an empty Relska bottle was found in the road near Quick's body; that a half-full bottle of Wild Irish Rose wine was found in Quick's car when it was located at North Hills Shopping Center and that defendant's palm print was on it; that defendant was given a beer in Webb's apartment and did not finish it; and that "Turf" Holloway testified that defendant smelled of wine and "appeared to have been drinking" on Tuesday, 22 June. Investigator Dobies testified that at no time during his conversa-

tions with defendant on 22 June, either at the Durham County Sheriff's Department or in the car as defendant was directing officers to the locations of Williams' body and Quick's car, did he detect any odor of alcohol about defendant. Dobies also testified that defendant "appeared to be in control, coherent. I didn't have any difficulty understanding his directions or his meanings." In this case, as in *Goodman*, no evidence was presented showing that the defendant's capacity to think and plan was affected or impaired by intoxication. Moreover, the trial judge included in his summary of the evidence most of the testimony which the defendant requested. The trial court also repeatedly instructed the jury that it had to find beyond a reasonable doubt that the defendant intentionally killed Anna Quick and Darryl Williams. This assignment of error is overruled.

**[13]** Next, defendant argues that the trial court committed error in failing to allow his written request that the jury be instructed that John Dwight Abrams might be an interested witness, contending that there was evidence that Abrams may have been the perpetrator of the crimes with which defendant was charged. By way of example, defendant cites the testimony of Investigator Gooch that defendant made statements to him which implicated Abrams—in one instance, defendant said that Abrams killed Quick and that he killed Williams, while at another point defendant said that Abrams killed Williams and that he killed Quick. Martha Trice placed defendant and Abrams together during the week of the crimes, in contradiction of Abrams' assertion that he had not seen defendant for four to five months prior to the time he saw defendant riding up Dorothy Drive at dusk on 21 June, and "Turf" Holloway's, as well as Abrams' own testimony, established that Abrams assisted defendant on 22 June in selling Holloway the revolver used to kill Quick and Williams, giving rise to an inference that Abrams was in recent possession of the murder weapon. *State v. Cabey*, 307 N.C. 496, 299 S.E. 2d 194 (1983). Even if the jury did not find Abrams to be the perpetrator of the offenses, it could have determined that Abrams was an accomplice, so an instruction on the special scrutiny to be given the testimony of an accomplice would have been appropriate, defendant asserts. *See State v. Bailey*, 254 N.C. 380, 119 S.E. 2d 165 (1961). Defendant contends that even though an interested witness instruction involves a subordinate feature of the case, it was nevertheless re-

versible error to fail to give an instruction properly requested by the defendant. *E.g., State v. Eakins*, 292 N.C. 445, 233 S.E. 2d 387 (1977).

We begin by noting that the trial judge gave the following instruction to the jury:

> You may find that a witness is interested in the outcome of this trial. In deciding whether or not to believe such a witness, you may take his or her interest into account. If, after doing so, you believe his or her testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

Judge Hobgood also instructed the jury as follows:

> You are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all or any part or none of what a witness has said on the witness stand. In determining whether to believe any witness, you should apply the same tests of truthfulness which you apply in your everyday affairs . . . [including] any interest, bias or prejudice the witness may have . . . .

These general instructions on interested witnesses and credibility adequately apprised the jury as to the weight to be accorded the testimony of any witness whom the jury might find to be biased or have an interest in the trial's outcome, including Abrams. *State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980). Furthermore, we do not find from our review of the transcript any credible evidence to support defendant's allegation that Abrams was either the perpetrator of or an accomplice in the crimes; the only evidence at all which suggested any involvement by Abrams was defendant's self-serving and contradictory statements to Gooch, and the evidence that Abrams helped defendant sell the murder weapon two days after Williams was killed. The case relied upon by defendant, *Cabey*, 307 N.C. 496, 299 S.E. 2d 194, is distinguishable. In that case we held that a person was an interested witness who was found in recent possession of property taken in a robbery and who admitted receiving it from the defendant. Although a more detailed instruction on interested witnesses would have been preferable, the trial judge's general instruction on the

credibility of witnesses was held to be adequate. In the present case, where there is no evidence to indicate that Abrams was charged with any offense relating to these crimes, that he was testifying pursuant to a plea agreement with the state or a grant of immunity from the state, or otherwise was a clearly interested witness, whether Abrams should be regarded as an interested witness was for the jury to resolve. *E.g., State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242. Moreover, as defendant concedes, the interested witness instruction relates to a subordinate feature of the case. In short, we do not find that defendant has shown he was prejudiced by the trial court's refusal to give the specific instruction he requested. We find this assignment of error to be meritless.

**[14]** By way of supplemental brief to this Court, defendant, pro se, brings forth three assignments of error concerning the trial court's denial of his motions to dismiss all the charges against him. He first argues that the trial court erred in denying at the close of the state's evidence his motion to dismiss the charges of murder in the first degree of both victims. He does not argue that the evidence was insufficient to sustain his convictions of murder in the first degree under the felony murder rule; however, he does challenge the sufficiency of the evidence to support a theory of first-degree murder based on premeditation and deliberation. Defendant premises his contention on the grounds that there was no evidence of the use of excessive force nor was there evidence that shots were fired after the victims were felled as might support an inference of premeditation and deliberation. The law is well settled as to the legal meaning of premeditation and deliberation. *E.g., State v. Jackson*, 317 N.C. 1, 343 S.E. 2d 814 (1986), *vacated on other grounds*, --- U.S. ---, 94 L.Ed. 2d 133 (1987); *State v. Brown*, 315 N.C. 40, 58-59, 337 S.E. 2d 808, 822-23 (1985), *cert. denied*, --- U.S. ---, 90 L.Ed. 2d 733 (1986). We find that the evidence was sufficient to support a reasonable inference of premeditation and deliberation as to each victim. The evidence in the light most favorable to the prosecution shows that both victims, whose bodies were found in isolated areas of north Durham County, had been shot multiple times at close range; autopsies revealed that both had close or contact wounds to the back, neck, face, and head behind the left ear. We have previously held that the nature and number of the victim's wounds is a circumstance

from which premeditation and deliberation can be inferred. *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808; *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). There was no evidence of any provocation by either victim. In short, the brutal method of these killings provides substantial evidence that the killer premeditated and deliberated. *Brown*, 315 N.C. 40, 337 S.E. 2d 808; *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335.

**[15]** Regarding defendant's subargument alleging that the state's evidence was sufficient to raise only a mere suspicion or conjecture as to his identity as the perpetrator of either murder, *see State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971); *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967), we observe that the evidence at trial indicated, inter alia, the following: both victims were in the company of defendant the last time they were seen alive; defendant and Williams arrived at Cynthia Webb's apartment together; defendant asked Leonard Hawes to accompany him to Greensboro, he and Williams left, and when defendant returned to Webb's apartment later, he was driving Williams' car and Williams was not with him; defendant told Leonard Hawes that the gun he had showed him earlier was warm because he had just shot it; defendant was identified as the person who represented himself as Darryl Williams and sold Williams' class ring in Greensboro; Quick's car was taken to North Hills Shopping Center in Raleigh and abandoned, and the car belonging to Williams, whose destination had been that same shopping center, was later found in Hillsborough; defendant led officers to Williams' body, the site of some of the victims' belongings, and to Quick's car and told them where to find the car belonging to Williams; defendant's palm- and/or fingerprints were found in both victims' cars; defendant sold the murder weapon to "Turf" Holloway; defendant made incriminating statements to investigating officers which implicated him in both murders. We find substantial evidence indicating that defendant was the murderer of both victims. *Id.* As to the defendant's argument that John Dwight Abrams could have been the perpetrator of the murders, there is absolutely no evidence whatsoever to support that contention, and the issue was resolved at trial against defendant by the jury. This assignment of error is completely meritless.

**[16]** Defendant also challenges the sufficiency of the evidence as to his convictions of the robberies with a firearm of Quick and

Williams. His argument in this regard appears to be that because the evidence presented as to the robberies was entirely circumstantial rather than direct, such evidence could not prove guilt beyond a reasonable doubt. Specifically, he argues that there was no direct evidence that he drove Quick's car to Raleigh or that he drove Williams' car to Hillsborough, nor is there direct evidence that he took the cars by endangering or threatening the lives of the victims or that he intended to permanently deprive the victims of their cars. Again, the evidence shows that both victims had cashed their employment checks and had last been seen with defendant on the days they were killed; defendant had been seen rummaging through Quick's handbag earlier in the day; defendant was driving Williams' car on the morning of the killing after having told Hawes that Williams was going to let him "borrow" it; defendant's prints were later found on several items inside Quick's car and on the car itself, which had been left at the same location from which Williams likely disappeared; when Williams' body was found, the left rear pocket on his trousers was unbuttoned and the other pocket had been turned inside out, and his wallet and class ring were missing; defendant sold Williams' high school ring in Greensboro and led officers to a location where they found several items which had been in Williams' wallet. The brutal killings of both victims in addition to defendant's recent possession of both Quick's and Williams' stolen cars raise the presumption of fact that he is guilty of armed robbery. *State v. Bell*, 270 N.C. 25, 153 S.E. 2d 741 (1967). In addition, the killing of Williams and defendant's recent possession of the high school ring which belonged to Williams was sufficient evidence to support the verdict of guilty of the armed robbery of Williams. *Id.*

Defendant also contends that the trial court erred in denying his motion to dismiss the kidnapping charge. For the reasons discussed earlier in this opinion, we have already resolved this issue in favor of the defendant.

**[17]** Defendant's last pro se contention is that his convictions of murder in the first degree and his death sentences were obtained by the state's knowing use of the perjured testimony of the Chief Medical Examiner, Dr. Page Hudson. In support of his accusation, he points to certain alleged inconsistencies between Dr. Hudson's testimony concerning the number of wounds from the victims' bodies and Dr. Hudson's testimony in an earlier Orange County

sentencing hearing for defendant's conviction for the murder in the second degree of Annie Carroway. *State v. Robbins*, 309 N.C. 771, 309 S.E. 2d 88. All of these inconsistencies are minor, insubstantial differences concerning the number of wounds he found and the number of bullets or fragments discovered. This testimony would not support a perjury charge.

In order to prevail on a claim of perjured testimony, defendant must show that the testimony was in fact false, material, and knowingly and intentionally used by the state to obtain his conviction. *McBride v. United States*, 446 F. 2d 229 (10th Cir. 1971), *cert. denied*, 405 U.S. 977, 31 L.Ed. 2d 252 (1972). Minor variations in testimony are insufficient to establish that a witness is perjuring himself, *State v. McDowell*, 310 N.C. 61, 310 S.E. 2d 301 (1984), and it is for the jury to determine the weight, if any, to be given to testimony where alleged inconsistencies are before the jury. *See State v. Montgomery*, 291 N.C. 235, 229 S.E. 2d 904 (1976). Defendant has not met his burden of showing that the testimony was in fact false, material, and knowingly and intentionally used to obtain his conviction. Such minor inconsistencies in testimony do not compel a finding that Dr. Hudson committed perjury and that the government knew it. Moreover, defendant had the opportunity to impeach Dr. Hudson's testimony at trial had he been of a mind to do so. This assignment of error is without merit.

We reverse the conviction of defendant on the charge of kidnapping in the first degree. Because armed robbery, not kidnapping, constituted the predicate felony for the verdicts of defendant's guilt of murder in the first degree based on felony murder, defendant's convictions for felony murder remain undisturbed. We find no error in defendant's other convictions.

**[18]** Defendant brings forth several assignments of error as preservation issues. His first argument—that the constitution prohibits the death qualification of prospective jurors—has been firmly decided adversely to defendant. *Lockhart v. McCree*, 476 U.S. ---, 90 L.Ed. 2d 137 (1986); *State v. Jackson*, 317 N.C. 1, 343 S.E. 2d 814. *See also State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980). This assignment of error is overruled.

**[19]** Next defendant argues that the trial court erred in denying defendant's motion to quash the bills of indictment because of

systematic exclusion of nonwhites from the jury pool from which the grand jury was drawn and also that the trial court erred in denying defendant's motion to quash the petit jury venire and master jury list because the pool from which it was selected is unconstitutionally unrepresentative. In so doing, defendant requests that we reexamine our decision in *State v. Avery*, 315 N.C. 1, 337 S.E. 2d 786 (1985). Defendant acknowledges that both he and Avery are black and were indicted and convicted in Durham County and that the issues in the two cases are identical. Defendant has presented us with no persuasive reasons as to why we should reconsider *Avery*, and we decline to do so. Defendant's assignment of error is therefore overruled.

**[20]** Defendant asserts that the North Carolina death penalty statute, N.C.G.S. § 15A-2000, is imposed in a discriminatory manner, is vague and overbroad, and involves subjective discretion, and thus violates the eighth and fourteenth amendments to the United States Constitution and article I, sections 19 and 27 of the Constitution of North Carolina. We have repeatedly upheld the constitutionality of the statute, *e.g.*, *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 166 (1986); *State v. Boyd*, 311 N.C. 408, 319 S.E. 2d 189 (1984), *cert. denied*, 471 U.S. 1030, 85 L.Ed. 2d 324 (1985), and do so again here. *See McCleskey v. Kemp*, 481 U.S. ---, 95 L.Ed. 2d 262 (1987). We overrule this assignment of error.

**[21]** Defendant next contends that the trial court erred in instructing the jury that it would be the jury's duty to recommend a sentence of death if the jury found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. Defendant concedes that the instructions in the present case were in substantial conformity with those upheld in *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, and *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983). This Court has consistently rejected this argument and here does so once more. This assignment of error is overruled.

**[22]** Last, defendant charges that the trial court erred in failing to instruct the jury that the state had the burden of proving the

nonexistence of each mitigating circumstance beyond a reasonable doubt and in placing the burden on the defendant to prove each mitigating circumstance by a preponderance of the evidence. Defendant has presented us with no compelling reasons as to why we should overrule our prior holdings on this issue, *e.g.*, *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673; *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L.Ed. 2d 1181 (1980), and we decline to reexamine them. Defendant's assignment of error is therefore overruled.

## II. SENTENCING PHASE

**[23]** The following aggravating circumstance was submitted to the jury during the sentencing phase of the trial: "Was the murder of Darrel [sic] Wade Williams committed while Phillip Thomas Robbins, Jr. was engaged in the commission of robbery with a firearm of Darrel Wade Williams, or first degree kidnapping of Darrel Wade Williams?" The jury answered the issue, "yes," and indicated that its finding was on the basis of "[b]oth robbery with a dangerous weapon *and* first degree kidnapping." In this opinion we have reversed the conviction of defendant on the charge of kidnapping in the first degree because of the insufficiency of the evidence to support that charge. Therefore, the submission of kidnapping as one of the bases supporting the above aggravating circumstance was error. We must next determine whether the error was prejudicial. The test to be applied was first announced by this Court in *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), as being whether there is a reasonable possibility that the error complained of might have contributed to the ultimate decision of the jury to recommend the death penalty. N.C.G.S. § 15A-1443(a) (1983).

In this case the evidence of defendant's *guilt* was strong, although there were no eyewitnesses to the killing. The evidence as to *punishment* was hotly contested. An indication of the difficulty the jurors had in arriving at a recommendation of punishment was their inquiry of the judge whether they could return a recommendation of life imprisonment without parole, later discussed in this opinion.

Through several witnesses defendant developed evidence about his prior life and how he had undergone drastic behavioral

changes in the six months before he was arrested. Three mitigating circumstances were submitted to the jury: (1) Defendant was under the influence of mental or emotional disturbance at the time of the murder; (2) his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired; (3) other mitigating circumstances. The jury responded that it found one or more of these circumstances to exist, without specification. For this discussion, we assume that the jury found all three.

Of course, we have no way of *knowing* if submission of the erroneous kidnapping basis for the aggravating circumstance tipped the scales in favor of the jury recommending the death penalty for the murder of Williams. The jury also recommended the death sentence for the murder of Anna Quick, where kidnapping was not submitted as a basis for the same aggravating circumstance. However, we can only speculate as to what weight or consideration the jury gave to the kidnapping as an additional basis for the aggravating circumstance. Surely it would seem reasonable that a jury might treat a defendant more harshly where the aggravating circumstance was supported by armed robbery *and* kidnapping than where only armed robbery formed the basis for the aggravating circumstance. There is a reasonable possibility that the consideration by the jury of the kidnapping charge might have contributed to the recommendation of the death penalty. We so hold, and vacate the death sentence of defendant for the murder of Darryl Williams. The case will be remanded to the Superior Court of Durham County for a new sentencing hearing on defendant's conviction of murder in the first degree of Darryl Williams. *See State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 796 (1980).

**[24]** By his next several assignments of error, defendant argues that North Carolina's death penalty statute, N.C.G.S. § 15A-2000 (1983), is unconstitutional as construed by this Court and as applied in this case because it prohibits the jury from considering a defendant's eligibility for parole. Specifically, defendant contends that the jury should have been instructed concerning defendant's eligibility for parole and should not have been prohibited from considering parole on the question of its sentencing recommendation on the grounds that it "is relevant to a mitigating circumstance at sentencing—the defendant's non-dangerousness—and

because it does not sufficiently dispel the jury's arbitrary and capricious misconceptions about parole." For the trial court's failure to so instruct, defendant contends that his rights were violated under the eighth and fourteenth amendments and he is thus entitled to a new sentencing hearing.

Initially, defendant points out that in the course of its deliberations during the sentencing phase, the jury returned to the courtroom with two written questions:

> Does the Court grant the jury the right to recommend a life sentence without possibility of parole? And, if so, whether that stipulation is binding on the Court.

To the jury's inquiry, Judge Hobgood responded in the language of the North Carolina pattern jury instruction which evolved from our decision in *State v. Conner*, 241 N.C. 468, 85 S.E. 2d 584 (1955):

> In answer to the question, my answer is as follows: The question of eligibility for parole is not a proper matter for you to consider in recommending punishment, and it should be eliminated entirely from your consideration and dismissed from your minds.
>
> In considering whether to recommend death or life imprisonment, you should determine the question as though life imprisonment means exactly what the statute says, imprisonment in the State's prison for life. You should decide the question of punishment according to the issues submitted to you by the Court, wholly uninfluenced by consideration of what another arm of the government might or might not do in the future. That is the ques--that is the Court's answer to the question.

N.C.P.I.—Crim. 150.10 n.2. Defendant correctly observes that this Court has consistently held that a criminal defendant's status under the parole laws is irrelevant to a sentencing determination and, as such, cannot be considered by the jury during sentencing, whether in a capital sentencing procedure under N.C.G.S. § 15A-2000 or in an ordinary case. *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982); *State v. Jones*, 296 N.C. 495, 251 S.E. 2d 425 (1979). Consequently, we have also held that the trial judge has a duty upon inquiry by the jury

to admonish the jurors to disregard the possibility of parole and to dismiss it from their minds. The trial judge is also forbidden from informing them of the laws and practices governing parole. *Brown*, 306 N.C. 151, 293 S.E. 2d 569; *Conner*, 241 N.C. 468, 85 S.E. 2d 584. *Accord, e.g., Brannon v. State*, 188 Ga. 15, 2 S.E. 2d 654 (1939); *Gaines v. Commonwealth*, 242 Ky. 237, 46 S.W. 2d 75 (1932); *Commonwealth v. Carey*, 368 Pa. 157, 82 A. 2d 240 (1951); *Jones v. Commonwealth*, 194 Va. 273, 72 S.E. 2d 693 (1952). *See generally* Note, *Munroe v. State: Jury Discussions of Parole Law in Texas*, 20 Hous. L. Rev. 1491 (1983); Comment, *Criminal Law—Improper Court Response to Spontaneous Jury Inquiry as to Pardon and Parole Possibilities*, 33 N.C.L. Rev. 665 (1955). Here, defendant did not object to the trial court's instruction pursuant to *Conner* nor did he ask the judge to inform the jury about North Carolina's parole laws. Generally, a defendant's failure to enter an appropriate and timely motion or objection results in a waiver of his right to assert the alleged error on appeal. *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308. Even assuming arguendo that defendant had properly preserved this issue for appeal, we would not overrule our prior holdings on this issue for the reasons which follow.

Defendant's contentions on this point are twofold. His principal argument is based on *California v. Ramos*, 463 U.S. 992, 77 L.Ed. 2d 1171 (1983), in which the United States Supreme Court acknowledged that the existence of a convict's future dangerousness is a relevant concern to the jury. Extending this holding to the situation at hand, defendant argues that his future nondangerousness was also a relevant concern to the jury in his case and that this nondangerousness may be a mitigating circumstance which the jury was entitled to consider during sentencing. In *Ramos*, the Supreme Court found no constitutional defect in a California state law requiring the trial judge to inform a capital sentencing jury that the governor possesses the power to commute a sentence of life imprisonment without possibility of parole (the "Briggs Instruction"). It is important to note, however, that while the instruction upheld in *Ramos* was held not to be prohibited by the Federal Constitution, it was not held, conversely, to be constitutionally required. *Id.* at 1014, 77 L.Ed. 2d at 1189. Additionally, in *Ramos*, the Supreme Court rejected the contention of the defendant that the Briggs Instruction was unconstitu-

tional because it does not inform jurors that the governor also is empowered to commute a death sentence, on the grounds that "an instruction disclosing the Governor's power to commute a death sentence may operate to the defendant's distinct disadvantage." *Id.* at 1011, 77 L.Ed. 2d at 1187. In arriving at its determination, the Court, by Justice O'Connor, wrote: "Our conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their States should not be permitted to consider the Governor's power to commute a sentence," *id.* at 1013, 77 L.Ed. 2d at 1188, and also remarked that "[m]any state courts have held it improper for the jury to consider or to be informed—through argument or instruction—of the possibility of commutation, pardon or parole." *Id.* at 1013 n.30, 77 L.Ed. 2d at 1188 n.30 (citing *State v. Jones*, 296 N.C. 495, 502-03, 251 S.E. 2d 425, 429). The opinions of several federal circuit courts are in accord with our holding. *Turner v. Bass*, 753 F. 2d 342 (4th Cir. 1985), *rev'd and death sentence vacated on other grounds sub nom. Turner v. Murray*, 476 U.S. ---, 90 L.Ed. 2d 27 (1986); *O'Bryan v. Estelle*, 714 F. 2d 365 (5th Cir. 1983), *cert. denied*, 465 U.S. 1013, 79 L.Ed. 2d 245 (1984). We do not find in *Ramos* any support for defendant's contentions.

Defendant's second argument on this issue is that the Constitution requires that the trial court inform the jury of facts about parole in order to dispel the alleged prejudicial misconceptions about parole which he contends most jurors harbor. Defendant contends that such alleged misconceptions raise the possibility of the jury acting in an arbitrary and capricious manner when sentencing without the benefit of accurate information concerning parole. In support of this argument, defendant refers us to the cases of *Godfrey v. Georgia*, 446 U.S. 420, 64 L.Ed. 2d 398 (1980); *Green v. Georgia*, 442 U.S. 95, 60 L.Ed. 2d 738 (1979); and *Gardner v. Florida*, 430 U.S. 349, 51 L.Ed. 2d 393 (1977), and concludes that the use of the *Conner* rule in his trial was unconstitutional because it failed to sufficiently minimize the risk that jurors' misconceptions about parole will affect the sentencing hearing.

We are unconvinced that due process requires an instruction on parole procedures out of concern that a jury may have misconceptions about parole eligibility. Defendant's contention that most lay jurors harbor prejudicial misconceptions about parole can be

based only on sheer speculation; there is no evidence in the record of any such prejudicial misconceptions harbored by jurors in the present case. Though the jurors did inquire whether they had the option of recommending a life sentence without the possibility of parole, there is absolutely no evidence that the jurors sentenced the defendant while under the mistaken impression that if they recommended life imprisonment, defendant would be released on parole. Moreover, providing the jury with information on parole eligibility is a double-edged sword. We are convinced that our present law under *Conner* and the assumption that jurors obey their oaths and instructions provide the best protection for criminal defendants. The recent United States Supreme Court case of *California v. Brown*, 479 U.S. ---, 93 L.Ed. 2d 934 (1987), further bolsters our position. In that case, an instruction cautioning the jury that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling," in the penalty phase of a capital murder trial was held not violative of the eighth and fourteen amendments. The Court held that the instruction merely served to admonish the jury "to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id.* at ---, 93 L.Ed. 2d at 940. Justice Rehnquist, writing for the majority, explained:

> An instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors which, we think, would be far more likely to turn the jury against a capital defendant than for him.

*Id.* at ---, 93 L.Ed. 2d at 941.

Similarly, the matter of parole is a factor not presented at trial and is completely irrelevant to the issues at trial. The Supreme Court's rationale, then, would seem to encompass the subject of parole eligibility, and thus our *Conner* instruction, which reflects our holding that the possibility of future interference with the sentence imposed on the defendant by parole is not a proper matter for the consideration of a jury charged

either with a determination of guilt or a recommendation as to punishment. We detect no constitutional defect in the *Conner* instruction and therefore stand by our prior holdings on this issue. Accordingly, we overrule defendant's assignments of error.

**[25]** In a related argument, defendant contends that even assuming that this Court adheres to its precedent on this issue, where a sentencing jury indicates that parole eligibility has become a factor in its deliberations, a mere instruction to disregard parole as a factor—without also instructing the jury so as to correct alleged prejudicial misconceptions about parole—is not adequate to dispel an arbitrary and capricious factor in the sentencing decision. He urges us to modify the *Conner* instruction and to adopt the minority view, *see* Annotation, *Procedure to be followed where jury requests information as to possibility of pardon or parole from sentence imposed*, 35 A.L.R. 2d 769 (1954); *see, e.g., State v. White*, 27 N.J. 158, 142 A. 2d 65 (1958), which would require the trial court, in addition to admonishing the jury under *Conner* to disregard parole in its deliberations as to punishment, to "instruct the jury about the truth concerning parole." Defendant reasons that "[b]y both admonishing and educating the jury, there is greater assurance that the prejudicially erroneous notions held by jurors will be dispelled . . . [and that a] defendant for whom life would be an appropriate punishment would not be sentenced to death upon a mistaken understanding." Again we note that defendant did not object to the *Conner* instruction at trial and has thereby waived his right to appellate review of this issue. N.C.G.S. § 15A-1446(b) (1983). Even were we to consider defendant's contentions in this regard, for the reasons set forth in our discussion above we decline to depart from our longstanding rule that a defendant's eligibility for parole is not under any circumstances a proper matter for consideration by a jury. *Conner; Brown*, 306 N.C. 151, 293 S.E. 2d 569.

By way of summary, we note our concurrence with Justice Marshall who, in his dissenting opinion in *Ramos*, wrote that the "possibility [of eventual release through commutation and parole] bears no relation to the defendant's character or the nature of the crime, . . . ." 463 U.S. at 1021, 77 L.Ed. 2d at 1194. *Accord Lockett v. Ohio*, 438 U.S. 586, 604 n.12, 57 L.Ed. 2d 973, 990 n.12 (1978). Any instruction relating to parole eligibility is not constitutionally required, and our law on the matter is not constitutional-

ly infirm. We adhere to our mandate first espoused in *Conner*. The trial judge did not err in refusing to instruct the jury as defendant requested.

Defendant next challenges certain remarks made by the prosecutor in his closing argument, alleging that the argument "was replete with improprieties that rendered the sentencing process unreliable" and entitles defendant to a new trial.

**[26]** Defendant first accuses the prosecutor of asking the jury "to decide something from the heart and not the head . . . a stirring of the emotions from you, this segment of the community." Defendant has lifted this phrase out of its proper context. A reading of the transcript reveals that this comment came in the midst of some speculation on the part of the district attorney that defense counsel would likely accuse him of playing on the jurors' emotions and of asking them "to decide something from the heart and not from the head, something that [they] may regret at a later time." The prosecutor then went on to tell the jurors merely that it was natural and normal to feel "genuine emotion, empathy, during the course of [the] trial." We disagree with defendant's characterization of this remark as an improper attempt to influence the jury to decide defendant's sentence based solely on their emotions, and thus find no gross impropriety in these remarks. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). Defendant also urges us to find gross impropriety in the district attorney's remarks asking the jury to consider the case "in the light of what you determine the law to be in this state." Though we find the remark to have been legally inaccurate and thus improper, we reject defendant's contention that the prosecutor was urging the jurors to "set aside the law and give free play to a 'stirring of emotions.' " The trial judge instructed the jury to apply only the law which he gave to them. We do not find that this statement amounted to prejudicial error. *Id.*

The district attorney observed that people are exposed to "things" via the mass media and asked, "and don't you catch yourselves a lot of times saying, my goodness, how terrible that is, how atrocious that is, they ought to do something about that." Defendant contends that these remarks improperly invited the jurors to ignore the evidence and make a sentencing determination based on public sentiment instead of on a rational consideration of

the factors permissible under N.C.G.S. § 15A-2000. *State v. Scott*, 314 N.C. 309, 333 S.E. 2d 296 (1985). These remarks are distinguishable from those held improper in *Scott* (in which the prosecutor appealed to the jury to convict the defendant because impaired drivers had caused other accidents) in that in the case *sub judice*, the district attorney did not argue outside the record that other murderers had killed other victims, nor did he encourage the jury to disregard the evidence and to base its determination on public sentiment. *See State v. Forney*, 310 N.C. 126, 310 S.E. 2d 20 (1984). Defendant did not object at trial to these remarks, and we do not find such gross impropriety as to have required corrective action by the trial judge. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304; *State v. Craig*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 464 U.S. 908, 78 L.Ed. 2d 247 (1983).

Next, defendant complains about the prosecutor's references to the defendant's having had "his day in court" and to the rights of crime victims, saying that this was an "invitation to a vigilante brand of justice in capital sentencing." On numerous occasions we have stated that emphasis is on the circumstances of the crime and the character of the criminal during sentencing, and therefore arguments regarding victims' rights are relevant. *See, e.g., State v. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984); *State v. Oliver*, 309 N.C. at 360, 307 S.E. 2d at 326. We find no gross impropriety in these closing remarks by the prosecutor.

Defendant next contends the district attorney in his closing remarks said that the death penalty should be imposed on this defendant as a deterrent, in violation of our holding in *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983). In truth, the district attorney generically argued that there were four reasons for the sentencing process and deterrence was among the reasons enumerated. These remarks by the prosecutor were not improper.

Defendant also challenges comments by the prosecutor that Darryl Williams "must have been in great fear" for his life and that both Williams and Anna Quick knew that they were going to die, which defendant alleges consisted of unreasonable and unsupported inferences and which invited the jury to "speculate wildly." Defendant argues that there was no evidence that either or both victims knew that death was imminent, that they feared for their lives, or that they begged for their lives. Defendant addi-

tionally alleges that by this argument the prosecutor interjected the additional aggravating circumstance that the murders were especially heinous, atrocious and cruel. We feel that the evidence gives rise to reasonable inferences that both victims feared for their lives. The fact that both bodies were found in isolated areas of north Durham County and that no trails of blood led to the bodies nor was any blood found in either automobile gives rise to a reasonable interpretation of the evidence, which the prosecutor argued, that the victims were forced at gunpoint out of their cars and were shot as they walked away. We do not find any gross improprieties in the prosecutor's argument which would have required the trial court to intervene ex mero motu. These assignments of error are overruled.

**[27]** Defendant contends it was error for the trial court to have submitted the aggravating circumstances to the jury that the murders of Anna Quick and Darryl Williams were committed while the defendant was engaged in the commission of robberies with a firearm of both victims, N.C.G.S. § 15A-2000(e)(5), and he is thus entitled to a new sentencing hearing. For the reasons discussed in the guilt-innocence phase of this opinion, we have found no error in either of the armed robbery convictions; therefore, the armed robbery offenses could properly be submitted to the jury as aggravating circumstances. *State v. Fields*, 315 N.C. 191, 337 S.E. 2d 518. This assignment of error is without merit.

**[28]** Defendant also assigns as error the trial court's failure to find a circumstance in mitigation for his sentences for armed robbery and kidnapping which he contends was established by the evidence, namely, that prior to arrest or at an early stage of the criminal process he voluntarily acknowledged wrongdoing in connection with the offenses to law enforcement officials. N.C.G.S. § 15A-1340.4(a)(2)(l) (1983). Because we have vacated defendant's conviction for kidnapping, we need not address this issue as it relates to that offense. Regarding the armed robbery conviction, defendant has waived appellate review of this issue by failing to make a timely motion requesting this mitigating circumstance and failing to object to the trial court's failure to find it after having been given ample opportunity by the trial judge to do so, N.C.G.S. § 15A-1446(a). Moreover, defendant was not entitled to a finding of this mitigating circumstance. Although defendant did acknowledge the murder of Anna Quick on the night he was taken into

custody and although he did voluntarily take officers to the site of Darryl Williams' body, he at no time acknowledged the robbery of Quick or of Williams. Defendant later equivocated and gave investigating officers conflicting and contradictory accounts of the murders. Furthermore, defendant made a motion to suppress these statements. This Court has held that if a defendant repudiates his incriminatory statement, he is not entitled to a finding of this mitigating circumstance. *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985). This assignment of error is meritless.

## III. PROPORTIONALITY

**[29]** We have concluded that defendant is entitled to a new sentencing hearing with respect to his conviction for the murder of Darryl Williams. Therefore, this Court's proportionality review is only addressed to defendant's conviction for the murder of Anna Quick.

As a final matter in every capital case, we are directed by N.C.G.S. § 15A-2000(d)(2) to review the record and determine (1) whether the record supports the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. After an exhaustive review of the transcript, record on appeal, briefs, and oral arguments, we find that the evidence supports the two aggravating circumstances found by the jury. The aggravating circumstances were: (1) the defendant had been previously convicted of a felony involving the use or threat of violence to a person, N.C.G.S. § 15A-2000(e)(3), and (2) the capital felony was committed while the defendant was engaged in the commission of robbery with a firearm of Anna Quick, N.C.G.S. § 15A-2000(e)(5).

We also conclude that there is nothing in the record which suggests that the sentence of death was influenced by passion, prejudice, or any other arbitrary factor. We thus turn to our final statutory duty of proportionality review.

In determining whether the death sentence in this case is disproportionate to the penalty imposed in similar cases, we first

refer to the now familiar "pool" of cases established in *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335.

> In comparing "similar cases" for purposes of proportionality review, we use as a pool for comparison purposes *all cases* arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time.

*Id.* at 79, 301 S.E. 2d at 355. The pool includes only cases which have been affirmed as to both phases of the trial. *State v. Jackson*, 309 N.C. 26, 45, 305 S.E. 2d 703, 717.

We have held that our task on proportionality review is to compare the case "with other cases in the pool which are roughly similar with regard to the crime and the defendant . . . ." *State v. Lawson*, 310 N.C. 632, 648, 314 S.E. 2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L.Ed. 2d 267 (1985).

> If, after making such comparison, we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

*Id.* at 648, 314 S.E. 2d at 503.

We note that defendant was convicted of the murder of Anna Quick on the theories of premeditated and deliberate murder and felony murder. With the magnitude and seriousness of our task in mind, we have reviewed the facts and circumstances of this case and compared them to all cases in the proportionality pool. Our careful comparison of the cases has led us to conclude that we cannot hold as a matter of law that the death sentence of defendant for the murder of Anna Quick was disproportionate.

The evidence in summary showed that on successive nights in June 1982 the defendant took Anna Quick, aged fifty-three, and Darryl Williams, aged eighteen, to isolated areas of Durham County where he shot them multiple times in the head, back, face, and chest. According to Dr. Hudson, the medical examiner, not all the wounds were lethal, raising a reasonable inference that the victims could have consciously suffered before dying. The bodies of the victims were hidden in ditches. Shortly after defendant left the apartment with Williams, he returned and acknowledged that he had just fired the pistol, which was still warm. The evidence showed that this pistol was used to kill Anna and Darryl. Defendant stole the automobiles of Anna and Darryl, as well as other personal property. Two motives for these deliberate killings are supported by the evidence: (1) to allow defendant to steal the property of the victims; (2) to eliminate all witnesses to the robberies.

In carrying out our duties under proportionality review, we have carefully considered the record, briefs, arguments and transcript. We must consider the circumstances of the offense and the character and propensities of the defendant. N.C.G.S. § 15A-2000 (d)(2) (1983). With respect to the crimes committed by defendant, all the circumstances point to two brutal, senseless killings. With respect to the defendant, the circumstances disclose him to be a cold-blooded killer who within a span of four days murdered three human beings: Anna, Darryl, and Annie Carroway. This Court has determined the guilt of defendant as to all three murders to be without prejudicial error. Although the Carroway murder was not used as an aggravating circumstance in the present case, there is no doubt that the three murders were all part of a continuing course of conduct by defendant. Particularly, the two murders in the present case were on successive days, involved the same modus operandi, and were motivated by the same reasons. Of all the cases in which this Court has performed proportionality review, this defendant stands alone with *Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981), as the only defendants convicted of three murders.

As defendant here was convicted on the basis of both premeditated and deliberate murder and felony murder, perhaps the most similar case is *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808. Brown sought out and robbed a convenience store during the ear-

ly morning hours when the female clerk was alone. He then forced her into his car and took her to an isolated area where he killed her by shooting her six times. The principal cause of death was a gunshot wound to her back. The facts in the present case are remarkably similar. Both cases raise the inference of killing to eliminate a witness; in addition Robbins killed for the purpose of robbing his victims. A heavy factor against Robbins is that he is a multiple killer. Although the jury found that defendant was under the influence of a mental or emotional disturbance at the time of the murders and that the capacity of defendant to appreciate the criminality of his acts was impaired, it is clear from his convictions of premeditated and deliberate murder that human life meant little to Robbins.

Our reference to the *Brown* decision does not suggest that we have overlooked other cases in the pool, such as *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985). Suffice it to say that we find the present case much more similar to *Brown* than to *Young*. We do not find it necessary to extrapolate or analyze *in our opinions* all, or any particular number, of the cases in our proportionality pool. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335. Upon our review of the entire proceedings in this case, together with our consideration and comparison of it with the cases in the proportionality pool, we cannot hold the death sentence for the murder of Anna Quick to be disproportionate. In so doing, we are mindful that almost any desired result can be supported by the selective use of discrete circumstances and statistics. Such methods, however, are foreign to our duties under the statute.

We hold as a matter of law that the death sentence imposed in this case for the murder of Anna Quick is not disproportionate within the meaning of N.C.G.S. § 15A-2000(d)(2). Upon this holding, the death sentence is affirmed. This Court has no discretion in determining whether a death sentence should be vacated. *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703; *see Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973.

## CONCLUSION

The conviction on the charge of kidnapping Darryl Williams is reversed. We find no error in the charge of armed robbery of Williams. On the charge of murder of Darryl Williams, we find no error in the guilt phase of the trial, but this charge is remanded

to the Superior Court, Durham County, for a new sentencing hearing.

We find no error in the charge of armed robbery of Anna Quick. We hold the murder charge of Anna Quick to be without error and the death sentence on this charge is affirmed.

No. 83CRS10237—kidnapping—reversed.

No. 83CRS10238—armed robbery—no error.

No. 82CRS13882—murder of Williams—no error in guilt phase; remanded for new sentencing hearing.

No. 83CRS12055—armed robbery—no error.

No. 82CRS13883—murder of Quick—no error.

Justice MEYER concurring in part and dissenting in part.

I concur in the majority opinion except as to that part entitled "II. SENTENCING PHASE," which holds that defendant is entitled to a new sentencing hearing because the kidnapping judgment has been arrested. I believe that portion of the majority opinion to be in error, and I would vote to affirm the judgment of the trial court.

The defendant was convicted of the first-degree murder of Darryl Williams on both the theories of premeditation and deliberation and of the felony murder rule. The underlying felony submitted was armed robbery. The kidnapping was not submitted as an underlying felony in the guilt phase. In such cases, this Court has held that the underlying felonies may also be considered as an aggravating circumstance at sentencing. *State v. Rook*, 304 N.C. 201, 230-31, 283 S.E. 2d 732, 750 (1981), *cert. denied*, 455 U.S. 1038, 72 L.Ed. 2d 155 (1982). During the sentencing phase of the trial, Judge Hobgood submitted to the jury as one of the aggravating circumstances, pursuant to N.C.G.S. § 15A-2000(e)(5), that the murder of Darryl Williams was committed while the defendant was engaged in the commission of the armed robbery, or the kidnapping of Williams, or both. Judge Hobgood also instructed the jury that, on the issues and recommendation form, it should answer whether its finding of this aggravating circum-

stance was "on the basis of the defendant's commission of robbery with a dangerous weapon of Darrel [sic] Wade Williams, *or* first-degree kidnapping of Darrel Wade Williams, *or* both." Judge Hobgood gave the jury three choices:

> Your answer will be one of the following choices: one, robbery with a firearm; or, two, first-degree kidnapping; or three, both robbery with a firearm and first-degree kidnapping.

When the jury returned its verdicts as to the first-degree murder of Darryl Wade Williams, the jury answered that it had found two aggravating circumstances: (1) that the defendant previously had been convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); and (2) that the murder of Darryl Wade Williams was committed while the defendant was engaged in the commission of robbery with a firearm of Darryl Wade Williams or first-degree kidnapping of Darryl Wade Williams, N.C.G.S. § 15A-2000(e)(5). The jury also answered that its finding of the second aggravating circumstance was based on the defendant's commission of "[b]oth robbery with a dangerous weapon *and* first degree kidnapping."

The majority holds that since the evidence was insufficient to support the first-degree kidnapping conviction, the trial court erred in submitting the kidnapping offense as an alternative theory for the aggravating circumstance under N.C.G.S. § 15A-2000(e)(5). I agree.

It should be noted that the defendant made no objection, when given the opportunity, to the State's request for an instruction on kidnapping as an aggravating circumstance. The defendant also made no objection to Judge Hobgood's framing of the issue as to whether the jury found the aggravating circumstance of N.C.G.S. § 15A-2000(e)(5) on the basis of the armed robbery or kidnapping or both. Here, under N.C.G.S. § 15A-2000(e)(5), there were alternative theories in a single enumerated aggravating factor:

> (5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, *robbery*, rape

> or a sex offense, arson, burglary, *kidnapping*, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

N.C.G.S. § 15A-2000(e)(5) (1983) (emphasis added). The majority has correctly held that though the kidnapping as an alternative theory for the aggravating circumstance was erroneously submitted, the aggravating factor survived because it was also based on the armed robbery.

The majority distinguishes between the "strong" evidence of defendant's guilt and the "hotly contested" evidence as to punishment. I must say that the significance of that distinction escapes me. In every death case, the evidence as to punishment is "hotly contested"—and even if it is not as a matter of fact, we treat it as such—because a life hangs in the balance. Without question, when a juror weighs a recommendation of punishment in a capital case, the strength of the evidence of guilt is still in his or her mind and is of significant importance. Here, the evidence of defendant's guilt was overwhelming, and the manner of the killing was brutal.

The majority says "we can only speculate as to what weight or consideration the jury gave the kidnapping." Is that not true in every case in which an aggravating factor has erroneously been submitted? That is precisely why this Court is compelled to make the harmless error analysis. By making the analysis, we direct and focus our attention on the precise question of whether we are able to say that, absent the offending circumstance, there is a reasonable possibility that the jury would have reached a different result.

"In capital sentencing procedures, erroneous submission of an aggravating circumstance . . . is not reversible *per se*; [such] error [is] subject to a harmless error analysis." *State v. Daniel*, 319 N.C. 308, 315 n.2, 354 S.E. 2d 216, 220 n.2 (1987). Where the evidence against a defendant is overwhelming, as here, the Court has not hesitated to say that:

> [W]e are here convinced that the error was harmless beyond a reasonable doubt and that the result of the weighing process used by the jury would not have been different had the impermissible aggravating circumstance not been present. Our review of the voluminous evidence offered by the State

> convinces us that submission of the aggravating circumstance that the murder was committed while committing the robbery was *not* prejudicial error.
>
> . . . .
>
> In addition to considering the evidence supporting the proffered aggravating circumstances, the jury was of course aware of the evidence offered at the guilt/innocence phase of the trial. Thus, even though the submission of the underlying felony was error, overwhelming evidence supporting other statutory aggravating factors convinces us that the weighing process has not been compromised.

*State v. Taylor*, 304 N.C. 249, 286, 288, 283 S.E. 2d 761, 784, 785, *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456 (1983).

The jury specifically found that it based its finding of the aggravating circumstance of N.C.G.S. § 15A-2000(e)(5) on the alternative ground that the defendant committed the murder of Darryl Williams during the commission of the armed robbery of Williams. Therefore, even though the jury could not properly find that the murder of Williams was committed during the kidnapping, there still remains the unchallenged finding that the murder was committed during the armed robbery of Williams. Here, the aggravating circumstance survives even though there was error in submitting the kidnapping offense as an alternative basis for the aggravating circumstance. Therefore, a determination that it was error to submit the kidnapping as an alternative theory for the aggravating circumstances does not invalidate the jury's finding of the aggravating circumstance under N.C.G.S. § 15A-2000 (e)(5).

It is completely inconsistent for this Court to let a death sentence stand where an entire aggravating factor is erroneous (as in *Taylor*) and grant a new sentencing hearing when the aggravating factor survives but contains one erroneous theory.

Even the majority characterizes the evidence of defendant's guilt as "strong." The majority also concedes that the jury returned a recommendation of death for the murder of Anna Quick, where kidnapping was not submitted as a possible basis for an aggravating factor. The evidence of defendant's guilt of two brutal

murders is overwhelming. We also know the defendant killed a third person in the same manner as a part of the same course of conduct. *See State v. Robbins*, 309 N.C. 771, 309 S.E. 2d 188 (1983). The wounds in each killing were similar; all three murders were execution-style killings with, in each case, shots behind the ear and in the back.

I am convinced that the error in the submission of the kidnapping offense as a theory of the aggravating circumstance to the first-degree murder of Darryl Williams was harmless and does not entitle the defendant to a new sentencing hearing.

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OLIVETTI CORPORATION v. AMES BUSINESS SYSTEMS, INC.

No. 418PA86

(Filed 2 June 1987)

1. **Fraud § 12— material misrepresentations—reasonable reliance—sufficiency of evidence**

There was competent evidence before the trial judge from which he could find that plaintiff Olivetti made material misrepresentations to defendant, a dealer in Olivetti word processors, and that defendant reasonably relied on the misrepresentations where defendant's evidence tended to show that Olivetti falsely told defendant that an agreement between Olivetti and NBI, the manufacturer of an Olivetti word processor, contained a five-year software update provision, that the agreement was not in trouble, and that Olivetti would continue to support the word processor for five years; it was imperative that defendant be able to offer the long-term software update feature of the agreement to potential customers in order to sell the Olivetti equipment; in order to induce defendant to continue to purchase Olivetti word processors, Olivetti intentionally withheld information from defendant that Olivetti had breached its agreement with NBI and NBI was no longer manufacturing the Olivetti word processor or providing software updates and maintenance; defendant did not have access to the nature of the Olivetti-NBI relationship except as represented to it by Olivetti; and defendant continued to purchase word processors from Olivetti for resale but would not have done so if it had known of the true status of the Olivetti-NBI agreement.

2. **Damages § 16.3— lost future profits—new business rule inapplicable in N. C.**

The "new business" rule, which precludes an award of damages for lost future profits where the allegedly damaged party has no recent record of profitability, is not the law in North Carolina. There should be no *per se* rule against the award of damages for lost future profits where they are shown with the requisite degree of certainty.

**3. Damages § 16.3— lost profits—insufficient evidence**

The trial court erred in finding that defendant dealer lost an opportunity to make profits as an NBI dealer because of plaintiff Olivetti's misrepresentations concerning the nature and status of an agreement between Olivetti and NBI where there was no competent evidence before the court that defendant could have become an NBI dealership or that it was precluded from doing so by Olivetti.

**4. Damages § 16.3— lost profits—former employee's sales for another dealer—improper measure of damages**

The trial court erred in using a former employee's sales of NBI word processors for another dealer as a measure of damages for defendant's lost future profits from its failure to become an NBI dealer because of misrepresentations by plaintiff where there was insufficient evidence in the record to show that the former employee would have made the same sales with defendant that he did with the other dealer.

Justice FRYE concurring in part and dissenting in part.

ON discretionary review of the decision of the Court of Appeals, 81 N.C. App. 1, 344 S.E. 2d 82 (1986), affirming the judgment entered 7 January 1985 by *Ferrell, J.*, after hearings at the 14 May and 29 May 1984 Civil Non-jury Sessions of Superior Court, MECKLENBURG County. Heard in the Supreme Court 10 March 1987.

*Poyner & Spruill, by J. Phil Carlton and Mary Beth Forsyth, and Weinstein, Sturges, Odom, Groves, Bigger, Jonas & Campbell, by Hugh B. Campbell, Jr., for plaintiff-appellant.*

*Joe C. Young for defendant-appellee.*

*Lacy H. Thornburg, Attorney General, by John F. Maddrey, Assistant Attorney General, for the State, amicus curiae.*

MEYER, Justice.

In April 1978, defendant Ames Business Systems, Inc. (hereinafter "Ames"), was incorporated by James H. Nicholson, formerly a salesman of accounting machines for Olivetti Corporation, and Wade M. Perry, previously an owner and operator of a small company that sold business forms and supplies. Ames was initially capitalized by Nicholson and four other investors, including Perry's wife and mother-in-law, for $45,000; Perry did not contribute any capital to Ames. Ames was formed to sell word processors for plaintiff Olivetti Corporation (hereinafter "Olivetti").

Ames and Olivetti entered into an agreement to that effect on 3 March 1978, including a provision for Olivetti to provide long-term maintenance and service through its Charlotte office. Olivetti signed a service contract with Ames on 1 May 1978, and Ames executed an initial order of $85,000 worth of equipment on the same date. Olivetti closed its Charlotte office the following month, giving Ames the option of taking over the Olivetti sales operation. Ames agreed and began distributing word processors out of Charlotte. Olivetti assigned its service contract with Ames to Piedmont Business Systems, Inc. Until Ames opened up its own service department, service was performed by an employee of Piedmont, Rex Jones. Ames lost $13,400 during that first year.

In April 1979, Olivetti began preparing to market a new word processor, the Olivetti TES-701. This machine was to be manufactured by NBI, Inc. (hereinafter "NBI"), and was essentially identical to the NBI-3000. The TES-701 was to be sold for about thirty percent less than the NBI-3000 and was apparently to compete for the same market. On 10 April 1979, Olivetti entered into a contract with NBI (hereinafter the "NBI agreement"), which was renewable on an annual basis and provided that, in the event of nonrenewal, NBI would continue to provide parts to Olivetti for five years thereafter. There was no provision in the agreement for long-term software updates.[1] In the summer of 1979, Olivetti discussed with Ames the benefits of the TES-701. As a way of encouraging Ames to carry the TES-701, one of Olivetti's employees, Tom Gallagher, told Ames that the NBI agreement did in fact contain a long-term software update provision. In July 1979, Ames ordered one TES-701 as a demonstrator. Ames showed another loss that year of $24,400, leaving it with a net worth of about $7,000.

As early as February 1980, Olivetti began trying to get out of the NBI agreement. During the spring, Olivetti and NBI held talks to arrange an amicable separation. At the same time, Ames, unaware of these talks, continued to buy TES-701s from Olivetti and sell them. In July 1980, Olivetti breached the agreement with NBI. A termination agreement with NBI provided Olivetti with

1. There was considerable testimony at trial regarding the significance of long-term software updates. It was Ames' position, not disputed by Olivetti, that software updates are a critical feature in the salability of word processing equipment.

maintenance and software updates only through 31 December 1982. As part of the termination agreement, Olivetti and NBI agreed that the breakup would be kept secret. In the fall of 1980, Ames began to hear rumors, through Mr. J. S. Epley, a potential customer, that Olivetti and NBI might be breaking up. Olivetti's employee Gallagher reassured Ames that the agreement was still intact and that Geoffrey A. Kohart, also of Olivetti, would write to reassure Epley. Kohart wrote the letter on 26 November 1980. This letter alluded to the industry rumors, but tended to downplay the possibility of trouble between NBI and Olivetti. Apparently reassured by the letter, Ames bought several TES-701s from Olivetti and sold two to Epley. Olivetti sold these to Ames at a very low price, saying that it wanted to reduce its inventory. According to Ames, Olivetti represented that it wanted to reduce its inventory to make room for additional TES-701s from NBI. At the end of the year, Ames had a net worth of negative $31,800.

Early in 1981, Olivetti changed its credit terms with Ames. Before Olivetti would honor new orders for parts or equipment, Olivetti required Ames to sign trade acceptances for the amount that Olivetti claimed Ames still owed it, some $108,379.11. Ames did so under protest. In March 1981, Ames met with an NBI representative to discuss becoming a dealership. Audley W. Downs, a regional manager responsible for dealer operations for NBI, met with Perry; Julius M. "Jay" Ozment, Ames' sales manager; David Harrison, Ames' service representative; and another Ames employee for a full day. When Downs left, Perry decided that it would not be feasible to market the NBI-3000, since it was the same machine as the TES-701 and he would essentially be competing with himself. Downs apparently also decided that Ames was not ready to become an NBI dealership and did not recommend that such a dealership be offered at that time. According to Olivetti, Ames did not meet NBI's financial requirements for becoming a dealership—some $250,000. According to Ames, it decided not to pursue a dealership with NBI because it had been assured that Olivetti would continue to support the TES-701. Furthermore, Ames presented evidence that it needed only about $26,000 to become a dealership and that that amount was available to it.

In June 1981, NBI contracted with Information Processing Consultants (hereinafter referred to as "IPC") to become its

dealership in North Carolina. In August or September, during a training session in Georgia for the TES-351 (Olivetti's then-newest word processing system), Kohart, an employee of Olivetti, told Ozment that Olivetti was phasing out the TES-701. According to Ames, Olivetti told Ames in the summer of 1981 that it would be buying more TES-701s from NBI. Olivetti offered to sell Ames ten TES-701s at a considerable discount, claiming that it wanted to clear its inventory to make room for more TES-701s. At the time of the trial, Ames had been unable to sell seven of the machines. In the fall of 1981, Ozment left Ames and set up an office for IPC in Charlotte. At the end of the year, Ames had a net worth, according to Olivetti, of negative $78,000.

The trial court found that Olivetti had defrauded Ames and had committed unfair and deceptive trade practices in violation of N.C.G.S. § 75-1. It calculated Ames' damages for lost future profits to be $401,000 and for lost past profits to be $5,200 and trebled those amounts pursuant to N.C.G.S. § 75-1.1, awarding Ames $1,218,600. The court also found that Ames would have been entitled to substantial punitive damages from Olivetti if N.C.G.S. § 75-1 did not apply to this case. The trial court also found that Ames owed Olivetti $57,000 based upon a pre-existing debt. Finally, the trial court ordered Ames to return its unsold Olivetti word processors to Olivetti, the contract price of which was deducted from Ames' debt. The Court of Appeals affirmed the judgment in all respects.

**[1]** Olivetti first argues that the Court of Appeals erred in affirming the trial court's finding that Olivetti made material misrepresentations upon which Ames reasonably relied. We disagree and affirm the Court of Appeals in this respect.

The trial court made extensive findings on this issue, including the following:

> 12. Based upon the false statements of Olivetti that it had a five year agreement with NBI for the 701, and the fact that the product was a good product, Ames purchased a demonstration 701 and proceeded to spend at least two-thirds of its time from August, 1979 through October, 1981 preparing to sell and attempting to sell the 701. In so doing, Ames concentrated its efforts on the 701 and slackened its efforts on

other products in its line. Ames did so in reliance upon the false representations of Olivetti.

. . . .

15. On or about July 17, 1980, Olivetti breached the NBI Agreement and refused to accept any further shipments of 701's from NBI. At that time Olivetti had over 400 of the 701's in inventory, at a purchase price of approximately $5,000 each, and was committed to purchase another 400 or more during the remainder of 1980. This breach was committed by Olivetti despite its representations to Ames that it had a five year supply agreement for the 701, and that it would support the 701 during that period of time.

. . . .

17. On or about September 23, 1980, Olivetti's president confirmed a termination arrangement reached September 15, 1980 with NBI's president. In this arrangement Olivetti would accept from NBI 47 additional 701 systems already completed, but no more; Olivetti would pay a $300 premium per unit on each of the 379 units purchased in 1980 ($113,700); NBI would make no additional software options available to Olivetti except records processing, stat/math, tailorable communications and a diablo wide track printer. The parties specifically agreed, at Olivetti's request, that no public announcement would be made about these matters. Olivetti never made a public announcement of the NBI termination.

. . . .

18. In October or November, 1980, Ames heard, through a potential customer, a rumor that Olivetti had breached the NBI Agreement and that the Agreement had been terminated. The customer, Mr. J. S. Epley of Charlotte, was considering the purchase of a 701 from Ames, and had heard about these matters. Mr. Epley was disturbed, because he liked Ames and the 701 but did not want to purchase a 701 unless he could be assured of continued service, and support, including hardware and software updates. He conveyed the information and his concern to Ames; and Mr. Jay Ozment,

Ames' salesman, telephoned Olivetti from Charlotte to check on the rumors.

. . . .

19. Mr. Ozment first talked about the matter with Mr. Gallagher, at Olivetti, the former product manager for the 701. Mr. Gallagher told Mr. Ozment there was no truth to the rumor and that everything was fine between NBI and Olivetti. Mr. Gallagher again stated that the Agreement with NBI was for five years, and said Olivetti was merely negotiating with NBI over price and systems updates. He then referred Mr. Ozment to Mr. Geoffrey Kohart, the then-current Olivetti product manager for the 701. Mr. Kohart confirmed to Mr. Ozment that the rumors were false, and that Olivetti and NBI were merely negotiating over quantities to be shipped. Mr. Kohart agreed to write Mr. Epley a letter confirming these matters.

. . . .

20. On or about November 26, 1980, Mr. Kohart, on behalf of Olivetti, wrote a letter to Mr. Epley in which he failed to acknowledge that the parties had agreed not to renew the NBI Agreement for 1981, and falsely stated that the Agreement provided for software disks, supplies and technical support for five years. Mr. Kohart wrote a similar letter to another dealer, in Minneapolis, in which he also falsely stated that the NBI Agreement provided for systems software updates for five years after its termination.

. . . .

25. In the summer of 1981 Olivetti offered to sell Ames 10 of the 701's on credit, at a substantially discounted price of $5,600.00 each. Ames asked Olivetti why it was selling the products at such a low price, and Olivetti falsely told Ames it was trying to reduce its inventory so it could purchase more 701's from NBI pursuant to its contract with NBI. Olivetti never told Ames that the NBI Agreement had been breached by Olivetti or that it had been terminated by NBI. Based upon Olivetti's misrepresentations, Ames purchased, on credit, 10 of the 701's from Olivetti in the early fall of 1981, plus two Olivetti 351's, a new word processing machine.

> Ames would not have purchased any of these machines if it had been told the truth by Olivetti. The total purchase price for the machines was $62,348. Ames signed notes or trade acceptances for the two 351's in the amount of $6,348 on August 28, 1981 and for the ten 701's in the amount of $56,000 on November 11, 1981.

(Document numbers and exhibit numbers omitted.)

In a non-jury trial, the trial court's findings of fact are conclusive on appeal if supported by competent evidence. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E. 2d 784 (1970). Our task, therefore, is limited to determining whether there was competent evidence before the judge from which he could find that Olivetti made material misrepresentations to Ames and from which he could find that Ames reasonably relied on those misrepresentations.

The trial judge heard testimony from Perry and Ozment regarding statements made by Gallagher that the NBI agreement contained a five-year software support provision, that the agreement between NBI and Olivetti was not in trouble, and that Olivetti would continue to support the TES-701 for five years. Moreover, the court had before it the 26 November 1980 letter from Kohart to Epley and the testimony of Perry that he understood the letter to be an assurance that the NBI-Olivetti agreement was not about to be breached. Finally, there was the testimony of Perry that he was further reassured in 1981 by officers of Olivetti that the agreement was intact.

There was also evidence that the representations made to Ames regarding the NBI agreement were false. The NBI agreement did not contain a provision for five years of software support. Olivetti concedes that the letter from Kohart was "technically incorrect" in that it represented that the NBI agreement included such support. Moreover, at the time this letter was written, NBI and Olivetti were trying to arrange a termination agreement. There was evidence from Ozment and Perry that Olivetti later withheld information from Ames regarding the actual breach of the NBI agreement. In fact, Olivetti's representations to Ames in 1981 came over a year after the NBI agreement had been breached. It appears, then, that there was competent evidence to support the trial court's finding that Olivetti made

misrepresentations to Ames regarding the nature and status of the agreement between Olivetti and NBI.

The trial court also found that the misrepresentations were material. Perry and Ozment testified to the significance of the agreement between NBI and Olivetti. Of paramount concern was the long-term support feature of the agreement. According to both witnesses, it was imperative that Ames be able to offer such support to potential customers in order to sell the Olivetti equipment. Moreover, Perry testified that he would not have bought more TES-701s if he had known of the true status of the NBI agreement. There was therefore evidence to support the judge's finding that the misrepresentations about the NBI agreement were material. This finding was also supported by evidence of Olivetti's attempts to keep the information about the breach secret. We hold, therefore, that there was sufficient evidence to support the trial judge's findings that Olivetti's misrepresentations were material.

Olivetti argues, however, that even if there were material misrepresentations, Ames was not reasonable in relying upon them. Olivetti cites *Calloway v. Wyatt*, 246 N.C. 129, 97 S.E. 2d 881 (1957), for the proposition that Ames had a duty of diligence to look beyond assurances made to it.

*Calloway* concerned a land transaction. The plaintiff-buyer knew that there were water shortages in the area and was concerned that the well on the property might not provide enough water to supply the house. The defendant-seller said that there was "plenty of" water in the well. The buyer did not turn on the water spigot until after the sale was closed. In holding that the plaintiff had not reasonably relied on the sellers' representations, we said:

> "'It is generally held that one has no right to rely on representations as to the condition, quality or character of property, or its adaptability to certain uses, where the parties stand on an equal footing and have equal means of knowing the truth. The contrary is true, however, where the parties have not equal knowledge and he to whom the representation is made has no opportunity to examine the property or by fraud is prevented from making an examination.' 12 R.C.L., 384 [23 Am. Jur. *Fraud and Deceit* § 169 (1939)].

> When the parties deal at arms length and the purchaser has full opportunity to make inquiry but neglects to do so and the seller resorted to no artifice which was reasonably calculated to induce the purchaser to forego investigation action in deceit will not lie. *Cash Register Co. v. Townsend*, 137 N.C. 652; *May v. Loomis*, 140 N.C. 350; *Frey v. Lumber Co.*, 144 N.C. 759; *Tarault v. Seip*, 158 N.C. 359, 23 A.J., 981."

*Calloway*, 246 N.C. at 134, 97 S.E. 2d at 885-86 (quoting *Harding v. Insurance Co.*, 218 N.C. 129, 134, 10 S.E. 2d 599, 602 (1940)).

Our decision, then, rested on three factors which are not present in the case at bar. First, in *Calloway* the plaintiff could have found out simply by turning on the faucet whether there was water in the house. We specifically held that the case would have been different if the buyer and seller had not had equal access to the information concerning presence or absence of adequate water for the house. Second, we noted that there was no allegation or proof by the plaintiff that the defendant had intended to deceive the plaintiff or even that the defendant was aware that there was insufficient available water. Third, *Calloway* rested on the established principle that representations about the quality or usability of real property are not ordinarily the subject of fraud. Under the unique facts of that case, we held that the plaintiff was under a duty to make the minimal inquiry needed to find out the truth.

Olivetti nonetheless relies on *Calloway* and argues that Ames should not have relied on the assurances of Gallagher and Kohart. Specifically, Olivetti contends that Perry should have made further inquiries of Kohart after reading the letter to Epley. Olivetti argues that Ames was put on notice, by rumors in the trade, that trouble was brewing between Olivetti and NBI and that Ames' reliance upon Kohart's letter was unreasonable as a matter of law. Moreover, Olivetti points to testimony of Rex Jones, an employee of Piedmont Business Equipment and previously Olivetti's service manager. Jones testified that he and Ozment had discussed, in the summer of 1981, the rumored breach of the NBI agreement. Thus, according to Olivetti, Ames was not reasonable in relying on any contrary representations from Olivetti after the summer of 1981. We disagree.

Ordinarily, the question of whether an actor is reasonable in relying on the representations of another is a matter for the finder of fact. *Whitaker v. Wood*, 258 N.C. 524, 128 S.E. 2d 753 (1963). While there are some extreme circumstances in which conduct may be considered unreasonable as a matter of law, this is not such a case. *Calloway*, a case where the two parties had equal access to the truth and where there was no evidence of intentional misrepresentation, does not apply. There was competent evidence here that Ames did not have access to the nature of the NBI-Olivetti relationship except as fraudulently represented to it by Olivetti. Olivetti's reliance upon some evidence that Ames was informed from other sources of the NBI-Olivetti breakup is misplaced. Such conflicts and contradictions in the evidence are for the trier of fact to resolve. *Garrett v. Garrett*, 229 N.C. 290, 49 S.E. 2d 643 (1948). In light of the evidence that Olivetti intentionally misled Ames for the purpose of inducing Ames to continue to deal with Olivetti and in light of the evidence that Olivetti intentionally withheld information regarding the breach of the NBI agreement, Olivetti will not now be heard to complain that Ames believed its false representations. We hold, therefore, that there was competent evidence from which the trial judge could find that Olivetti made material misrepresentations to Ames, upon which Ames reasonably relied.

Olivetti next argues that the trial court erred in finding that Ames was damaged by Olivetti's misrepresentations. We agree and reverse the Court of Appeals to the extent that it affirmed the trial court's award of damages.

The trial court found as facts that had it not been for Olivetti's fraud, Ames could have become an NBI dealer; that if Ames had become an NBI dealer, Ozment would not have left Ames to join IPC; and that if Ozment had stayed with Ames, he would have made the same sales for Ames as he did for IPC. The court concluded that the proper measure of damages was the sales Ozment made for IPC during the three years after Ozment left Ames.[2] Olivetti argues that Ames should be precluded from

2. The trial court also found that Ames was damaged by having, subsequent to the filing of this action, sold two TES-701s at a loss of $5,200. The proper measure of damages for fraudulent misrepresentation in the sales context is the difference between the goods as represented and their actual value at the time and place of acceptance. N.C.G.S. §§ 25-2-721, 25-2-714 (1986). Because Ames did not present the

recovering any damages for lost profits because Ames had not previously made any profits. Alternatively, Olivetti argues that even if Ames is not barred as a matter of law from showing lost future profit damages, it has not done so here with the reasonable certainty our law requires.

**[2]** We first consider Olivetti's argument that the "new business" rule should be applied to this case. This rule would preclude an award of damages for lost profits where the allegedly damaged party has no recent record of profitability. *See* Comment, *Remedies—Lost Profits as Contract Damages for an Unestablished Business: The New Business Rule Becomes Outdated*, 56 N.C.L. Rev. 693 (1978).[3] Jurisdictions applying this rule seem to have decided, as a matter of law, that a showing of lost future profit damages by such a business will be too speculative. Moreover, the new business rule is founded in part on the contract law principle that only those damages within the contemplation of the parties at the time of contracting are recoverable. *See* E. Hightower, *North Carolina Law of Damages* § 2-8 (1981). Where the action is in tort rather than contract, the principle is stated somewhat differently, to the effect that the damages must be the natural and probable result of the tort-feasor's misconduct. *Steffan v. Meiselman*, 223 N.C. 154, 25 S.E. 2d 626 (1943). Olivetti argues that where a new business is involved, the parties would not contemplate lost profits as an element of either contract or tort damages.

**[3]** Olivetti has directed our attention to several cases from other jurisdictions applying the new business rule. *See, e.g., E.F.K. Collins Corp. v. S.M.M.G., Inc.*, 464 So. 2d 214 (Fla. App.

trial court with evidence of the difference in value between the TES-701s as represented and their actual value at the time of their acceptance, however, it appears that there was nothing before the court upon which to base its finding in this regard. We therefore vacate that part of the trial court's finding that awards Ames $5,200 for lost past profits from the sale of two TES-701s.

3. We note in passing that the term "new business" for the purposes of this doctrine is not restricted to those businesses that have recently been instituted, but rather applies to any business without a recent history of profitability. Thus Ames' argument that the new business rule does not apply to it because it is not "new" need not be considered. Since the record is clear that Ames never had a profitable year, the new business rule would apply to Ames should this Court adopt that rule.

1985); *Radlo of Georgia, Inc. v. Little*, 129 Ga. App. 530, 199 S.E. 2d 835 (1973); *Buddy's Tastee #1, Inc. v. Tastee Donuts, Inc.*, 483 So. 2d 1321 (La. App.), *writ denied*, 486 So. 2d 738 (La. 1986); *Kenford Co., Inc. v. County of Erie*, 67 N.Y. 2d 257, 502 N.Y.S. 2d 131 (1986); *First Texas Savings Association of Dallas v. Dicker Center, Inc.*, 631 S.W. 2d 179 (Tex. App. 1982). It appears, however, that this Court has never addressed the question of whether the new business rule is the law in North Carolina. Olivetti urges us to adopt this rule, arguing that it guards against windfall recoveries to aggrieved parties based upon speculative forecasts of hypothetical losses. Olivetti cites *Lawrence v. Stroupe*, 263 N.C. 618, 139 S.E. 2d 885 (1965), for the proposition that we have always viewed future damages claims with strict scrutiny and concludes that the new business rule is in keeping with our rejection of speculative damage awards and our close review of awards of future damages.

While we agree with Olivetti that lost future profits are difficult for a new business to calculate and prove, we are persuaded that there should be no *per se* rule against the award of such damages where they may be shown with the requisite degree of certainty. Accordingly, we hold, along with what appears to be a majority of jurisdictions reaching the issue, that the new business rule is not the law of our state.

It is a well-established principle of law that proof of damages must be made with reasonable certainty. *Weyerhaeuser v. Supply Co., Inc.*, 292 N.C. 557, 234 S.E. 2d 605 (1977). Olivetti argues that Ames has not proven with reasonable certainty either that it lost the opportunity to become an NBI dealership or what, if any, profits it would have made as an NBI dealership. We agree.

In order for Ames to show that it was deprived of an opportunity to make profits, it must first show that there was in fact such an opportunity. The trial judge found as a fact that Ames, in reliance on Olivetti's misrepresentations, passed up the opportunity to become an NBI dealer. We hold, however, that there was no competent evidence to support this finding. There was no evidence that NBI ever offered a dealership to Ames. On the contrary, the testimony from Downs, the NBI representative, was that no such offer was made. Although a firm offer is not a prerequisite for recovery under a lost opportunity theory, *Rannbury-*

*Kobee Corp. v. Miller Machine Co., Inc.*, 49 N.C. App. 413, 271 S.E. 2d 554 (1980), Downs also testified that Ames did not appear to qualify financially for such an undertaking. Perry, Ozment, and Harrison, all employees or former employees of Ames, testified that after the meeting with Downs, Ames decided not to pursue becoming an NBI dealership. While these witnesses were competent to testify to their own intentions, they were not competent to testify that NBI would ever have made a dealership offer to Ames. There was, therefore, no competent evidence before the judge to support his finding that Ames could have become an NBI dealership.

Ames' proof was insufficient in another respect. Ames contends that it passed up the opportunity to become an NBI dealership in order to remain an Olivetti dealer. However, there was no evidence at trial that Ames could not have been both an NBI dealer and an Olivetti dealer. In fact, Ames did take on other lines of equipment while remaining a dealer for Olivetti. Moreover, Jay Ozment was able to sell both NBI and Olivetti equipment for IPC. Thus, even if Ames was defrauded into retaining the Olivetti line of equipment, it was not precluded from taking on the NBI line. We hold that there was insufficient evidence to support the trial court's finding that Ames could have become an NBI dealership in 1981 or that, if it could have become an NBI dealership, it was precluded from doing so by Olivetti. We hold, therefore, that Ames has failed to show with reasonable certainty that it lost an opportunity to make profits as an NBI dealer.

**[4]** Even if Ames had shown that it could have become an NBI dealer, it has not shown with reasonable certainty that it would have made profits in that event. The trial court used as a measure of Ames' lost profits the sales of Jay Ozment for IPC, the company that became the NBI dealership in North Carolina. The court concluded that Ozment would not have left Ames if Ames had become an NBI dealer and that Ozment would have made the same sales for Ames as he did for IPC.

The burden of proving damages is on the party seeking them. *Brown v. Moore*, 286 N.C. 664, 213 S.E. 2d 342 (1975). As part of its burden, the party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable

certainty. *Midgett v. Highway Commission*, 265 N.C. 373, 144 S.E. 2d 121 (1965).

In finding of fact 27, the trial court recited:

> 27. If Ames had become an NBI dealer in late 1980 or early 1981, it is reasonable that Jay Ozment would not have left Ames and also David Harrison, and that Ames would have had the sales which Jay Ozment produced for IPC, and also the service business which Ames lost to IPC. Also, it is reasonable that Ames would have gotten the normal amount of service business from the additional sales.

We note first that while the trial judge denoted this as a finding of fact, we are not bound by this designation. *Brown v. Board of Education*, 269 N.C. 667, 153 S.E. 2d 335 (1967). It appears to us that this finding includes a mixed question of fact and law. While the amount of damages is ordinarily a question of fact, the proper standard with which to measure those damages is a question of law. *See Weyerhaeuser Co. v. Supply Co.*, 292 N.C. 557, 234 S.E. 2d 605 (jury award of damages for breach of contract vacated because measure of damages incorrect). Such questions are, therefore, fully reviewable by this Court. *Taylor v. Cone Mills*, 306 N.C. 314, 293 S.E. 2d 189 (1982).

We have previously held that there was insufficient evidence to support the trial court's finding that Ames would have become an NBI dealer had it not been for the misrepresentations of Olivetti. The trial court's conclusion in finding 27 that Ozment would have made the same sales for Ames as he did for IPC was based upon the false premise that Ames did not become an NBI dealer because of Olivetti's misconduct and is erroneous as a matter of law. Assuming, *arguendo*, that the trial court was not precluded from using Ozment's sales for IPC as a measure of Ames' damages, there was insufficient evidence before the trial court to measure such damages with reasonable certainty. There is little evidence in the record on the question of whether Ozment would have made the same sales with Ames that he did with IPC. The evidence that is in the record suggests that IPC was able to market its products more widely and sell those products more cheaply than could Ames, regardless of any misconduct by Olivetti. Ames' only evidence on this question was that Ozment used similar sales techniques for IPC that he had for Ames and, though

later his sales territory was considerably larger, that for some time he sold only in the Charlotte area. The judge's conclusion from this evidence that Ozment would have made any sales for Ames over the next three years, much less that he would have made more than $800,000 worth of sales, was manifestly unsupported and the result of speculation. We hold that the trial court erred in using Ozment's sales as a proper measure of damages. Accordingly, the trial court's award of damages to Ames must be vacated.

Olivetti next argues that the trial court erred in trebling the damage award pursuant to Chapter 75 of our General Statutes. Because we have held that Ames did not prove its damages with reasonable certainty, we need not address this question. Nor do we reach Ames' contention that it is entitled to punitive damages if we were to determine that Chapter 75 does not apply to this case. Punitive damages may only be awarded where some compensatory damages have been shown with reasonable certainty. *Oestreicher v. American National Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976).

The final issue raised by Olivetti concerns the amount due it from Ames from past purchases of equipment. Olivetti argues that the trial court improperly reduced its claim of $148,990.68. As evidence of Ames' debt, Olivetti introduced certain trade acceptances signed by Ames. The trial court found that these trade acceptances were signed under protest and recalculated the actual amount owed Olivetti. He then ordered unsold Olivetti equipment to be returned by Ames and reduced the amount of the debt accordingly. We find no error in the judge's determination of the amount owed Olivetti by Ames and therefore affirm the Court of Appeals in this regard.

In sum, we hold that the trial court correctly concluded that Olivetti made material misrepresentations to Ames, upon which Ames reasonably relied. However, Ames has not borne its burden of showing that it was damaged by these material misrepresentations. We conclude further that Ames is not entitled to punitive damages, as it has not shown any compensatory damage. We find no error in the trial court's calculation of the amount due Olivetti by Ames. We need not reach the question of whether Chapter 75 applies to this transaction.

Affirmed in part, reversed in part.

Justice FRYE concurring in part and dissenting in part.

I concur in that part of the majority's opinion which affirms the trial court's findings that Olivetti intentionally made material misrepresentations upon which Ames reasonably relied, and that portion which rejects the so-called "new business rule." I dissent from that portion of the opinion which holds that the trial court erred in finding that Ames was damaged by Olivetti's misrepresentations.

First, I dissent from that portion of the majority opinion (tucked away in footnote number 2) vacating the findings by the trial court which support the $5,200 award to Ames for losses from the sale of two TES-701s. Because Olivetti failed to properly present and discuss the trial court's award of $5,200 for Ames' loss from the sale of two TES-701s, this issue is deemed to have been abandoned and therefore is not properly before this Court. *See* N.C.R. App. P. 28(a) and 16(a).

Rule 28(a) of the North Carolina Rules of Appellate Procedure deals expressly with situations where parties make assignments of error on appeal but do not present or discuss the alleged errors in their brief. The rule plainly states that:

> [q]uestions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned.

N.C.R. App. P. 28(a).

On appeal to the Court of Appeals, Olivetti, by assignment of error number 10 based on exception numbers 32 and 33 raised the question regarding the trial court's award of $5,200 to Ames for losses resulting from the sale of two TES-701s purchased from Olivetti. However, Olivetti failed to present or discuss this question in its brief before the Court of Appeals. Indeed the Court of Appeals acknowledges this omission in its opinion, noting that "Olivetti contests only that part awarded for *lost profits*." (Emphasis added.) *Olivetti Corp. v. Ames Business Systems, Inc.*, 81 N.C. App. 1, 15, 344 S.E. 2d 82, 90 (1986). Therefore, pursuant to Rule 28(a), the question concerning the basis for the trial court's award of damages to Ames for losses on the sale of two TES-701s,

raised in Olivetti's assignment of error number 10, was properly deemed abandoned.

Rule 16(a) of the North Carolina Rules of Appellate Procedure defines the scope of this Court's review of the Court of Appeals' decision, in pertinent part, as follows:

> Review by the Supreme Court after a determination by the Court of Appeals . . . is to determine whether there is error of law in the decision of the Court of Appeals. Except where the appeal is based solely upon the existence of a dissent in the Court of Appeals, review is limited to consideration of the questions properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court . . . . A party who was an appellant in the Court of Appeals, and is either an appellant or an appellee in the Supreme Court, may present in his brief any question which he properly presented for review to the Court of Appeals . . . .

This case comes to us on discretionary review of the Court of Appeals' decision. In its new brief, Olivetti, however, again does not contest the trial court's award of $5,200 to Ames for losses resulting from the sale of two TES-701s. Thus, Olivetti has failed to bring a challenge to this award within the scope of our review as required by Rule 16(a). Moreover, under Rule 16, Olivetti, the appellant in the Court of Appeals, having failed to properly present this issue in the Court of Appeals, could not have raised the issue anew in its brief on appeal to this Court. *See* N.C.R. App. P. 16(a).

Furthermore, even if the question of whether the trial court's findings support the $5,200 award to Ames for losses from the sale of the two TES-701s were properly before this Court, I could not agree with the majority's decision to vacate these findings. Assuming that the majority is correct in stating that the "proper measure of damages for fraudulent misrepresentation in the sales context is the difference between the goods as represented and their actual value at the time and place of acceptance," I disagree with the majority's conclusion that "it appears that there was nothing before the court upon which to base its findings" that Ames lost $5,200 from the sale of the two TES-701s.

Defendant's answer to plaintiff's interrogatories reveals that Ames purchased ten TES-701s from Olivetti, priced at $5,600

each; Ames in turn sold two of the units for a total of $6,000, thus resulting in a loss of $5,200 on the sale of these two units. The contract price at which Ames purchased the TES-701s is regarded as strong evidence of the value of the goods as represented, *see HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E. 2d 188 (1974), and the price received for the two TES-701s sold by Ames in an arm's-length transaction is some evidence of their value at the time of acceptance. *Credit Co. v. Concrete*, 31 N.C. App. 450, 229 S.E. 2d 814 (1976). Thus there is competent evidence supporting the trial court's findings and award based on Ames' $5,200 loss from the sale of the two TES-701s.

Second, I dissent from that portion of the majority opinion which holds that Ames failed to show that it was damaged by Olivetti's misrepresentations. The majority in its opinion rightly declines to adopt the so-called "new business rule" as the law in North Carolina as a special exception to our existing rules regarding proof of damages. It correctly states that the proper test to apply in the instant case is whether proof of damages has been shown with reasonable certainty. It then incorrectly concludes that Ames failed to do so.

As our Court of Appeals observed, it appears to be a general rule that where the *fact* of damages is proven with reasonable certainty, most courts allow plaintiffs some latitude in proving the *amount* of damages in actions involving wrongful conduct such as tort and antitrust actions. *See*, e.g., D. Dobbs, *Remedies*, § 3.3 at 151, 153-55 (1973). As the United States Supreme Court has said,

> Where the [wrongful conduct] itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.

*Story Parchment Co. v. Patterson Parchment Co.*, 282 U.S. 555, 563, 75 L.Ed. 544, 548 (1931). In another case, it elaborated:

> Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.
>
> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created . . . . That principle is an ancient one, *Amory v. Delamirie*, 1 Strange 505, 93 Eng. Reprint 664, and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application.

*Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65, 90 L.Ed. 652, 660 (1946) (holding, *inter alia*, that profits of a rival theater were sufficient to prove lost profits in an antitrust action) (citations omitted).

In the instant case, Ames clearly proved the *fact* of damages. The trial court found as follows on this question:

> 31. Olivetti's conduct in November, 1980, whereby it intentionally misled Ames by falsely telling Ames that its relationship with NBI was all right, and that it was negotiating with NBI for a continuation of the NBI Agreement, and that the Agreement provided for certain support for five years, when, in fact, Olivetti had breached its agreement with NBI and the two companies had agreed not to renew the NBI Agreement, and the Agreement did not provide for the support represented by Olivetti, constituted willful and intentional fraud and unfair and deceptive business acts and practices by Olivetti against Ames. Olivetti's representations were made to Ames in order to conceal Olivetti's earlier misrepresentations to Ames and to further deceive Ames and to induce Ames to continue its efforts to market the 701 product; and they did in fact deceive Ames. Ames reasonably relied upon these intentional misrepresentations, to its detri-

ment, in that it continued to expend efforts to market the 701, and borrowed $46,000 to purchase for cash five additional 701's which it continued to market, and thereby passed up other business opportunities, including an opportunity to become an NBI dealer in early 1981.

The Court finds that Ames' damages for this continued fraud and unfair and deceptive business acts or practices, are $401,000.00. This figure includes $77,000 in lost profits in 1982, $121,000 in lost profits in 1983, and $203,000 in lost profits in 1984.

As the majority so correctly notes, in a non-jury trial the trial court's findings of fact are conclusive on appeal if they are supported by any competent evidence. *Huski-Bilt, Inc. v. Trust Co.*, 271 N.C. 662, 157 S.E. 2d 352 (1967). This is true despite the fact that the evidence may be conflicting. *Id.* Both credibility and weight are matters for the finder of fact, not for the appellate courts. *Plott v. Plott*, 313 N.C. 63, 326 S.E. 2d 863 (1985); *Harrington v. Rice*, 245 N.C. 640, 97 S.E. 2d 239 (1957).

In the instant case, the trial judge's finding that Ames was damaged, that is, the *fact* of damages, is supported by other findings of fact and by ample competent evidence.

The majority appears to be much swayed by Olivetti's attempt to depict Ames as an incorrigible loser that could not in any event have made a profit, and it places great stress upon the fact that Ames never in fact showed a profit. The evidence does not support Olivetti's characterization. Ames was formed in 1978 primarily to market Olivetti products. Perry, its president, testified that the company projected a loss for its first two years of operation, due largely to its start-up expenses. It did in fact lose $13,400 in its first year on sales of $133,903. It lost $24,445 its second year on sales of $238,984. However, there was evidence that during this second year (1979) Ames spent $40,000 promoting the TES-701s, although it did not yet have any to sell. One need not stretch the facts to conclude that without this additional expenditure, Ames would have made a profit in 1979, one year ahead of its projections.

Ames' loss in 1980 may be similarly attributed to its efforts on behalf of Olivetti's TES-701. In 1980, Ames had a total loss of

$38,421. The trial court found that beginning in August 1979, through October 1981, at least two-thirds of Ames' time was spent preparing to sell and attempting to sell the 701. This finding is supported by ample evidence. The court also found that Ames slackened its efforts on its other products. This finding is supported both by testimony and by documentary evidence; Ames sold eighteen Olivetti 401s, one of its main products before the TES-701, in 1979, but only seven of these machines in 1980. Ames' total sales in 1980 fell to $193,417. Of this amount, $88,745 represents sales of the TES-701s, giving the company a gross profit on these sales of only $38,577.60. Ames spent $83,000 in this year promoting the machine. Therefore had Ames not been trying to market the TES-701, it might also have made a profit in 1980. Thus, there is simply no basis for concluding, as Olivetti would have the Court do, that Ames was inherently a losing proposition.

Similarly, Ames presented ample evidence that had Olivetti not reneged on its various commitments regarding the TES-701, Ames would have made profits marketing that machine. Perry testified that Ames did not actually begin presenting demonstrations on the TES-701 or have any models that it could sell until the beginning of 1980. Olivetti sent it a demonstrator model in October of 1979, but the model did not work. Ames was forced to wait for replacement parts. Ozment, Ames' principal salesman, testified that initial sales of the TES-701 were good. Then, as the trial court found,

> 18. In October or November, 1980, Ames heard, through a potential customer, a rumor that Olivetti had breached the NBI Agreement and that the Agreement had been terminated. The customer, Mr. J. S. Epley of Charlotte, was considering the purchase of a 701 from Ames, and had heard about these matters. Mr. Epley was disturbed, because he liked Ames and the 701 but did not want to purchase a 701 unless he could be assured of continued service, and support, including hardware and software updates. He conveyed the information and his concern to Ames; and Mr. Jay Ozment, Ames' salesman, telephoned Olivetti from Charlotte to check on the rumors.
>
> 19. Mr. Ozment first talked about the matter with Mr. Gallagher, at Olivetti, the former product manager for the

701. Mr. Gallagher told Mr. Ozment there was no truth to the rumor and that everything was fine between NBI and Olivetti. Mr. Gallagher again stated that the Agreement with NBI was for five years, and said Olivetti was merely negotiating with NBI over price and systems updates. He then referred Mr. Ozment to Mr. Geoffrey Kohart, the then-current Olivetti product manager for the 701. Mr. Kohart confirmed to Mr. Ozment that the rumors were false, and that Olivetti and NBI were merely negotiating over quantities to be shipped. Mr. Kohart agreed to write Mr. Epley a letter confirming these matters.

These findings are in accord with both Perry's and Ozment's testimony. The trial court went on to find that Mr. Kohart did write the requested letter, which was introduced into evidence, and that Mr. Epley did then purchase two TES-701s, which purchase is again supported by the evidence.

Nevertheless, the rumors continued and played havoc with Ames' attempts to sell the TES-701. The trial court found:

21. As a result of the rumors in the trade that NBI had terminated the Agreement [which would render it impossible for Olivetti to properly support the TES-701], it became very difficult for Ames to sell the 701 product in 1981. Ames representatives conferred on several occasions during 1981 with Olivetti representatives, but Ames was never told of the termination of the NBI Agreement. Olivetti kept this information from Ames and its other dealers, and misrepresented the fact that the Agreement had been terminated in order to be able to sell its inventory of 701's to them.

. . . .

23. Although Ames eventually sold the five 701's it purchased from Olivetti in December, 1980, these sales were very slow and difficult because of Olivetti's secret actions, even with reduced prices and high trade-ins, and Ames lost sales and profits as a result of Olivetti's actions.

Both Perry and Ozment testified that the persistent rumors that Olivetti would not continue to provide support for the TES-701 was what made it difficult to market. The trial court found that "customers and dealers are very reluctant to purchase a product

like the 701 if they cannot be fairly assured of continued hardware and software updates and support," and again, this finding is amply supported by testimony.

Thus, Ames clearly showed, and the trial court so found, that Olivetti's actions made it difficult for Ames to sell the TES-701 because of customer fears of losing a source of support for the machine. Ames also showed through its evidence, again reflected in the trial court's findings, that the opposite result was likely when support was available.

The trial court found that in the summer of 1981, Olivetti sold Ames ten TES-701s at a cheaper price than usual, falsely assuring Ames that the low price was to reduce its inventory so that it could purchase more of them from NBI. As the majority correctly notes, this finding was supported by competent evidence. The trial court also found:

> 26. At or about the time Olivetti sold the ten 701's to Ames, it also sold approximately 100 of these products to a consortium of NBI dealers, including one dealer in North Carolina. Olivetti did not inform Ames about this sale. When Ames' salesman, Jay Ozment, learned about the sale by Olivetti of the 701's to NBI dealers, including one dealer in Raleigh, he, his wife Teresa, who was Ames' Marketing Service Representative, and Ames' serviceman, David Harrison, concluded that Olivetti had destroyed the market for the 701 for Ames, and in so doing had destroyed Ames, and they proceeded to make plans to leave Ames. Mrs. Ozment left Ames in October, 1981. Mr. Ozment and Mr. Harrison left Ames in late October or early November, 1981, and went to work for the new North Carolina dealer for NBI products, a company called IPC. Mr. Ozment and Mr. Harrison opened a Charlotte office for IPC and proceeded to take a substantial amount of Ames' service business from Ames and to successfully sell Olivetti 701's and NBI 3000's in the Charlotte area.
>
> Mr. Ozment sold nine Olivetti 701's during his first eleven months with IPC, at a price of $9,995 each, plus related accessories, totalling $130,000 in sales of Olivetti equipment. In addition, he sold NBI products similar to the Olivetti products. In his last complete fiscal year with IPC, October, 1982 through September, 1983, Mr. Ozment, using

> sales practices similar to those he used with Ames, sold $413,000 of NBI products. From the end of September, 1983 until the date of his testimony (May 15, 1984), he had sold $282,000 of NBI products. The gross profit of these products is approximately 35 percent.

This finding is supported by Ozment's testimony.

Ozment stated flatly that the reason he could sell TES-701s at IPC and not at Ames was that IPC, being itself an NBI dealer, could provide assurances of support for the machine. Ozment also experienced no difficulties in selling NBI's own product, the 3000, as a salesman for IPC. As Olivetti's own attorney acknowledged before the trial court, the NBI 3000 and the TES-701 were essentially identical machines, having only "minor cosmetic differences."

Thus, the evidence appears to amply support the *fact* that Ames lost sales and profits because of Olivetti's clandestine behavior.

The majority asserts that Ames has failed to show with reasonable certainty the *amount* of lost profits. It says:

> Assuming, *arguendo* that the trial court was not precluded from using Ozment's sales for IPC as a measure of Ames' damages, there was insufficient evidence before the trial court to measure such damages with reasonable certainty. There is little evidence in the record on the question of whether Ozment would have made the same sales with Ames that he did with IPC. The evidence that is in the record suggests that IPC was able to market its products more widely and sell these products more cheaply than could Ames, regardless of any misconduct by Olivetti. Ames' only evidence on this question was that Ozment used similar sales techniques for IPC that he had for Ames and that for some time he sold only in the Charlotte area. The judge's conclusion from this evidence that Ozment would have made any sales for Ames over the next three years, much less that he would have made more than $800,000 worth of sales, was manifestly unsupported and the result of speculation.

Slip op. at 19.

I beg to differ. In cases like the instant case where the *fact* of damages from a defendant's misconduct is shown to a reasonable certainty, the innocent victim should not be required to show an exact dollar amount with mathematical precision. *See Story Parchment Co. v. Patterson Parchment Co.*, 282 U.S. 555, 75 L.Ed. 544; *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 90 L.Ed. 652. It is true that there can be no absolute certainty that Ozment would have made exactly the same sales for Ames, had Ames had the requisite support for its products, that Ozment made for IPC. Nevertheless, there is more evidence than the majority suggests. There is testimony that Ozment initially sold in the same territory (Charlotte); that he used the same sales methods; that he called upon the same customers he would have called on for Ames (he took his customer lists with him when he left); that he sold the same machine or one with only minor cosmetic differences; that he sold the TES-701s for IPC at a comparable price to that then being charged by Ames (he sold IPC's TES-701s for less than ten percent less than Ames was charging) and the NBI 3000 for almost $4,000 more; and that he was able to make these sales for IPC where he had been unable to do so for Ames because of the support factor. Due to Olivetti's own actions in making the TES-701 unmarketable by anyone not an NBI dealer, Ames is not in a position to show any closer figures of its lost sales than these, achieved by the same salesman selling the same or virtually the same machine to the same customers at comparable or greater prices in the same territory. The trial court so found, saying of Perry's lost profit computations, "The Court finds that these projections are reasonable, particularly in view of the fact that Olivetti's wrongful conduct caused Ames to take actions which make more definite projections difficult to ascertain." Because Olivetti has placed Ames in this position, it should not be permitted to complain that Ames' damages cannot be measured with the exactness and precision that might otherwise be possible. Accordingly, I believe not only that Ozment's sales for IPC are a proper measure of Ames' lost sales, but also that it is a just and reasonable inference that Ozment would have made approximately the same sales for Ames.

I also note that the majority states that the trial court concluded that the proper measure of damages was the sales Ozment made for IPC during the three years after Ozment left Ames. Slip

op. at 13. What the trial court actually found was that Perry projected that Ames' profits would have been $77,000 in 1982, $121,000 in 1983, and $203,000 in 1984, based upon Ozment's sales for IPC and Perry's experience with operating costs and with related service sales and costs. This finding is supported by Perry's testimony. Thus, Perry was not basing his figures on *IPC's* profits; he was basing them on Ozment's *sales* and applying Ames' own historical experience to these sales to determine what profit *Ames* would have made had Ozment made these sales for Ames. Use of this method, on the facts of this case, permits a just and reasonable inference as to the extent of Ames' damages.

The trial judge did find that had it not been for Olivetti's fraud, Ames could have become an NBI dealer. The majority holds that this finding is not supported by competent evidence. It says:

> In order for Ames to show that it was deprived of an opportunity to make profits, it must first show that there was in fact such an opportunity. The trial judge found as a fact that Ames, in reliance on Olivetti's misrepresentations, passed up the opportunity to become an NBI dealer. We hold, however, that there was no competent evidence to support this finding. There was no evidence that NBI ever offered a dealership to Ames. On the contrary, the testimony from Downs, the NBI representative, was that no such offer was made. Although a firm offer is not a prerequisite for recovery under a lost opportunity theory, *Rannbury-Kobee Corp. v. Miller Machine Co., Inc.*, 49 N.C. App. 413, 271 S.E. 2d 554 (1980), Downs also testified that Ames did not appear to qualify financially for such an undertaking. Perry, Ozment, and Harrison, all employees or former employees of Ames, testified that after the meeting with Downs, Ames decided not to pursue becoming an NBI dealership. While these witnesses were competent to testify to their own intentions, they were not competent to testify that NBI would ever have made a dealership offer to Ames. There was, therefore, no competent evidence before the judge to support his finding that Ames could have become an NBI dealership.

Slip op. at 16.

I am unable to understand the majority's reasoning in this respect. Perry gave positive testimony that he could have raised the money required had Ames decided to pursue a dealership with NBI. If, as the majority opinion suggests, Ames' ability to raise the necessary money were the only reason Ames would not have become an NBI dealer, I fail to see why Perry's testimony about the amount of money available to him is *not* competent evidence, while Downs' testimony that Ames did not "appear" to qualify financially *is* competent, especially in light of the fact that Ames never submitted a financial statement to NBI. Downs' testimony supports a conclusion that Ames' supposed financial deficiency was its only drawback from NBI's standpoint. Downs said that aside from any financial question,

> I was very much impressed with the three other people that were in the room when we had those discussions. They seemed to have—they were very committed to and very knowledgeable about a related product, the Olivetti 701 which NBI manufactured for Olivetti during that period of time. That I had a comfort level that they could be successful, those people could be successful in selling, supporting, and servicing the NBI product line.

Perry testified that Ames failed to pursue the NBI dealership further because the NBI machine was essentially identical and more expensive than the TES-701, and he would thus only be competing with himself if he took on the NBI line; Downs also testified that although Ames could have continued to be an Olivetti dealer as far as NBI was concerned, NBI would not have allowed Ames to sell both the TES-701 and the NBI 3000 for that very reason. Accordingly, I believe that there is sufficient evidence to support the trial judge's findings.

Furthermore, I do not agree that in order to recover damages, Ames had to show that it would have become an NBI dealer but for Olivetti's fraud. In his finding summarizing Perry's computation of damages, the trial judge did say that Perry projected these profits "as an NBI dealer." However, as we have said before, the purpose of the requirement that the trial judge make findings of fact is so that the reviewing court may determine " 'from the record whether the judgment—and the legal conclusions that underlie it—represent a correct application of the

law.' " *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E. 2d 593, 595 (1986). The findings should indicate the evidence relied upon by the judge. *Id.* What Perry actually said in the testimony upon which this finding is based was that these profits were his projections "if properly supported by Olivetti or if I had taken the MBI [sic] product . . . ." His testimony described his written calculations, introduced into evidence, and entitled "Damages through loss of opportunity to sell properly supported TES 701 or to convert Ames to NBI dealership." Perry himself made no distinction in reaching his figures. Indeed, the testimony reflected in the trial judge's findings, was that the product lines were essentially the same. The critical point, from Perry's testimony about the necessity for having support and Ozment's testimony that the factor that enabled him to sell the TES-701s for IPC was the availability of support, appears to be Ames' ability to get this support, which it would have done either if Olivetti had honored its commitments or if Ames had become an NBI dealer. Accordingly, the opportunity to become an NBI dealer was not critical to Perry's proof of lost profits.

For all of the above reasons I would hold that Ames has proved its damages with reasonable certainty and that the trial court did not err in so finding.

Chief Justice EXUM and Justice MARTIN join in this concurring and dissenting opinion.

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STATE OF NORTH CAROLINA v. MITCHELL JOHN PAKULSKI AND ELLIOTT CLIFFORD ROWE

No. 256PA85

(Filed 2 June 1987)

**1. Criminal Law § 128.2— jury deadlock—mistrial—no double jeopardy by subsequent trials**

It is clear from the record that there was a jury deadlock warranting a mistrial in defendants' original trial for first degree murder so that their second and third trials did not violate their rights against double jeopardy where the record showed that on the first day of deliberations, the jury foreman expressed his concern that the jury could not reach a verdict, one defendant moved for a mistrial, and the motion was denied; on the morning of the second

day of deliberations, the foreman again expressed concern that the jury could not reach a decision, and the court again denied a motion for a mistrial; and on the afternoon of the second day of deliberations, the court determined that there was a genuine deadlock and declared a mistrial. Moreover, the trial court's failure initially to make findings in support of the mistrial declaration does not alter this result.

2. **Homicide § 21.6; Robbery § 4.3— felony murder—armed robbery—taking property after victim killed**

There was sufficient evidence of armed robbery to support submission of a felony murder charge to the jury where the evidence tended to show that defendants ransacked a doctor's office; when deceased entered as part of his rounds as a security guard, defendants attacked him, took his gun, and pinned him to the floor; and one defendant then shot deceased and took money from his person. A homicide victim is still a "person" within the meaning of a robbery statute when the interval between the fatal blow and the taking of property is short.

3. **Homicide § 21.6— felony murder—breaking or entering—failure to prove possession of deadly weapon**

Where the State failed to prove possession of a deadly weapon at the time of a felonious breaking or entering, that felony could not be used as a predicate to a felony murder charge.

4. **Criminal Law § 124.2— felony murder—felonies in disjunctive—one felony unsupported by evidence—new trial**

Defendant is entitled to a new trial on a felony murder charge where armed robbery and felonious breaking or entering were submitted in the disjunctive as possible felonies supporting a felony murder conviction, the evidence was insufficient for submission of felonious breaking or entering as the underlying felony, and the theory upon which the jury relied cannot be discerned from the record.

5. **Criminal Law § 119— *failure to give requested instruction—harmless error***

Although an instruction on prior inconsistent statements was warranted where defense counsel questioned a State's witness about inconsistent statements he made to the police and at previous trials, the trial court's failure to give defendant's requested instruction on prior inconsistent statements was not prejudicial error where the court instructed the jury that the witness had been granted complete immunity, that he was an interested witness, and that the jury should, in assigning weight and credibility to his testimony, "carefully examine his testimony and scrutinize it with care."

BEFORE *Fountain, J.*, and a jury at the 29 October 1984 Criminal Session of Superior Court, HAYWOOD County, the defendants were found guilty of first-degree felony murder, larceny of a motor vehicle, felonious breaking or entering and larceny, robbery with a firearm, and conspiracy to commit felonious breaking or entering and larceny. The jury recommended that both de-

fendants be sentenced to life imprisonment on the murder conviction, and they were so sentenced. The defendants were also sentenced to a term of ten years for the offense of larceny of a motor vehicle and a sentence of ten years for the offense of conspiracy to commit breaking or entering and larceny. The trial court arrested judgment on the felonious breaking or entering and larceny verdict and on the robbery with a firearm verdict. Defendants' notices of appeal were filed one day late; however, their petition to this Court for writ of certiorari was granted on 11 June 1985. Heard in the Supreme Court 12 March 1987.

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

*Ann B. Petersen for defendant-appellant Pakulski.*

*Gordon Widenhouse for defendant-appellant Rowe.*

MEYER, Justice.

Following two mistrials, a Haywood County jury found each of the defendants guilty of first-degree murder under a theory of felony murder. Judgments of conviction and sentences of life imprisonment were entered on 17 November 1984. Judgments were arrested on the offenses of armed robbery and felonious breaking or entering, as these offenses formed the offenses upon which the convictions of felony murder were predicated.

On appeal, defendants bring forward assignments of error relating only to the convictions of felony murder. They argue: (1) that the trial court violated their rights against double jeopardy; (2) that there was insufficient evidence that the murder was committed in the course of an armed robbery or a felonious breaking or entering; (3) that because armed robbery and felonious breaking or entering were submitted in the disjunctive, as possible felonies supporting a felony murder conviction, the defendants were deprived of their right to a unanimous verdict; and (4) that the trial court erred in failing to submit the pattern jury instruction on impeachment of a witness.

We hold that there was insufficient evidence to submit to the jury the charge of felony murder based on felonious breaking or entering as the predicate felony. Because the felonious breaking or entering and armed robbery were submitted in the disjunctive

as predicate offenses of the felony murder, it is impossible to determine from the record whether the jury based its verdict of felony murder on a predicate felony that was improperly submitted. Therefore, we order a new trial.

We find no merit in defendants' contentions that the trial court violated the defendants' rights against double jeopardy. We also hold that the trial court did not commit prejudicial error in failing to submit the pattern jury instruction on impeachment of witnesses.

On Sunday morning, 17 September 1978, Dr. Guy Abbate of Waynesville visited his office on Church Street. There he found the body of Willard Setzer, a private security guard, draped in an American flag and lying on the floor. Abbate's office had been ransacked, and a subsequent inventory revealed that several items, including a kitchen knife, surgical gloves, and syringes, were missing. Dr. Abbate notified law enforcement authorities and an investigation ensued.

On 29 January 1979, a Haywood County grand jury returned true bills of indictment against defendants Mitchell John Pakulski and Elliott Clifford Rowe, charging them with first-degree murder of Willard Setzer. Because of extradition litigation in Ohio and later in the federal court (*see Pakulski v. Hickey*, 731 F. 2d 382 (6th Cir. 1984); *In re Rowe*, 67 Ohio St. 2d 115, 423 N.E. 2d 167 (1981)), the defendants were not transported to North Carolina until 9 March 1984. On 5 April 1984, the Haywood County grand jury returned additional indictments charging defendants with robbery of Setzer with a dangerous weapon, larceny of Setzer's automobile, felonious breaking or entering of Dr. Guy Abbate's office, felonious larceny and possession of property belonging to Dr. Abbate, conspiracy to commit murder, and conspiracy to break or enter.

All charges were consolidated for trial. The case was first called to trial at the 24 April 1984 Special Session of Superior Court, Haywood County. After deliberating for approximately two hours on the evening of 24 May 1984 and for three hours on the morning of 25 May, the jury was unable to reach a verdict and a mistrial was declared. A second trial was held in July 1984, and once again a mistrial was declared because the jury was unable to reach a verdict.

The matter came on for trial a third time at the 29 October 1984 Criminal Session of Haywood County Superior Court. The State's case hinged on the eyewitness testimony of David Chambers, an accomplice of defendants who testified in return for a grant of immunity. The State also offered testimony of law enforcement personnel involved in the investigation of the murder. The State's evidence tended to show the following:

Along with Chambers, both defendants went to Dr. Abbate's office on the evening of 16 September 1978. Rowe broke a window in order to enter the office and then let Chambers and Pakulski in through the front door. Pakulski and Rowe ransacked the office and put valuable items in a plastic bag. The items taken included a syringe-like item.

About ten minutes after defendants entered Abbate's office, Willard Setzer arrived. Rowe hit Setzer on the side of the head with a paint bucket. Setzer fell to the floor and drew his pistol from its holster. Pakulski took the pistol, and Rowe tripped Setzer from behind as he was getting up. Pakulski then fired a single shot into Setzer's head behind his right ear lobe. Pakulski and Rowe then picked Setzer's pockets, removing his money, gun, and wallet.

The regional pathologist, Dr. Robert S. Boatwright, testified that he first examined Setzer's body on the afternoon of Sunday, 17 September 1978. Based on his locating and removing a .22-caliber bullet from Setzer's brain, Boatwright opined that Setzer died of a gunshot wound.

Dan Crawford, the State Bureau of Investigation resident agent for Haywood County, testified that he assisted in the investigation. He observed Mr. Setzer's body on the floor in Dr. Abbate's office and observed that Setzer's Smith and Wesson .22-caliber magnum handgun was missing.

At the time of the murder, law enforcement officials were unable to locate Setzer's 1975 blue Chevrolet Nova. After entering registration information on the national computer network, they located the vehicle in Dayton, Ohio. A catheter syringe-type device and Setzer's notebook were found inside the car. Law enforcement officials were unable to lift latent fingerprints from the car.

Defendants presented alibi evidence indicating that they were in Toledo, Ohio, on the weekend of the murder. They also presented numerous witnesses who contradicted Chambers' testimony.

At the close of the State's evidence, the trial court dismissed the charge of conspiracy to commit murder. At the close of all the evidence, the trial court ruled that the evidence was insufficient to submit the charge of first-degree murder on a theory of premeditation and deliberation. Thus, with respect to the murder charge, the jury was instructed on felony murder based on felonious breaking or entering and armed robbery.

The jury returned verdicts finding each of the defendants guilty of first-degree felony murder, felonious larceny of a motor vehicle, felonious breaking or entering, armed robbery, and conspiracy to break and enter.

After a sentencing hearing, each defendant was sentenced to life imprisonment on the murder conviction. For the larceny of a motor vehicle, each defendant was sentenced to a prison term of ten years. For the conspiracy offense, each defendant was sentenced to a concurrent term of ten years. The trial court arrested judgment on the armed robbery and felonious breaking or entering verdicts, as these were submitted as predicate felonies to the felony murder.

I.

**[1]** In their first argument, defendants contend that the mistrial concluding the first trial was not properly entered. Thus, they argue, the second and third trials violated their rights against double jeopardy as secured by the fifth and fourteenth amendments to the United States Constitution and Article I, § 19, of the North Carolina Constitution. Specifically, defendants complain that the trial court erred in failing to make findings of fact to support the declaration of mistrial.

The jury began its deliberation on the afternoon of 24 May 1984. On that evening, after dinner, the foreman reported to the court that there were some differences among the jurors. The court then requested that the jury break for the evening and return in the morning. Defendant Pakulski then moved for a mistrial, and the motion was denied.

On the following morning, the jury resumed deliberations at 9:20 a.m. At 9:51 a.m., they returned to the court and the foreman stated that they were unable to reach a verdict. The court then instructed the jury in accordance with N.C.G.S. § 15A-1235 on its duty to deliberate. Defendants then moved for a mistrial, and the motion was denied.

The jurors took a lunch break between 12:20 p.m. and 1:25 p.m. When they returned, the following exchange took place between Judge Burroughs and the foreman:

COURT: Mr. Cox, do you feel like you're making any progress?

MR. COX: No, sir.

COURT: Do you think you're hopelessly deadlocked?

MR. COX: Yes, sir, I do.

COURT: All right, I'll withdraw juror No. 12 and declare a mistrial. Juror No. 12 is withdrawn.

The record contains no contemporaneous findings of fact to support the mistrial declaration. Nor does the record contain any defense counsel objection to the failure to make findings of fact in support of the mistrial declaration.

On 6 July 1984, prior to the second trial, defendant Pakulski moved to dismiss on the basis of double jeopardy and the failure of the trial court to make findings of fact with respect to the mistrial declaration, as required by N.C.G.S. § 15A-1064. The motion was denied and a *nunc pro tunc* order of mistrial, containing proper findings, was entered.

It is well settled that the prohibition against double jeopardy does not prevent a defendant's retrial when his previous trial ended in a hung jury. *State v. Odom*, 316 N.C. 306, 341 S.E. 2d 332 (1986); *United States v. Perez*, 22 U.S. (9 Wheat) 579, 6 L.Ed. 165 (1824). Also, this Court has held that the decision to order a mistrial lies within the discretion of the trial judge. *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978). *See also Arizona v. Washington*, 434 U.S. 497, 54 L.Ed. 2d 717 (1978).

In a capital case, the trial court has no authority to discharge the jury without the defendant's consent, unless on the basis of

manifest necessity. *State v. Crocker*, 239 N.C. 446, 80 S.E. 2d 243 (1954). Long ago, Chief Justice Ruffin observed that, in a capital case, "generally speaking, such necessity must be set forth in the record." *State v. Ephraim*, 19 N.C. (2 Dev. & Bat.) 162, 166 (1836).

In 1977, the General Assembly extended the rule requiring the findings of fact to all cases in which mistrial is ordered. N.C.G.S. § 15A-1064 provides:

> Before granting a mistrial, the judge must make finding of facts [sic] with respect to the grounds for the mistrial and insert the findings in the record of the case.

N.C.G.S. § 15A-1064 (1983).

Unless timely objected to by defense counsel, a trial court's failure to make findings in support of a mistrial is not subject to appellate review. *State v. Odom*, 316 N.C. 306, 341 S.E. 2d 332; N.C.R. App. P. 10(b)(2). However, in a *capital* case, the failure to object to a mistrial declaration will not prevent a defendant from assigning the declaration of mistrial as error on appeal. *State v. Lachat*, 317 N.C. 73, 343 S.E. 2d 872 (1986).

Defendants argue that this Court's decision in *State v. Lachat*, 317 N.C. 73, 343 S.E. 2d 872, controls the disposition of this case. An examination of the factual setting and holding in *Lachat* is therefore appropriate.

In *Lachat*, the defendant was first tried for murder in August 1984. During the first trial, the court initially withdrew a juror and declared a mistrial in response to the foreman's statement that the jury was having a difficult time moving forward. The court communicated to the jurors that it did not believe the jury could reach a verdict and that the case would be tried at some later date by another jury. However, as the court was about to dismiss the jurors, the foreman stated that the jury was willing to keep trying; other jurors stated that they would try to reach a verdict and that the foreman did not adequately represent the views of the jury when he stated that they could not reach a verdict. The court then struck the withdrawal of the juror and continued the trial. On the following day, the foreman once again stated that the jurors could not reach a decision; the court withdrew a juror and declared a mistrial without making findings for the record. Four months later, on the second day of defend-

ant's second trial, the court denied defendant's motion to dismiss on the basis of double jeopardy and made findings and conclusions concerning the necessity for the first mistrial. We held:

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

*Lachat*, 317 N.C. at 85, 343 S.E. 2d at 878.

The present case is readily distinguishable from *Lachat*. Here, there was no initial mistrial declaration and subsequent attempt to reinstate jurors. In fact, in *Lachat*, Justice Mitchell wisely foresaw the need

> to make it clear, however, that this opinion does not address and is not dispositive of those cases in which manifest necessity for a mistrial clearly appears in the record . . . .

*Id.* at 87, 343 S.E. 2d at 879.

A jury's failure to reach a verdict due to deadlock is "manifest necessity" justifying declaration of a mistrial. *State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981); N.C.G.S. § 15A-1235(d) (1983). Jury deadlock is certainly apparent in the record of the present trial. On the first day of deliberations, the foreman expressed his concern that the jury could not reach a verdict; defendant then moved for a mistrial. On the morning of the second day of deliberations, the foreman again expressed concern that the jury could not reach a decision, and defendant again moved for a mistrial. Finally, on the afternoon of the second day of deliberations, the court determined that there was genuine deadlock and declared a mistrial.

That the court initially failed to make findings in support of the mistrial declaration does not alter the record, from which it is clear that there was deadlock warranting a mistrial. We find no violation of the double jeopardy provisions.

II.

A.

By their second argument, defendants contend that there was insufficient evidence of breaking or entering or of robbery to support submission of the felony murder charge.

At trial, defendants moved to dismiss on the grounds that there was insufficient evidence to permit the court to charge the jury on a theory of felony murder. The court denied the motion and instructed the jury on the underlying felonies of armed robbery and breaking or entering.

In reviewing the denial of a motion to dismiss, this Court examines the evidence adduced at trial in the light most favorable to the State, in order to determine whether there is substantial evidence of every essential element of the crime. *State v. McKinnon*, 306 N.C. 288, 293 S.E. 2d 118 (1982). Applying that standard, we address defendants' contentions with respect to each felony submitted as a basis for the felony murder charge.

1. ARMED ROBBERY.

**[2]** A murder committed in the perpetration of any robbery is murder in the first degree. N.C.G.S. § 14-17 (1986). Armed robbery is "(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." *State v. Beaty*, 306 N.C. 491, 496, 293 S.E. 2d 760, 764 (1982). The use or threatened use of a dangerous weapon must precede or be concomitant with the taking or be so joined with it in a continuous transaction by time and circumstances as to be inseparable. *State v. Hope*, 317 N.C. 302, 345 S.E. 2d 361 (1986).

Defendants argue that because Setzer was killed before any items were removed from his person, the robbery was merely an afterthought and not part of one continuous chain of events. We disagree.

Defendants analogize their position to that of the defendant in *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). In that case, the defendant was convicted of first-degree murder, in the perpetration of first-degree rape and robbery with a dangerous weapon. We held that there was insufficient evidence to support the submission of the armed robbery charge. Defendant's possession of a television set and an automobile after the victim's death did not give rise to an inference that the defendant took the objects from the victim's presence by use of a dangerous weapon. The evidence indicated "only that defendant took the objects as an afterthought once the victim had died." *Id.* at 102, 261 S.E. 2d at 119.

The present case is readily distinguishable from *Powell.* First, here, the items were removed from the person of the victim; in *Powell*, the objects taken were a television set and an automobile, neither of which is carried on one's person. Second, in the present case, unlike *Powell*, there was abundant evidence that removing money from the person of Setzer was more than a mere afterthought to the killing. The State's evidence established that defendants ransacked Dr. Abbate's office. When Setzer entered as part of his rounds as a security guard, defendants attacked him, took his gun, and pinned him to the floor. Defendant Pakulski then shot Setzer and took money *from his person.* A homicide victim is still a "person," within the meaning of a robbery statute, when the interval between the fatal blow and the taking of property is short. *State v. Fields*, 315 N.C. 191, 337 S.E. 2d 518 (1985); 2 W. LaFave and A. Scott, *Substantive Criminal Law* § 8.11(c) at 443 (1986).

Based on our review of the evidence, viewed in the light most favorable to the State, we find that there was sufficient evidence to warrant an instruction allowing the jury to find that the murder was committed in the course of an armed robbery.

2. FELONIOUS BREAKING OR ENTERING.

**[3]** Felony murder includes murder "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, *or other felony committed or attempted with the use of a deadly weapon.*" N.C.G.S. § 14-17 (1986) (emphasis added). Defendants argue that because the initial breaking into Dr. Abbate's office was not accomplished with a

deadly weapon, the breaking or entering may not serve as an underlying felony on which to predicate a felony murder conviction. We agree.

In *State v. Fields*, 315 N.C. 191, 337 S.E. 2d 518, this Court addressed the question of whether N.C.G.S. § 14-17 requires that a defendant effectuate the "other felony" with a deadly weapon or whether mere possession of the deadly weapon during the commission of the predicate felony satisfies the elements of the statute.

In *Fields*, the defendant, while possessing a .38-caliber pistol, broke into a homeowner's storage shed. When a neighbor came by to investigate, defendant shot and killed him with the pistol. This Court upheld defendant's conviction of felony murder and held that the homicide was "effected during the perpetration of a felony committed with the use of a deadly weapon." *Id.* at 200, 337 S.E. 2d at 523.

In response to defendant's contention that he did not use a weapon to accomplish the breaking into the storage shed, the *Fields* Court observed:

> We hold that possession is enough, and the defendant is guilty of felony murder, even if the weapon is not physically used to actually commit the felony. If the defendant has brought the weapon along, he has at least a psychological use for it: it may bolster his confidence, steel his nerve, allay fears of his apprehension. Even under circumstances where the weapon is never used, it functions as a backup, an inanimate accomplice that can cover for the defendant if he is interrupted.

*Id.* at 199, 337 S.E. 2d at 523.

In the present case, the State concedes that defendants did not use a deadly weapon to accomplish the breaking into Dr. Abbate's office. Moreover, there is no evidence that defendants even possessed a deadly weapon when they broke into Dr. Abbate's office. Thus, the State failed to prove possession of a deadly weapon at the time of the felonious breaking or entering. Accordingly, that felony may not be used as a predicate to a felony murder charge.

B.

**[4]** The State contends that error in submitting the breaking or entering felony is harmless because the jury could have based its verdict solely on the robbery felony. The State's argument, while superficially appealing, overlooks that the verdict form does not reflect the theory upon which the jury based its finding of guilty of felony murder. Where the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based its verdict on the theory for which it received a proper instruction. Instead, we resolve the ambiguity in favor of the defendant. *E.g., State v. Belton*, 318 N.C. 141, 162, 347 S.E. 2d 755, 768 (1986).

It is not clear that the jury found that the murder was committed in the course of an armed robbery. Because it is quite possible that the finding of guilty of felony murder was based on the breaking or entering on which the jury should not have been instructed, we must order a new trial.

Because we must remand the case for a new trial on the first-degree murder charges for insufficiency of the evidence as to breaking or entering committed with the use of a deadly weapon, we need not address defendants' contentions concerning error in the charge relating to the use of the deadly weapon or unanimity of the verdict upon submission of the case on alternative theories. Those issues will not arise on retrial.

III.

**[5]** In their final argument to this Court, defendants contend that the trial court erred in failing to give a requested instruction on prior inconsistent statements of a witness. During the instruction conference, defense counsel asked the court to give the pattern instruction on prior inconsistent statements (N.C.P.I.—Crim. 105.20). The judge then stated, "If I overlook that, call it to my attention. I don't think I will." The court never gave the requested instruction.

The State requests that we review this assignment of error under the plain error rule, inasmuch as the omission was not called to the court's attention prior to jury deliberations.

However, based on our reading of the record, it appears that defense counsel complied with the spirit of Appellate Rule 10(b)(2), which in pertinent part 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, stating distinctly that to which he objects and the grounds of his objection . . . . An exception to the failure to give particular instructions to the jury . . . shall identify the omitted instruction . . . by setting out its substance immediately following the instructions given . . . .

It is clear from the record that the defendant requested an instruction on impeaching a witness with a prior inconsistent statement. Therefore, our review consists of a determination of whether the court erred in failing to give the requested instruction and, if so, whether there is a reasonable possibility that had the error not been committed, a different result would have been reached. N.C.G.S. § 15A-1443 (1983).

A trial judge is to declare and explain the law arising on the evidence. N.C.G.S. § 15A-1232 (Cum. Supp. 1985). This Court has held that instructions on a witness' credibility relate to a subordinate feature on which the court need not charge absent a request from counsel. *State v. Eakins*, 292 N.C. 445, 233 S.E. 2d 387 (1977).

At trial, David Chambers was extensively cross-examined. Defense counsel questioned Chambers about several inconsistent statements he gave to police in 1978. Defense counsel also questioned Chambers about inconsistencies between his trial testimony and testimony he gave at earlier trials. It therefore appears that an instruction on prior inconsistent statements was warranted. However, the failure to give the requested instruction did not amount to prejudicial error, inasmuch as the court instructed the jury that Chambers had been granted complete immunity, that he was an interested witness, and that the jury should, in assigning weight and credibility to Chambers' testimony, "carefully examine his testimony and scrutinize it with care." Thus, any error in omitting an instruction on prior inconsistent statements was not prejudicial.

In conclusion, we find no error in defendants' convictions for larceny of a motor vehicle, felonious breaking or entering, robbery with a dangerous weapon, and conspiracy to commit breaking or entering. However, we hold that defendants are entitled to a new trial on the first-degree murder charges because of the improper submission of breaking or entering as a possible predicate felony of the felony murder. Because it is impossible to determine from the record whether the jurors based their conviction of felony murder on the breaking or entering, we order a new trial.

As to defendant Pakulski:

No. 79CRS710—First-degree murder—new trial.

No. 84CRS1709—Larceny of a motor vehicle—no error.

No. 84CRS1710—Felonious breaking or entering—no error.

No. 84CRS1711—Robbery with a firearm—no error.

No. 84CRS2027—Conspiracy to commit felonious breaking or entering—no error.

As to defendant Rowe:

No. 79CRS712—First-degree murder—new trial.

No. 84CRS1712—Larceny of a motor vehicle—no error.

No. 84CRS1713—Robbery with a firearm—no error.

No. 84CRS1714—Felonious breaking or entering—no error.

No. 84CRS2029—Conspiracy to commit felonious breaking or entering—no error.

Justice MITCHELL concurs in the result.

STATE OF NORTH CAROLINA v. WILLIAM LEE RASOR

No. 276A85

(Filed 2 June 1987)

**1. Criminal Law §§ 74.3, 92.5— codefendant's confession—inapplicability of Bruton rule—severance not required**

The rule of *Bruton v. United States*, 391 U.S. 123 (1968), did not require the severance of defendant's trial from that of his codefendant where all references to defendant were removed from the codefendant's confession before its admission into evidence, and where the codefendant took the stand and was cross-examined by defendant as to all aspects of his testimony. N.C.G.S. § 15A-927(c)(1).

**2. Criminal Law § 92.5— severance not required by antagonistic defenses**

The trial court did not abuse its discretion in denying defendant's motion to sever based on antagonistic defenses where the State presented plenary evidence of defendant's guilt apart from the codefendant's testimony, defendant had the opportunity to cross-examine the codefendant, and this was not a case in which the State relied on the testimony of each defendant to convict the other or in which the jury was likely to infer from the conflict that both defendants were guilty. N.C.G.S. § 15A-927(c)(2).

**3. Criminal Law § 162— waiver of objection—same evidence admitted without objection**

Defendant waived his objection to evidence of a breaking and entering and larceny of firearms which occurred only a short time before the murder and armed robbery for which defendant was on trial when he undertook to explain the circumstances of the prior crimes. N.C.G.S. § 8C-1, Rule 404(b).

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

There was sufficient evidence to support defendant's conviction for first degree murder based upon premeditation and deliberation where the codefendant's testimony tended to show that defendant was hiding in the back of a shed when the victim entered, that defendant came out of hiding after the codefendant pistol-whipped the victim, that defendant observed the victim struggling to stand up, and that defendant then picked up an ax and hit the victim repeatedly; defendant's own testimony established that upon his escape from a juvenile center he had firmly resolved to avoid recapture and that he heard a conversation between the codefendant and the victim during which the victim said that he would "call the law"; medical testimony tended to show that the victim was eighty-six years old, that he was 5 feet 7 inches tall and weighed about one hundred pounds, that he was in poor health and walked with the help of a cane, and that he suffered multiple traumatic head injuries caused by several blows; and police testimony tended to show that the shed walls and floor were splattered with blood, that the victim lay in a pool of blood, and that an ax found nearby was bloodstained.

5. **Robbery § 4.5— armed robbery—intent to steal—when formulated—continuous transaction**

When the circumstances of an alleged armed robbery reveal an intent to permanently deprive the owner of his property and a taking effectuated by the use of a dangerous weapon, it makes no difference whether the intent to steal was formulated before the use of force or after it, so long as the theft and the use of force can be perceived by the jury as constituting a single transaction.

6. **Robbery § 4.3— armed robbery—wounding of victim—subsequent taking of property**

The evidence was sufficient to support defendant's conviction of armed robbery where it tended to show a continuous transaction in which defendant critically wounded the victim and removed his wallet a short time afterwards.

7. **Criminal Law § 128.2— codefendant's sanitized confession—remarks by codefendant's counsel—denial of mistrial**

The trial court did not err in denying defendant's motion for a mistrial made when the codefendant's counsel objected to testimony concerning the codefendant's sanitized confession on the ground that "that's not his complete statement" since counsel's remark did not hint as to the contents of the excluded portions of the confession or intimate that those portions implicated defendant.

APPEAL by defendant from judgments sentencing defendant to life imprisonment and fourteen years, respectively, for convictions of murder in the first degree and robbery with a dangerous weapon, imposed by *Allen, J.*, at the 4 September 1984 session of Superior Court, BUNCOMBE County. Heard in the Supreme Court 9 March 1987.

*Lacy H. Thornburg, Attorney General, by David Roy Blackwell, for the state.*

*Arthur E. Jacobson for defendant.*

MARTIN, Justice.

For the reasons stated below, we find defendant's assignments of error to be meritless and hold that he received a fair trial free from prejudicial error.

Viewed in the light most favorable to the state, the evidence presented at trial tended to show the following: Defendant, aged sixteen, and Roger Giles, aged fifteen, were juvenile offenders committed to the Juvenile Evaluation Center in Swannanoa. On 19 March 1984, defendant and Giles escaped from the center.

They spent that night and most of the next day in hiding but resolved that they would make it home without recapture, even if they had to kill themselves.

Late in the afternoon of 20 March, defendant approached the home of Garland Norton and asked to use the telephone. Defendant called home but no one would agree to pick him up. He inquired about using the phone again later, but Mr. Norton stated that he would be leaving soon and suggested that defendant borrow a neighbor's phone instead. Defendant reported back to Giles, noting the presence of guns in the house. The two then waited until Mr. Norton departed before breaking a window and entering the house. They remained in the house through the evening of 22 March.

During their stay defendant and Giles vandalized the house and made long-distance calls to their families and friends in an effort to arrange a ride home. They discussed holding Mr. Norton at gunpoint and forcing him to provide transportation, but they departed without attempting to carry out this plan. When Mr. Norton returned on 22 March, he discovered gunshot holes in the ceiling, the dismantled remains of several guns from his collection, and the words "red rum" scrawled on the bathroom mirror. Two .44-caliber handguns, a .22-caliber rifle, a 30-30 rifle, several hundred rounds of ammunition, and a hunting knife were missing.

After leaving the Norton house, defendant and Giles came upon a convenience store and discussed the possibility of holding the clerk at gunpoint and forcing her to drive them home. They waited outside for the store to close but abandoned the plan when a police officer pulled up to the store. They decided to spend the night in an outbuilding across the street from the store. This structure was located behind the home of an elderly couple, John and Georgia McMahan, and was used as a garage or storage shed. Defendant suggested that he could either break into the McMahan house or gain entry by asking to use the phone and pulling a gun. The next morning, 23 March, defendant and Giles entered the convenience store armed with .44-caliber handguns but too many customers came in and they retreated to the McMahans' shed.

In the early afternoon, Mrs. McMahan came outside to hang her wash and spotted Giles in the shed. She saw shotgun shells

and gunpowder on the shed floor and briefly questioned Giles about this. She then made an excuse to go back in the house, where she informed her husband of Giles' presence and phoned the police to report a prowler on the property. Mr. McMahan, aged 86, went out to the shed and spoke to Giles, unaware that defendant was hiding in the back of the shed.

When he saw the shotgun shells, Mr. McMahan told Giles he was going to "call the law." As he turned his back, Giles hit him in the head with the butt of a handgun. Mr. McMahan fell to the floor, and defendant emerged from hiding. As Mr. McMahan struggled to stand up, defendant bludgeoned him two or three times with a kindling ax, then took his wallet and handed the money in it to Giles.

When police arrived on the scene they found Mr. McMahan lying in a pool of blood on the shed floor, just inside the doorway. A bloody ax rested nearby. Giles was apprehended as he walked away from the shed. He had two knives, a loaded .44-caliber handgun, and $67, which he identified as "the old man's money," on his person. While in custody he twice confessed to hitting Mr. McMahan with a pistol but named defendant as the one who had beaten him with the ax.

Defendant was apprehended when the officer assisting Mr. McMahan heard a rattling noise from the back of the shed and saw the barrel of a 30-30 rifle pointing out towards him. He ordered defendant to put the rifle down. Defendant initially refused to do so, complying only after the officer threatened to shoot. Defendant had ammunition and a vial of gunpowder in his possession. The 30-30 rifle was both loaded and cocked. A .22-caliber rifle and a .44-caliber handgun, both loaded, were discovered in the immediate vicinity. These guns, as well as the one taken from Giles, were identified by Garland Norton as the weapons stolen from his house. Mr. McMahan's wallet was discovered about a foot from defendant's hiding place.

John McMahan died on 6 April. An autopsy revealed that he had suffered two skull fractures, multiple scalp lacerations, brain hemorrhaging, and a brain laceration an inch deep. These injuries were consistent with "several blows" to the head and were determined to be "the initiating factor in a chain of events leading to death."

Defendant and Giles were tried jointly. Defendant chose to present evidence at trial and testified on his own behalf. He admitted stealing Mr. Norton's guns and planning to kidnap the convenience store clerk. He denied hitting Mr. McMahan or taking his wallet. He stated that he had heard Giles' conversation with Mr. McMahan, followed by a "thump" and the sound of something hitting the floor. He claimed that he did not witness the assault because the view from his hiding place in the back of the shed was obstructed. He further denied having pointed a rifle at police before his capture.

Defendant was convicted of robbery with a dangerous weapon and murder in the first degree based on premeditation and deliberation. (As to Giles' fate, see *State v. Giles*, 83 N.C. App. 487, 350 S.E. 2d 868 (1986).) Defendant brings forward four issues for our consideration on appeal.

Defendant first contends that the trial court erred by granting the state's motion for joinder and denying defendant's motions to sever. N.C.G.S. § 15A-926(b)(2)(a) authorizes joinder of defendants where the state seeks to hold each defendant accountable for the same crimes; however, section 15A-927(c)(2) requires the court to grant severance whenever it is necessary to promote or achieve a fair determination of guilt or innocence. Whether defendants should be tried jointly or separately pursuant to these provisions is a matter addressed to the sound discretion of the trial judge. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976). Absent a showing that defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed on appeal. *Id.*

Traditionally, a defendant objecting to joinder has been required to demonstrate prejudice by the joint trial. *State v. Finley*, 118 N.C. 1162, 24 S.E. 495 (1896). Defendant claims that the joint trial prejudiced him in that (1) Giles' extrajudicial confession, which also incriminated defendant, fell within the prohibitions of *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476 (1968), and (2) Giles' defense was antagonistic to his own.

**[1]** We first note that the *Bruton* ruling is not implicated under the facts of this case. In *Bruton*, the Supreme Court held that a non-testifying defendant's extrajudicial confessions may not be admitted at a joint trial because of the devastating effect upon the

confrontation rights of the other defendant, notwithstanding the trial court's instructions that the jury consider the statements only as against the declarant. 391 U.S. at 126, 20 L.Ed. 2d at 479. We have interpreted *Bruton* to require the exclusion of extrajudicial confessions at joint trials unless all portions which implicate defendants other than the declarant are deleted. *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968). "If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately." *Id.* at 291, 163 S.E. 2d at 502. These requirements are codified under N.C.G.S. § 15A-927(c)(1). *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985).

Here the state complied with the statute by sanitizing Giles' extrajudicial statements. All references to defendant were removed, and redacted versions of the statements were offered into evidence through the testimony of Deputy Donald Cole, the officer to whom they had been made. However, even if the state had not sanitized the statements, no *Bruton* violation would have occurred. *Bruton* applies only to the extrajudicial statements of a declarant who is unavailable at trial for full and effective cross-examination. *Nelson v. O'Neil*, 402 U.S. 622, 29 L.Ed. 2d 222 (1971). Where the declarant can be cross-examined, a codefendant implicated by extrajudicial statements has been fully accorded his right to confrontation. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976), *reh'g denied*, 293 N.C. 259, 243 S.E. 2d 143 (1978); *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858 (1972); *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492. Here the declarant Giles took the stand and was vigorously cross-examined by defendant as to all aspects of his testimony. The trial court did not abuse its discretion in denying defendant's motion to sever based on *Bruton*.

**[2]** Nor are we persuaded by defendant's assertion that antagonistic defenses mandated severance in this case. Defendant claims that this case exemplifies the situation wherein "the State stands by and witnesses a combat in which the defendants attempt to destroy each other, much to the glee of the prosecutor." We warned of such dangers associated with antagonistic defenses at joint trials in *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979), *cert. denied*, 446 U.S. 929, 64 L.Ed. 2d 282 (1980). However we also observed that the existence of antagonistic defenses alone does not necessarily warrant severance. The test under section 15A-927(c)(2) is whether the conflict in the defendants' respective

positions at trial is such that, considering all of the other evidence in the case, they were denied a fair trial. *Id.* at 587, 260 S.E. 2d at 640. Thus the focus is not on whether the defendants contradict one another but on whether they have suffered prejudice.

No prejudice results where the state presents plenary evidence of defendant's guilt, apart from the codefendant's testimony, and where defendant has the opportunity to cross-examine the codefendant. *See id.* at 588, 260 S.E. 2d at 641; *State v. Lake*, 305 N.C. 143, 286 S.E. 2d 541 (1982). Here the state brought forth evidence tending to show that defendant was an escapee from a state institution, that he was present at the murder scene, that he pointed a gun at police and refused to surrender until threatened with death, that his hiding place was surrounded with weapons, and that the victim's wallet lay within a foot of where he was apprehended. This was strong evidence to support a jury finding of defendant's guilt. We have already noted that defendant subjected Giles to rigorous cross-examination. Clearly this was not a case in which the state stood idly by and relied on the testimony of each defendant to convict the other or in which the jury was likely to infer from the conflict that both defendants were guilty. *State v. Nelson*, 298 N.C. at 588, 260 S.E. 2d at 641. We cannot say as a matter of law that the antagonistic defenses prevented the jury from rendering a fair and impartial verdict as to the guilt or innocence of each defendant. *State v. Lake*, 305 N.C. at 148, 286 S.E. 2d at 544. The trial court did not abuse its discretion in denying defendant's motion to sever based on antagonistic defenses.

**[3]** Defendant next contends that the trial judge improperly admitted evidence that defendant had committed offenses other than those for which he was being tried. Specifically, he objects to evidence that he and Giles broke into Garland Norton's house, vandalized the premises, and stole guns and ammunition. Defendant notes that he was charged with one count of felony breaking and entering and three counts of larceny of a firearm arising from his conduct at the Norton home. The trial judge denied the state's motion to join these charges with the murder and armed robbery charges for trial. Therefore, defendant argues, all references to crimes committed at the Norton home were extraneous to proof of murder and armed robbery and were admitted solely to prove

bad character, in violation of North Carolina Rule of Evidence 404(b). Rule 404(b) provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

The state insists that the evidence of breaking and entering and larceny was relevant because these crimes were part of a continuous chain of events beginning with the escape from the juvenile center and ending with the murder of Mr. McMahan. The state argues that these acts are intertwined with the murder and illustrate that defendant and Giles had embarked on a course of concerted illegal conduct and had acquired dangerous weapons with the intent to facilitate their flight at any cost. *See State v. Hunt*, 305 N.C. 238, 247, 287 S.E. 2d 818, 823 (1982) (evidence of connected crimes admitted to show "overall violent intent to pursue an evil course of action which eventually culminated in murder").

Under the facts of this case, we need not determine whether evidence of the other crimes was properly admitted for any purpose under Rule 404(b). Defendant himself testified extensively as to his conduct at the Norton home. He began by reading an eighteen-page statement he had made to the police, in which he admitted participation in the entry and vandalization of the home and the larceny of weapons. He provided more details of the incidents in response to direct and cross-examinations. Ultimately the jury heard the bulk of the contested evidence in defendant's own words during his case in chief. We have long held that when evidence is admitted over objection, and the same evidence is later admitted without objection, the benefit of the objection is lost. *State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982). Consequently we conclude that defendant waived his objection to the introduction of the evidence when he undertook to explain the circumstances of the Norton incident. *See State v. Maccia*, 311 N.C. 222, 316 S.E. 2d 241 (1984).

Defendant next contends that the trial court erroneously denied his motions to dismiss the charges at the close of the

state's evidence and at the close of all the evidence. In each instance, defendant moved for dismissal on the grounds that the evidence was insufficient as to each element of the offenses charged.

We note in passing that the denial of defendant's motion to dismiss at the close of the state's evidence is not properly at issue on this appeal. Defendant chose to offer evidence after his motion was denied and thereby waived appellate review of the trial judge's decision. N.C.G.S. § 15-173 (1983); *State v. Griffin*, 319 N.C. 429, 355 S.E. 2d 474 (1987). Thus, we need only address defendant's motion to dismiss at the close of all the evidence.

In considering a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense charged and substantial evidence that the defendant is the perpetrator. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). The evidence must be examined in the light most favorable to the state, and the state is entitled to every reasonable intendment and inference to be drawn therefrom. *State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980). Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

We first consider the sufficiency of the evidence with respect to the murder charge. Murder in the first degree is the intentional and unlawful killing of a human being with malice, premeditation, and deliberation. N.C.G.S. § 14-17 (1986); *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979). Premeditation means that the defendant formed the specific intent to kill for some length of time, however short, before the actual killing. *State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981). Deliberation means that the intent to kill was executed in a cool state of blood, without legal provocation, and in furtherance of a fixed design. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). No particular length of time is required for the mental processes of premeditation and deliberation; it is sufficient that the processes occur prior to, and not simultaneously with, the killing. *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970).

**[4]** Premeditation and deliberation ordinarily must be proved by circumstantial rather than direct evidence. *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808 (1985), *cert. denied*, --- U.S. ---, 90 L.Ed.

2d 733 (1986). Some of the circumstances which may support an inference of premeditation and deliberation are: the brutality of the killing, the nature and number of the victim's wounds, the dealing of lethal blows after the victim has been felled and rendered helpless, and a lack of provocation on the part of the victim. *Id.* We conclude that substantial evidence of each of these circumstances was presented here.

Giles' testimony, viewed in the light most favorable to the state, tended to show that defendant was hiding in the back of the shed when Mr. McMahan entered, that defendant came out of hiding after Giles pistol-whipped Mr. McMahan, that defendant observed Mr. McMahan struggling to stand up, and that defendant then picked up the kindling ax and hit Mr. McMahan repeatedly. Defendant's own testimony established that upon his escape from the juvenile center he had firmly resolved to avoid recapture and that he heard the conversation between Giles and Mr. McMahan during which Mr. McMahan said he would "call the law." Medical testimony tended to show that Mr. McMahan was eighty-six years old, that he stood 5 feet 7 inches tall and weighed about one hundred pounds, that he was in poor health and walked with the help of a cane, and that he suffered multiple traumatic head injuries caused by several blows on 23 March. Police testimony tended to show that the shed walls and floor were splattered with blood, that Mr. McMahan lay in a pool of blood, and that an ax found nearby was bloodstained.

Taken as a whole, this evidence supports a reasonable inference that defendant inflicted multiple wounds upon an elderly and infirm victim, that the victim had already been felled and rendered helpless, that the wounds were of a particularly brutal nature, and that they were inflicted without legal provocation. The evidence also supports an inference that defendant formed an intent to kill during the time which elapsed between the victim's statement that he would contact the authorities and defendant's wielding of the ax. In light of this evidence, we hold that there was sufficient evidence to support defendant's conviction for murder in the first degree based upon premeditation and deliberation. Defendant's motion to dismiss the charge of murder in the first degree at the close of all the evidence was properly denied.

We next consider the sufficiency of the evidence with respect to the robbery charge. Armed robbery is the taking of personal property from the person or presence of another, by the use or threatened use of a dangerous weapon, whereby the victim's life is endangered or threatened. N.C.G.S. § 14-87(a) (1986); *State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1981). Defendant maintains that there was insufficient evidence that he intended to commit armed robbery at the time of the assault on Mr. McMahan. He contends that all evidence points to an entirely different motivation for the use of the deadly weapon—to prevent Mr. McMahan from calling the police—and characterizes the removal of Mr. McMahan's wallet as, at most, an afterthought.

**[5]** This issue is controlled by the general rule most recently enunciated in *State v. Hope*, 317 N.C. 302, 345 S.E. 2d 361 (1986):

> In this jurisdiction to be found guilty of armed robbery, the defendant's use or threatened use of a dangerous weapon must precede or be concomitant with the taking, *or be so joined with it in a continuous transaction by time and circumstances as to be inseparable.*

*Id.* at 306, 345 S.E. 2d at 364 (emphasis added). Where there is a continuous transaction, the exact time relationship between the violence and the taking is unimportant. *Id.; State v. Lilly*, 32 N.C. App. 467, 232 S.E. 2d 495, *disc. rev. denied*, 292 N.C. 643, 235 S.E. 2d 64 (1977). Thus, when the circumstances of the alleged armed robbery reveal an intent to permanently deprive the owner of his property and a taking effectuated by the use of a dangerous weapon, it makes no difference whether the intent to steal was formulated before the use of force or after it, so long as the theft and the use of force can be perceived by the jury as constituting a single transaction. *State v. Fields*, 315 N.C. 191, 337 S.E. 2d 518 (1985).

**[6]** Here, the evidence viewed in the light most favorable to the state tended to show a continuous transaction in which defendant critically wounded the victim and removed his wallet a short time afterwards. We hold that this evidence was sufficient to support defendant's conviction for armed robbery. *See State v. Handsome*, 300 N.C. 313, 266 S.E. 2d 670 (1980) (evidence of armed robbery sufficient, even though no threats or requests for money were made and the victim was shot first before the money was taken,

because the violence and the taking constituted a continuous transaction). Further, we reject defendant's contention that evidence of another motive for the attack is somehow exculpatory. Mixed motives for using force do not negate actions pointing undeniably to a taking inconsistent with the owner's possessory rights. *State v. Fields*, 315 N.C. 191, 337 S.E. 2d 518 (defendant's theory that the taking of the victim's property was merely an afterthought is not persuasive where the force and theft appear to be a continuous transaction). Defendant's motion to dismiss the charge of armed robbery at the close of all the evidence was properly denied.

**[7]** In his final assignment of error, defendant contends that the trial court erred in denying his motion for mistrial. Defendant moved for mistrial on the grounds that remarks made by Giles' attorney during the testimony of Deputy Donald Cole raised impermissible inferences in the minds of the jurors.

Following an extensive voir dire on the admissibility of Giles' confessions, the trial court ruled that redacted versions of the statements would be allowed into evidence through the testimony of Deputy Cole. When the prosecutor began to question Cole as to Giles' redacted statement, the following exchange occurred:

Q. And what did [Giles] say?

A. He said that he had hit or slapped the old man in the back of the head with a gun and knocked him down.

MR. BELSER: Objection, Your Honor, on the grounds that that's not his complete statement.

THE COURT: Overruled.

Q. And did you ask anything further at that time?

A. I asked him why.

Q. And what was his response to that?

A. The Defendant Giles stated, 'Because he was going to call the law.'

MR. BELSER: Objection, Your Honor, because that's not his complete statement.

Defendant moved for a mistrial, objecting to Mr. Belser's indication that Giles' statement was incomplete. The trial judge denied the motion but cautioned Belser to refrain from embellishing his objections with improper commentary.

Whether a motion for mistrial should be granted is a matter addressed to the trial judge's sound discretion. A mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict. *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982). Counsel's remark "that's not his complete statement" appears neutral on its face. It does not hint as to the contents of the excluded portions of the confession, nor does it intimate that these portions implicate defendant. Defendant's bald assertion that he was "forced into a defensive posture which obligated him to take the witness stand on his behalf and to read his statement to the jury" is unsupported. He has not shown that the impropriety in the present case was so egregious as to affect the jury's ability to render an impartial verdict. Under the circumstances, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

No error.

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FRANCES H. ROSI AND HUSBAND, FRED D. ROSI v. MARY SHULL McCOY, GARLAND THOMAS McCOY, AND NAUTILUS HOMES, INC.

No. 122PA86

(Filed 2 June 1987)

**Deeds §§ 20.2; 20.6— restrictive covenants—setback requirement—right of developer to waive**

The trial court erred by granting summary judgment for plaintiffs, and not for defendants, in an action to enforce a subdivision restrictive covenant where plaintiffs and defendants owned adjoining lots in a subdivision with a setback requirement of fifteen feet on side lot lines; defendants' house was only 12.5 feet from the lot line; and defendants secured an amendment to the setback restriction under a clause in the restrictive covenants which allowed the developers, and their successors and assigns, to amend, modify or vacate any of the restrictions. The clause allowing modification of the covenants by the developer or its assigns referred to successor developers to successors in title to the lots. The question of whether the reservation by the developers of the right to amend the covenants meant that the covenants were personal

covenants was unnecessarily decided by the Court of Appeals because the defendants had obtained an amendment modifying the setback requirements, the developers still owned lots, the amendment was duly recorded, and the defendants were not in violation of the amendment.

Justice MITCHELL concurring in the result.

ON grant of plaintiffs' petition for discretionary review of a unanimous decision of the Court of Appeals, 79 N.C. App. 311, 338 S.E. 2d 792 (1986), reversing an order of summary judgment for plaintiffs entered by *Watts, J.*, at the 28 January 1985 Session of Superior Court, CURRITUCK County. Heard in the Supreme Court 11 February 1987.

*Trimpi, Thompson & Nash, by Thomas P. Nash, IV, and John G. Trimpi, for plaintiff-appellants.*

*John G. Gaw, Jr., for defendant-appellees.*

FRYE, Justice.

The sole question before this Court is whether the plaintiffs may enforce a restrictive covenant fixing a minimum side setback requirement against defendants when defendants have secured an amendment to this requirement with respect to their lot from the developers pursuant to another provision of the covenants in question. The Court of Appeals held that the plaintiffs could not enforce the original requirement, and we affirm, although on somewhat different grounds.

Plaintiffs and defendants own adjacent lots in the same development, the Whalehead Club Subdivision in Currituck County, North Carolina. The lots in the subdivision are subject to a set of restrictive covenants filed with the Register of Deeds, Currituck County. Paragraph "Fourth" of the covenants, which applies to plaintiffs' and defendants' lots, provides in part that "[n]o building or structure, including porches, shall be erected . . . nearer than . . . 15 feet to any interior side lot line . . . ." When defendants' builder erected a house on their lot, however, the builder placed the house only 12.5 feet from the plaintiffs' lot. Plaintiffs complained and initiated the instant action on 7 November 1983, seeking injunctive relief.

Defendants requested and secured an amendment for their lot to the side setback restriction, from fifteen feet to twelve feet, from the developer pursuant to paragraph "Fifteenth" of the restrictive covenants. Paragraph "Fifteenth" reads:

> The Developers, their successors or assigns, reserve the right to amend, modify or vacate any restriction herein contained whenever the circumstances, in the opinion of the Developers, their successors or assigns, warrant such amendment, modification or vacation as being necessary or desirable.

This paragraph applies to the entire development. The developers still owned lots in the subdivision at the time the amendment was given for the defendants' lot. The amendment was duly recorded with the Currituck County Register of Deeds.

All parties moved for summary judgment. The trial judge awarded summary judgment to the plaintiffs and issued an injunction requiring defendants to conform to the original fifteen foot restriction. Defendants were allowed 270 days to move their house. Defendants appealed to the Court of Appeals. Upon the defendants' posting bond, the trial judge postponed enforcement of the injunction pending the outcome of the appeal.

The Court of Appeals reversed the trial judge's decision and remanded the case for entry of summary judgment in favor of the defendants. Relying on a long line of previous decisions of this Court, the Court of Appeals held that the reservation by the developer of the right to amend, modify or vacate any of the restrictive covenants rendered the covenants personal in nature and therefore unenforceable *inter se* by the grantees of the developer. 79 N.C. App. at 313-14, 338 S.E. 2d at 793-94. Plaintiffs petitioned this Court for discretionary review, which was allowed 12 August 1986.

Plaintiffs do not contend that the Court of Appeals misstated the law; instead, they argue that the court misconstrued paragraph "Fifteenth." They contend that in deciding that the developer had reserved a right to amend or modify unilaterally any of the restrictive covenants, the Court of Appeals necessarily construed the phrase "[t]he Developers, their successors or assigns" to mean the developers alone, with words "successors or assigns"

having effect only if the original developers were succeeded in their position as developers by someone else. According to plaintiffs, the Court of Appeals thereby improperly failed to give effect to the word "successors." Plaintiffs would have the Court begin its analysis by interpreting the word "successors" to mean "successors in title to the lots," that is, the lot owners rather than successor-developers. They argue that the Court should then read the phrase "the developers, their successors or assigns" as requiring the developers to obtain the consent of all of the lot owners in the development before exercising the right to amend any of the restrictive covenants. Because the developers acted unilaterally, the plaintiffs contend that defendants' purported amendment is invalid.

We reject the plaintiffs' contentions and agree with the defendants that the Court of Appeals correctly construed paragraph "Fifteenth" to give the developers the right to amend the restrictive covenants unilaterally.

As this Court has previously stated,

> [t]he applicable rules of interpretation require that the meaning of the contract be gathered from a study and a consideration of all the covenants contained in the instrument and not from detached portions. It is necessary that every essential part of the contract be considered—each in its proper relation to the others—in order to determine the meaning of each part as well as of the whole, and each part must be given effect according to the natural meaning of the words used.

*Callahan v. Arenson*, 239 N.C. 619, 625, 80 S.E. 2d 619, 623-24 (1954).

Because restrictive covenants are in derogation of the free and unfettered use of land, they are to be strictly construed in favor of the unrestricted use of property. *Shuford v. Oil Co.*, 243 N.C. 636, 91 S.E. 2d 903 (1956); *Ingle v. Stubbins*, 240 N.C. 382, 82 S.E. 2d 388 (1954). All ambiguities will be resolved in favor of the free alienation of land. *Hobby & Son v. Family Homes*, 302 N.C. 64, 274 S.E. 2d 174 (1981). With these principles in mind, we turn first to consider the natural meaning of the words of paragraph "Fifteenth."

As used in this paragraph, the word "successors" does not appear to mean all successors in title, as urged by the plaintiffs. Black's Law Dictionary 1283 (rev. 5th ed. 1979) defines a successor as "[o]ne that succeeds or follows; one who takes the place that another has left, and sustains the like part or character; one who takes the place of another by succession." Thus, "successor" does not invariably refer to a successor in title; rather, the reader must consider the nature of the "part or character" to be taken. In paragraph "Fifteenth," this "part or character" is described as "the developers," not "the grantors" or some similar term. Successor-developers thus appears to be the natural meaning of the term "successors" as used in this phrase rather than all successors in title to the lots.

The provisions of paragraph "Fifteenth" support the conclusion that the "part or character" in question was that of the developers as developers rather than as mere lot owners. By its own terms, the paragraph *reserves* a right; this terminology is not consistent with an agreement to exercise the right reserved only with the consent of all other lot owners. The language employed in describing the right reserved, "whenever the circumstances, in the opinion of the Developers, their successors or assigns, warrant such amendment . . . as being necessary or desirable," contains terms generally associated with the exercise of individual judgment. Taken as a whole, the wording in this paragraph is more consistent with an intent to reserve to the developers some flexibility with respect to future development than with an intent for them to bind themselves to make no change unless all of the lot owners agreed.

Even assuming, *arguendo*, that "successors" in this paragraph means successors in title, the phrase "the developers, their successors or assigns" cannot be given plaintiffs' interpretation without altering the ordinary meaning of the construction employed. Plaintiffs argue that for purposes of interpretation, the word "and" should be inserted into the phrase between "developers" and "their successors," so that the phrase would read "the developers *and* their successors or assigns." Read in this manner, plaintiffs argue, the phrase would mandate the consent of any "successors or assigns" before the restrictive covenants could be validly amended or modified. However, a structure in the form, word A, word B, or word C, employed in the phrase under con-

sideration, generally indicates the use of an enumerative series (e.g., coffee, tea or milk). *See* W. Follett, *Modern American Usage* 397-401 (1966). The conjunction employed at the end of the series expresses the relationship between each member of the series, not merely the relationship between its two final members. *See id.* The series here would ordinarily be read as "the developers, or their successors or assigns." While "or" may be conjunctive rather than disjunctive, a conjunctive interpretation is permissive in such usage, not mandatory (e.g., "Would you like cream or sugar?"). *See* W. Follett, *Modern American Usage* 64-65.

Our interpretation is buttressed by the fact that if plaintiffs' interpretation were adopted, paragraph "Fifteenth" would add nothing to the meaning of the covenants. Plaintiffs argue that paragraph "Fifteenth" merely means that if all the lot owners, including the developers, agree, the restrictive covenants may be amended, modified or vacated. However, the law already recognizes the right of owners of lots subject to restrictive covenants to change or vacate the covenants if all consent. *See* P. Hetrick, *Webster's Real Estate Law in North Carolina* § 389 (rev. ed. 1981), and cases cited therein. Interpretations that result in superfluous terms are disfavored. Restatement (Second) of Contracts § 203 and comment b at 93 (rev. ed. 1981).

A consideration of the entire instrument, as a whole, discloses no necessity for giving the words of paragraph "Fifteenth" any meaning other than their natural meaning. Following an introduction in which the lot owners are specifically described as "persons, firms, corporations, hereafter acquiring any property [in the Whalehead development]," the instrument contains thirteen numbered paragraphs restricting the use of the lots in the development. Several of these permit specific actions only with the prior approval of the developers. The fourteenth paragraph provides a mechanism for securing the approval of the developers where required. The fifteenth and final numbered paragraph is the one in question, reserving the right to amend, modify or vacate the covenants. In a closing statement, the instrument essentially sets forth an intention that the covenants run with the land and provides for changing the covenants as to each section after 1992 by agreement of a majority of the lot owners in that section. The lot owners are described in this paragraph as "all parties and all persons claiming under them."

Thus, we note the following points. First, the lot owners are not described as "successors" to the developers in any other portion of the document but are described with specificity as "persons . . . hereinafter acquiring any property" and "all persons claiming under them." Second, the numerous provisions wherein the developers retained a right to approve particular actions by the lot owners indicate a plan for continuing control of the development by the developers. Third, the provision that a majority of the lot owners could change the covenants does not appear until the closing section, separated from paragraph "Fifteenth." Plaintiffs argue that this provision should be read together with paragraph "Fifteenth" as showing a scheme whereby until 1992 the covenants could be changed only with the consent of all lot owners but after that time, by agreement of a majority of the lot owners in an individual section for that section. Were this interpretation correct, however, one would expect to find both of these provisions together in paragraph "Fifteenth," or alternatively, the second provision in a separate paragraph immediately following paragraph "Fifteenth," instead of scattered in different portions of the instrument.

Plaintiffs also argue that the fact that in paragraphs "First" through "Fourteenth," the developers are merely described as "developers," with no reference to "successors or assigns," somehow indicates that the addition of the words "successors or assigns" in paragraph "Fifteenth" compels our acceptance of their interpretation. We are not persuaded. The addition of the phrase "successors or assigns" to paragraph "Fifteenth" renders it unnecessary in the previous paragraphs.

Finally, we note that plaintiffs have shown no other instance wherein a court has interpreted a phrase similar to "developers, their successors or assigns," in a clause in a set of restrictive covenants similar to paragraph "Fifteenth," as having the meaning plaintiffs would have this Court give to paragraph "Fifteenth." *But cf., e.g., Suttle v. Bailey*, 68 N.M. 283, 361 P. 2d 325 (1961) (although plaintiffs' suggested interpretation was apparently not raised in this case, the court interpreted the reservation of a right to amend by the grantor, his successors or assigns, as negating an intent that restrictive covenants run with the land, although such intent was expressly set forth in the agreement).

Although the Court of Appeals correctly construed paragraph "Fifteenth" as reserving to the developers a right to amend the restrictive covenants without the consent of all of the lot owners, the court actually decided a broader question than was necessarily before it. It essentially held that the reservation by the developers of the right to amend the covenants meant that the covenants were personal covenants which could only be enforced by the developers, not by the lot owners *inter se*. 79 N.C. App. at 314, 338 S.E. 2d at 794. The court thereby held that the plaintiffs could not enforce any of the restrictive covenants against these defendants (and necessarily *vice versa*), regardless of whether either party secured an amendment. Strictly speaking, however, the only question before the court was whether the plaintiffs could enforce the original restrictions against the defendants where the defendants had obtained an amendment modifying side setback requirements as to their lot pursuant to paragraph "Fifteenth," the developers still owned lots at that time, the amendment was duly recorded, and the defendants were not in violation of the amendment. Because it is not necessary to decide whether plaintiffs could maintain an action against defendants for violation of the restrictive covenants in the absence of amendment, we expressly decline to decide that question in this action. *See Higdon v. Jaffa*, 231 N.C. 242, 56 S.E. 2d 661 (1949) (where developer had retained a right to sell lots in a subdivision without restriction but never exercised this option, the reservation was rendered wholly nugatory and restrictive covenants could be enforced *inter se* by the lot owners); *Hawthorne v. Realty Syndicate, Inc.*, 300 N.C. 660, 268 S.E. 2d 494 (1980) (a general plan—indicative of an intent that restrictive covenants run with the land—may be shown by the existence of substantially similar restrictions).[1] *Cf. Nelle v. Loch Haven Homeowners' Association, Inc.*, 413 So. 2d 28 (Fla. 1982) (resolving conflict between covenants apparently providing for a general scheme or plan and a reservation by the developers of a right to amend these covenants by reading into the covenants an implied requirement of reasonableness and allowing lot owners to enforce restrictions *in-*

1. The Whalehead Subdivision contains 1,117 lots. Upon the record before the Court, the developers had given only six amendments, applying only to the setback requirements. The largest modification shown therein was 4.9 feet to one front setback requirement; modifications of only two to three feet or less are more usual.

*ter se*); *see also Wright v. Cypress Shores Development Co.*, 413 So. 2d 1115 (Ala. 1982).

The party moving for summary judgment must establish the lack of any triable issue by showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972). The record before this Court establishes, and plaintiffs do not contest, that defendants secured an amendment from the developers pursuant to paragraph "Fifteenth," that the developers still owned lots in the subdivision at that time, that the amendment was duly recorded, that defendants are not in violation of the amendment, and that plaintiffs took title to their property with notice of the contents of paragraph "Fifteenth." Plaintiffs contested only the interpretation of paragraph "Fifteenth," contending that the paragraph mandated their consent before a valid amendment could issue. With this question decided against them, the Court of Appeals was clearly correct in reversing the trial judge's order of summary judgment for the plaintiffs.

Defendants also moved for summary judgment. Applying the same standard to the facts just set forth, it is also clear that defendants are entitled to summary judgment as to plaintiffs' action against them. The Court of Appeals remanded the case to the Superior Court, Currituck County, for entry of summary judgment in favor of defendants. Insofar as the Court of Appeals' order awarded summary judgment to defendants only as to plaintiffs' action against them, and not as to any other claims defendants may have asserted in their pleading, this ruling was also correct.

Accordingly, the decision of the Court of Appeals is affirmed as modified herein, and the case is remanded to that court for further remand to the Superior Court, Currituck County, for further proceedings not inconsistent with this opinion.

Modified and affirmed.

Justice MITCHELL concurring in result.

It seems rather clear to me that the covenants in question in this case either run with the land or are personal covenants.

Whether they are one or the other is dependent not upon whether the developers have sold all of the lots in the development, but upon a proper interpretation of the covenants themselves.

Assuming the majority is correct in construing the term "successors" to include only "successor-developers" and not all successors in title to the lots, I share the view of the Court of Appeals that the covenants, so construed, gave "notice to all grantees within the subdivision that, by gaining the consent of the developers, a grantee may place his building on any lot within the area without right of interference by the owner of any other lot." *Rosi v. McCoy*, 79 N.C. App. 311, 313, 338 S.E. 2d 792, 794 (1986). This definition of "successors" compelled the Court of Appeals to conclude that the restrictions are not part of a general plan for residential development for the benefit of each purchaser, but are enforceable only as personal covenants for the benefit of the developers. *See Maples v. Horton*, 239 N.C. 394, 80 S.E. 2d 38 (1954); *Humphrey v. Beall*, 215 N.C. 15, 200 S.E. 918 (1939); Annot., 4 A.L.R. 3d 570 (1965).

The majority avoids deciding whether the covenants in question here are personal covenants by stating that the only question to be decided is "whether the plaintiffs [successors in title to the developers] could enforce the original restrictions against the defendants who had obtained an amendment of the setback requirements from the developers." That was the only question answered by the Court of Appeals, although it did so by holding that the covenants were personal covenants which could be enforced only by the developers and not by the lot owners. The Court of Appeals answered the same question now answered by this Court, but it did so upon a different—and in my view more nearly correct—theory than that relied upon by the majority here.

The theory relied upon by the Court of Appeals, in addition to being correct, is more true than that of the majority here to the general rule recited by the majority—that restrictive covenants are to be construed in favor of the unrestricted use and free alienation of land. The Court of Appeals reached its construction in favor of the unrestricted use of property from the face of the covenants themselves. The majority here avoids the same reasoning only by viewing the covenants in the artificially dim light

of the partial amendment of the covenants as to one of the lots by the developers and the fact that the developers have not yet sold all of the lots in the development.

The opinion rendered by the Court of Appeals made the status of the restrictive covenants before us clear—they were construed to be personal covenants solely for the benefit of the developers. The opinion of the majority of this Court leaves the plaintiffs and remaining lot owners of the development to wonder if their ability to enforce the covenants against other lot owners depends upon whether the developers have granted amendments relating to particular lots or have sold all of the lots in the development. Questions concerning the permissible uses of land must be answered with much more certainty.

For the reasons fully stated in the opinion of the Court of Appeals, I concur only in the result reached by the majority of this Court.

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STATE OF NORTH CAROLINA v. OLLIE LEWIS BLAKE

No. 692A86

(Filed 2 June 1987)

**Homicide § 21.8— second degree murder—sufficiency of evidence**

The evidence was sufficient to permit the jury to find beyond a reasonable doubt that all the elements of second degree murder were present and that defendant was the perpetrator of the crime where it tended to show that, on the day the victim was killed, defendant was angry with and threatened the victim because the victim shot his truck; defendant was upset because the victim had been released on bond and went to the magistrate's office to inquire about the victim's release; within ten to fifteen minutes thereafter a man, fitting defendant's description and driving a vehicle fitting the description of a vehicle defendant was driving shortly before and shortly after the shooting, was observed at the victim's residence; within minutes of this observation, a gunshot was heard; the victim ran from his dwelling and fell in the street where he died from a gunshot wound; thereafter a man fitting defendant's description moved beside the victim's residence toward the front porch; and defendant had concentrations of the constituents of gunshot primer on his hands within two and one-half hours of the killing.

Justice WEBB dissenting.

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, 83 N.C. App. 77, 349 S.E. 2d 78 (1986) (*Hedrick, Chief Judge*, with *Arnold, J.*, concurring and *Orr, J.*, dissenting), finding no error in defendant's trial before *Ellis, J.*, at the 18 November 1985 criminal session of DURHAM County Superior Court, which resulted in a conviction of second degree murder. Heard in the Supreme Court 14 May 1987.

*Lacy H. Thornburg, Attorney General, by Francis W. Crowley, Assistant Attorney General, for the state.*

*Loflin & Loflin, by Thomas F. Loflin III, for defendant appellant.*

EXUM, Chief Justice.

The question presented is whether the trial court erred in denying defendant's motion to dismiss based upon the sufficiency of the evidence to support a conviction of second degree murder. We hold the evidence is sufficient to support a verdict of guilty of second degree murder and, therefore, affirm the decision of the Court of Appeals.

I.

Defendant was charged in a proper bill of indictment with the murder of Douglas McLamb. At trial, the evidence presented by the state tended to show the following:

On Saturday, 20 October 1984, between 6:30 and 7 p.m., defendant Blake and his girlfriend Debra Johnson, traveling in defendant's black El Camino truck, came to Douglas McLamb's residence located at 915 Washington Street. An argument ensued between defendant and McLamb which led to McLamb's firing several shots from a .22 caliber rifle at defendant's black El Camino as defendant, Debra and her daughter, Angel, were driving away. They stopped at a nearby convenience store, and Debra called the police.

Defendant walked back to McLamb's house, and he and McLamb began arguing again. Durham police officers arrived to investigate the reported shooting. At first defendant tried to persuade the officers not to arrest McLamb. But when the of-

ficers informed defendant that one bullet had struck defendant's El Camino, defendant stopped trying to help McLamb, pointed a finger at McLamb's face and stated, "If the bullet hit the car that is your ass." The police arrested McLamb and confiscated the rifle. On the way downtown McLamb stated that he was especially afraid of defendant since he did not have a gun to defend himself.

Shortly after McLamb was arrested, his wife and her daughter left 915 Washington Street and drove with defendant and Debra Johnson in the black El Camino to defendant's mobile home residence on Mannix Road in Durham County. Defendant called the magistrate's office, discovered McLamb had been released on bond, and told Mrs. McLamb he was going to the magistrate to find out why they had let McLamb go. Defendant left the trailer with Richard Clayton and drove to the magistrate's office in the El Camino. Defendant was seen with Richard Clayton at the magistrate's office inquiring about McLamb ten to fifteen minutes after McLamb's 9:40 p.m. release.

Douglas McLamb had been in police custody two hours when he was released on bond at approximately 9:40 p.m. He was picked up behind the courthouse by his best friend and neighbor, Ricky New. New testified that on the way home McLamb expressed his fear of defendant and his fear that defendant would come back to harm him. New dropped off McLamb at 915 Washington Street.

About ten or fifteen minutes later New and his wife were watching television when a car with "sort of loud mufflers" pulled up in front of his house and parked across the street. New said he "just got up to see who it was and it was Lewis Blake's [defendant's] car." The car's lights were out and it was pointed toward McLamb's house. New telephoned McLamb but the number was busy so he left by the back door to warn him.

New heard two loud noises which sounded like gunshots. He saw McLamb come out the front door of his home and run to the street. New heard another loud noise and saw McLamb collapse in the street. New called the police to report what had happened. While New was talking to the dispatcher, he and his wife saw the black El Camino turn around in front of their house and drive away. They then went to the street and found McLamb with a

wound in his right shoulder. McLamb died as a result of the gunshot wound, which pierced several major arteries.

Mrs. New saw the black El Camino parked in front of her home at about 10 p.m. There appeared to be two people inside. She saw an average-sized man with long blond hair, wearing a dark T-shirt and faded jeans, get out of the driver's seat and walk in the direction of McLamb's house. She did not see where the driver went. While trying to see where the man went, Mrs. New heard a gunshot and saw McLamb run out of his front door and fall in the street. Mrs. New could not identify defendant as being the man she saw. She also testified that the black El Camino did a three-point turn and left hastily after McLamb collapsed.

Another neighbor of McLamb, Mrs. Mazelle Peninger, while on her back porch, thought she heard a shot and saw an unidentified individual on the back stairs of McLamb's house. Her back porch faced McLamb's back door at an angle. She could not describe what type of clothing the person was wearing or whether the individual had a weapon. Mrs. Peninger's son-in-law, Joseph Chambers, observed a white male with shoulder-length blond hair, wearing blue jeans, running beside McLamb's house. He saw the man run around to the front of McLamb's house. He heard two shots with a slight pause between them. Neither Mrs. Peninger nor Mr. Chambers could identify defendant as the individual they saw that night.

The victim's brother testified that he went to the house at 915 Washington Street in the morning of 21 October 1984 and observed the back door standing open, a broken door jam, and a broken cylinder lock. A piece of the lock was lying on the kitchen floor. He found a spent .25 caliber shell cartridge in the kitchen and gave it to investigating officers.

A magistrate, who was present at McLamb's booking after his arrest, testified that after McLamb was released, two men, one of whom he recognized as defendant, approached him and asked if McLamb had been released. When he replied affirmatively, they immediately left the office. This inquiry occurred ten to fifteen minutes after McLamb left.

The state introduced into evidence a tape recording of three telephone calls received by the emergency 911 dispatcher. At

10:10:47 p.m. a call was received. The caller said, "This is 915 Washington Street. Somebody is trying to kick my door in." Another call came in at 10:11:49 p.m. The caller said, "There's somebody dead on the street. Washington Street and Monmouth Avenue."

Around midnight the same night of the shooting defendant was picked up in his black El Camino by a deputy sheriff. Defendant was with Richard Clayton. Defendant was wearing "a black tee-shirt, blue jeans, and a pair of brown boots. . . ." Other evidence showed defendant to be a white male with shoulder-length dark blond, or light brown, hair. Richard Clayton's hair was medium length, substantially shorter than defendant's.

Durham Police Department Identification Officer Byers made hand wipings of defendant's hands at 12:40 a.m. on Sunday, 21 October 1984, which were analyzed by forensic chemist Creasy of the SBI for the presence of gunshot residues. Chemist Creasy found concentrations of barium, antimony and lead—constituents of gunshot primer—on defendant's hand wipings, which were higher than the concentrations found on the victim's hands. The concentrations of these elements were not present in the proper locations for Creasy to render an opinion whether defendant could have fired a gun.

Defendant offered no evidence.

The jury found him guilty of second degree murder, and the trial judge sentenced him to fifteen years' imprisonment.

II.

In his only assignment of error, defendant contends there was insufficient evidence to support his conviction of second degree murder and that the trial court erred in denying his motion to dismiss at the close of the evidence.

Second degree murder is the unlawful killing of another human being with malice but without premeditation and deliberation. *State v. Brown*, 300 N.C. 731, 268 S.E. 2d 201 (1980); *State v. Jenkins*, 300 N.C. 578, 268 S.E. 2d 458 (1980). Defendant contends there was insufficient evidence to show that he committed the crime.

When considering a motion to dismiss for insufficiency of evidence, the court is concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). The evidence must be considered in the light most favorable to the state; all contradictions and discrepancies therein must be resolved in the state's favor; and the state must be given the benefit of every reasonable inference to be drawn in its favor from the evidence. *State v. Scott*, 296 N.C. 519, 251 S.E. 2d 414 (1978); *State v. Miller*, 289 N.C. 1, 220 S.E. 2d 572 (1975). There must be substantial evidence of all elements of the crime charged, and that the defendant was the perpetrator of the crime. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982); *State v. Scott*, 296 N.C. 519, 251 S.E. 2d 414; *State v. Clyburn*, 273 N.C. 284, 159 S.E. 2d 868 (1968).

In *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649, we defined substantial evidence as follows:

> Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E. 2d 164, 169 (1980). 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. *State v. Powell*, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980). If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be allowed. *State v. Cutler*, 271 N.C. 379, 383, 156 S.E. 2d 679, 682 (1967). This is true even though the suspicion so aroused by the evidence is strong. *State v. Evans*, 279 N.C. 447, 453, 183 S.E. 2d 540, 544 (1971).

307 N.C. at 66, 296 S.E. 2d at 652. This statement of the sufficiency of the evidence test comports with the articulation given by the United States Supreme Court as 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." *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L.Ed. 2d 560, 573 (1979) (emphasis original). *See State v. LeDuc*, 306 N.C. 62, 291 S.E. 2d 607 (1983); *State v. Earnhardt*,

307 N.C. 62, 296 S.E. 2d 649; *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981).

> The test of the sufficiency is the same whether the evidence is circumstantial or direct, or both: the evidence is sufficient to withstand a motion to dismiss and to take the case to the jury if there is 'evidence [which tends] to prove the fact [or facts] in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture.' *State v. Johnson*, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930). If the evidence adduced at trial gives rise to a reasonable inference of guilt, it is for the members of the jury to decide whether the facts shown satisfy them beyond a reasonable doubt of defendant's guilt. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

*State v. Jones*, 303 N.C. 500, 504, 279 S.E. 2d 835, 838.

These controlling principles of law are more easily stated than applied to the evidence in a particular case. Of necessity, the principles must be applied to the evidence introduced in each case, and adjudications in prior cases are rarely controlling as the evidence differs from case to case. *State v. Cutler*, 271 N.C. 379, 383, 156 S.E. 2d 679, 682 (1967).

Defendant has cited several cases in which the reviewing court found the evidence insufficient to permit consideration by the jury. The most persuasive of these cases is *State v. Chapman*, 293 N.C. 585, 238 S.E. 2d 784 (1977). Defendant contends that a comparison of the evidence in *Chapman* with that here compels the conclusion that defendant's motion to dismiss for insufficiency of the evidence should have been allowed. In *Chapman*, a felonious assault case, the state's evidence tended to show that the victim was struck in the back by a shotgun blast as he prepared to leave his home. The victim did not see who shot him or where the blast came from. Three weeks before the shooting, the victim had been acquitted of a robbery charge brought against him by defendant. Although defendant had refused to talk to the victim after the acquittal, there had been no harsh words between them concerning the charge. After the shooting defendant was arrested and advised of his constitutional rights. At this time it was determined defendant owned a 12-gauge shotgun, which he voluntarily gave to the police, stating he had not fired it in two months. At

the time it was surrendered, however, the gun contained a spent shell similar to one discovered near the place of the assault and later determined to have been fired from defendant's gun. The breech of the gun carried a strong odor of gunpowder.

Defendant gave an exculpatory statement that he had been watching television when he was told there had been a shooting. Defendant's evidence tended to show that defendant was seen by a passing motorist near where the crime occurred. At that time he had nothing in his hands, nor did the motorist see a gun nearby. Shortly after he passed defendant, the motorist heard a gunshot and reported it to the police. The motorist returned to the scene a few minutes later and observed defendant wearing the same clothing as before.

In a unanimous opinion, we held the evidence in *Chapman* was insufficient to do more than raise a mere suspicion that it was defendant who secretly assaulted the victim. In his opinion for the Court Justice Copeland stated:

> The most the State has shown is that the victim could have been shot by a shell fired from defendant's gun. There is nothing, other than an inference which could arise from mere ownership of the gun, that would tend to prove that defendant actually fired the shot. 'Beyond that we must sail in a sea of conjecture and surmise. This we are not permitted to do.' *State v. Minor*, 290 N.C. 68, 75, 224 S.E. 2d 180, 185 (1976). Even when the State's evidence is enough to raise a strong suspicion, if it is insufficient to remove the case from the realm of conjecture, nonsuit must be allowed.

*State v. Chapman*, 293 N.C. at 587-88, 238 S.E. 2d at 786.

Although *Chapman* supports somewhat defendant's contentions, we find the evidence here points more clearly to defendant's guilt than did the evidence in *Chapman*. In summary, the evidence tends to show that on 20 October 1984 defendant, angry with the victim because the victim shot his truck, expressed his ill will towards and threatened the victim. Within hours, defendant, upset because the victim had been released on bond, went to the magistrate's office to inquire about the victim's release. Within ten to fifteen minutes thereafter a man, fitting defendant's description and driving a vehicle fitting the description of a vehi-

cle defendant was driving shortly before and shortly after the shooting, was observed at the victim's residence. Within minutes of this observation a gunshot was heard. The victim ran from his dwelling and fell in the street where he died from a gunshot wound. Thereafter a man fitting defendant's description moved beside the victim's residence toward the front porch. Defendant had concentrations of the constituents of gunshot primer on his hands within two and one-half hours of the killing.

This evidence taken all together is sufficient to permit the jury reasonably to find beyond a reasonable doubt both that defendant was the perpetrator of the crime and that all the elements of second degree murder are present. This case is different from *Chapman* in that here all of the events pointing to defendant's guilt occurred within hours and in rapid succession—defendant's anger toward the victim for shooting his truck, defendant's anxious inquiry concerning the victim's release on bond, and the shooting of the victim at the victim's home where moments before and after the shooting a person fitting defendant's description and driving a truck like defendant's truck was seen. In *Chapman* there had been no expression of anger by defendant toward the victim. The only evidence of possible ill will between the two was the victim's acquittal on a criminal charge brought by defendant; but this event occurred some three weeks before the shooting.

Cases supporting our decision are: *State v. Perry*, 293 N.C. 97, 235 S.E. 2d 52 (1977) (conviction upheld where evidence established defendant committed an earlier robbery and the same gun and same *modus operandi* used in both crimes, even though there was no direct evidence placing defendant at the crime scene); *State v. Durham*, 201 N.C. 724, 161 S.E. 398 (1931) (conviction upheld despite no eyewitness to shooting, where defendant possessed a motive and an opportunity to commit the crime and other circumstances pointed to defendant); *State v. Matthews*, 162 N.C. 542, 77 S.E. 302 (1913) (although no one saw anyone shoot deceased, defendant's conviction upheld where evidence showed defendant was angry at deceased, had threatened to kill the deceased, had lain in wait for deceased on a prior occasion, and was near crime scene); *State v. Wilcox*, 132 N.C. 1120, 44 S.E. 625 (1903) (no eyewitness to the actual shooting; conviction upheld where defendant had the motive and opportunity to commit the crime and was the last person to see the deceased alive); *State v.*

*Morrow*, 31 N.C. App. 654, 230 S.E. 2d 568 (1976) (conviction upheld where no direct evidence placed defendant at the crime scene but where the evidence tended to show: (1) defendant's automobile was similar to car seen late at night parked beside a mountain road where a man was seen holding a "slumped-over" woman dressed in a gown; (2) defendant's wife's body was found covered by a gown at a point approximately fifteen feet from where the car was parked; (3) a neighbor saw defendant return home alone later that same night; and (4) defendant expressed a lack of concern as to his wife's whereabouts when he reported her missing a few days after she was found dead).

The decision of the Court of Appeals is, therefore,

Affirmed.

Justice WEBB dissenting.

I dissent. I do not believe this case can be distinguished from *State v. Chapman*, 293 N.C. 585, 238 S.E. 2d 784 (1977). Unless we are willing to overrule *Chapman*, which I favor, I do not believe we should hold there is sufficient evidence to convict the defendant in this case. In *Chapman*, the defendant was positively identified as being at the scene at the time the victim was shot. The defendant had a motive for shooting the victim. A spent shell from the defendant's shotgun was found in the area from which the victim was shot and shortly after the victim was shot the defendant's shotgun had recently been fired. This Court held the evidence was not sufficient to convict the defendant.

In this case there was evidence that defendant had a motive to shoot the victim and the defendant threatened the victim. There was evidence from which the jury could conclude the defendant was in the area when the victim was shot. The evidence was inconclusive as to whether the defendant had recently fired a gun. The majority has held this is substantial evidence of every element of the crime. I would agree with the majority if there were no *Chapman*. It seems to me the evidence in this case is as close to the evidence in *Chapman* as it could be on the salient features of the case. I believe *Chapman* should be overruled. If we are not to overrule *Chapman*, I believe we should say there is not sufficient evidence to convict the defendant in this case.

STATE OF NORTH CAROLINA v. ROGER LEE FREEMAN

No. 160A86

(Filed 2 June 1987)

1. **Rape and Allied Offenses § 4.1— evidence relevant to show victim's fear**

A rape victim's testimony that defendant fumbled with ropes hanging from a pipe but never tied her up, that she was terrified and thought she was going to die, and that after she and defendant returned to her apartment from an aborted robbery, she couldn't believe she was still alive was relevant on the issue of fear, and its extent, induced in the victim by defendant in connection with the rape.

2. **Criminal Law § 86.1— hairs and fibers on incriminating articles—cross-examination of defendant—relevance for impeachment**

The State's cross-examination of defendant concerning how certain hairs and fibers could have been found on articles linking defendant with the commission of a kidnapping and rape did not call for defendant to testify as an expert or assume the truth of the State's evidence and was properly permitted to challenge the credibility of defendant's denial of guilt and his testimony tending to support this denial. N.C.G.S. § 8C-1, Rule 611(b).

3. **Criminal Law §§ 146.1, 146.3— double jeopardy—failure to object at trial—waiver of issue on appeal—exercise of supervisory jurisdiction**

Defendant waived his right to raise on appeal the issue of whether his conviction and sentencing for both first degree kidnapping and first degree rape violated the prohibition against double jeopardy where he failed at trial to move to arrest judgment in either the kidnapping or rape convictions and did not otherwise object to the convictions or sentences on double jeopardy grounds. However, the Supreme Court elected to review the issue on appeal in the exercise of its supervisory power over the trial divisions, N. C. Const. art. IV, § 12, N.C.G.S. § 7A-32, and pursuant to Rule 2 of the N. C. Rules of App. Procedure.

4. **Criminal Law § 27.5; Kidnapping § 1— first degree kidnapping—first degree rape—double jeopardy**

Defendant's conviction and sentencing for both first degree kidnapping and first degree rape violated the constitutional prohibition against double jeopardy where the trial court told the jury it would have to find, among other things, that the kidnapping victim "had been sexually assaulted" in order to convict defendant of first degree kidnapping; there was evidence of the rape for which defendant was both indicted and convicted, a first degree sexual offense for which defendant was indicted but not convicted, and another rape for which defendant was not indicted; the trial court did not specify in its instructions to the jury in the kidnapping case which of these sexual assaults the jury might use to satisfy the "sexual assault" element of first degree kidnapping; and it cannot be said that the jury's verdict of first degree kidnapping was based upon a sexual assault other than the rape for which defendant was convicted.

**5. Criminal Law § 166— exceptions not supported by argument in the brief**

Exceptions brought forward in defendant's brief but for which no argument or authority is stated are deemed abandoned. Rules of App. Procedure 28(a), (b)(3).

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing life sentence after defendant's conviction of first degree rape (No. 84CRS5368) at the 13 January 1986 session of Superior Court, GUILFORD County, High Point Division, *Judge John* presiding. Defendant's motion to bypass the Court of Appeals in No. 84CRS5366 (nonfelonious larceny) and No. 84CRS5369 (first degree kidnapping) allowed. Argued in the Supreme Court on 9 February 1987.

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

*Robert L. McClellan, Assistant Public Defender, for defendant appellant.*

EXUM, Chief Justice.

Questions presented on this appeal are whether the trial court erred by (1) admitting certain testimony by the prosecuting witness; (2) permitting certain cross-examination of the defendant; (3) accepting guilty verdicts and imposing sentences for both first degree kidnapping and first degree rape; and (4) denying defendant's motion to dismiss all charges for insufficiency of the evidence. We find merit in defendant's contentions as to question three. We conclude there was no other error in defendant's trial and convictions. We remand for further sentencing proceedings consistent with this opinion.

I.

This is defendant's second appeal. On his first appeal this Court ordered a new trial for error in the jury selection process. *State v. Freeman*, 314 N.C. 432, 333 S.E. 2d 743 (1985). At his second trial defendant was found guilty of misdemeanor larceny, first degree rape and first degree kidnapping. He was acquitted of first degree sexual offense, second degree burglary and robbery with a firearm.

At defendant's second trial the state's evidence tended to show as follows:

On 24 March 1984 the victim had returned to High Point, North Carolina, from a vacation. She arrived at her apartment building shortly after 10 p.m., got out of her car and began removing her luggage. A man she identified as defendant, Roger Lee Freeman, approached her, pointed a gun at her head and told her to come with him.

Defendant led the victim at gunpoint into a back room in the basement of a nearby abandoned house. He had her sit in a chair while he fumbled with some ropes hanging from a pipe. Defendant said, "Before I kill you, I'm going to rape you." He ordered her to lie down and to remove her clothes. Holding a knife to her throat, defendant had vaginal intercourse with the victim. Despite her pleas to spare her life and her offer to give him money, defendant told her she was going to die. He raised his knife and brought it down very quickly but stopped just above her chest. Defendant forced the victim to perform oral sex on him while he held the gun at her head. He raped her a second time at knifepoint.

After allowing the victim to dress, defendant inquired about obtaining money by using her bank card at a 24-hour bank machine. Defendant led the victim back to her apartment and ordered her to get the bank card. Defendant, pointing a pistol at the victim from a position inside his coat pocket, had her drive to a bank machine, where she withdrew one hundred dollars and gave the money and card to defendant.

They went back to the victim's apartment. Defendant searched the entire apartment, including the victim's jewelry box located in the bedroom. Discovering that the victim worked for Domino's Pizza, defendant ordered her to get dressed and drive there with him. The victim persuaded defendant not to attempt a robbery. After they returned to the parking area of the victim's apartment, defendant released her upon her promise that she would not tell anyone what had happened.

Once safely inside her apartment, the victim called the police, who arrived shortly and took her to the hospital for examination. The emergency room physician performed a vaginal examination on the victim and found live sperm present.

After returning to her apartment, the victim discovered that a gold necklace and bracelet kept in her jewelry box were missing.

The victim gave a detailed statement to police describing her assailant and the events of the evening, which statement corroborated her testimony at trial.

Defendant was arrested on Monday, 26 March 1984, after fleeing from police officers at the bus station in High Point. A knife, gun, two gold necklaces and a bracelet were found in his possession.

Two forensic chemists with the State Bureau of Investigation testified that most of the hairs discovered on a black seat cover and yellow blanket taken from the basement room in the abandoned house were consistent with pubic and head hair samples from defendant and the victim. Moreover, a button found in that room "most likely" had originated from the victim's shirt, and an examination of defendant's clothing indicated he had come into contact with the black seat cover found in the room.

Defendant testified on his own behalf. He said he arrived in High Point on Friday, 23 March 1984, from Pulaski, Virginia, and spent most of that day and the next at his sister's home in High Point. He went to Abe's Bar at around 8:00 p.m., Saturday, 24 March 1984. There he saw the victim, who was selling "speed" and cocaine. When she dropped her canvas bag during a confrontation with another woman, defendant took cocaine from the bag while another patron of the bar removed a green change purse containing LSD. Defendant proceeded to consume the cocaine and LSD.

Defendant denied having any further contact with the victim at any time. He testified that he ran when approached by police officers on Monday, 26 March 1984, because he knew he was carrying a concealed weapon and had been charged in Virginia with violating the terms of his probation. Defendant said he obtained the two gold chains from the victim's change purse while in Abe's Bar.

Upon his convictions as set out above, defendant was sentenced to terms of two years for larceny, twelve years for first

degree kidnapping, and life imprisonment for first degree rape, all sentences to run consecutively.

II.

**[1]** Defendant first complains that the trial court erred by allowing certain testimony by the prosecuting witness. She was permitted to testify as follows:

> Q. What were you asking?
>
> A. What he was going to do; would he please just leave me alone.
>
> Q. Did he respond at all to that?
>
> A. No. He then reached up toward the ceiling. I could see what looked like pieces of rope hanging from a pipe. He fumbled with the ropes, but he never brought the ropes down and never tied me up.

Defendant's motion to strike the last answer was denied. Later, after the victim testified defendant told her she was going to die, the victim was permitted to testify:

> Q. What were you thinking at that time . . .?
>
> A. I was terrified and thought I was going to die.

Again defendant's motion to strike was denied. Finally, defendant complains of the following colloquy concerning the time after the victim returned to her apartment following the aborted robbery at Domino's Pizza:

> Q. And what were you thinking at that time?
>
> A. I got inside and I couldn't believe what had just happened. And I couldn't believe I was still alive.

Defendant's objection came after the response and he made no motion to strike.

We find no error in the admission of any of this testimony. Defendant, without the citation of any pertinent authority, contends that by the first passage the witness was wrongly permitted to paint a "worst case scenario" and to give the jury the impression, unsupported by competent evidence, that defendant

intended to tie her up. Next defendant argues that the last two portions of testimony amounted to irrelevant expressions of the witness's emotional feelings and to improper conclusions that defendant "attempted to kill her." We disagree.

"[I]n a criminal case, every circumstance which is reasonably calculated to throw light upon the alleged crime is admissible." *State v. Price*, 301 N.C. 437, 452, 272 S.E. 2d 103, 113-14 (1980). Rape is sexual intercourse by force and without the victim's consent. N.C.G.S. § 14-27.3(a)(1) (1986); *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984); *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968). Threats of serious bodily harm which reasonably induce fear may constitute the requisite force. *State v. Hall*, 293 N.C. 559, 238 S.E. 2d 473 (1977); *State v. Roberts*, 293 N.C. 1, 235 S.E. 2d 203 (1977); *State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225 (1969); *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967).

All of the challenged testimony was relevant on the issue of the fear, and its extent, induced in the victim by defendant in connection with the rape charge.

As to the last portion of the challenged testimony, we note further that defendant waived his right to object to it on appeal by not objecting to the question or moving to strike the response at trial. N.C.G.S. § 8C-1, Rule 103 (1986); *State v. Burgin*, 313 N.C. 404, 329 S.E. 2d 653 (1985).

III.

**[2]** Defendant next contends the trial court erred in allowing the state to cross-examine him concerning how certain hairs and fibers could have been found on articles linking defendant with the commission of the offenses. The trial transcript reveals the following with regard to this assignment of error:

> Q. I see. Could you tell us how one of [the victim's] pubic hairs that's consistent with her pubic hairs got on that black seat cover in the basement of that abandoned house next door to where she lived?
>
> A. No, sir, I don't.
>
> Q. You don't know that either?
>
> A. I got an idea in my own mind.

Q. You've got an idea in your own mind, but you don't know?

A. Yes, sir. I think they were placed there by Mr. Tobin.

Q. I see. So you think Mr. Tobin went to [the victim], plucked one of her pubic hairs and dropped it on that black seat cover?

MR. MCCLELLAN: Objection, Your Honor.

THE COURT: Objection overruled.

A. I don't know what—I don't know what he did or what he didn't do. I tried to get—in the line-up—I mean, when Mr. Tobin was in the office, you know, he started talking to me. He read me these statements and everything, and then a police officer came up and was question and answer.

Q. So, getting back to my original question, are you saying that Detective Tobin got one of [the victim's] pubic hairs and laid it on that black seat cover?

A. I'm saying that if any of my hairs—

MR. MCCLELLAN: Objection, Your Honor.

THE COURT: Overruled. Go ahead.

Q. Go ahead.

A. I'm saying that if any of my hairs and stuff or anything that might be consistent with mine was put on there.

Q. Yes, sir.

A. It'd come off of my clothes or off of me when I changed clothes.

Q. I see. But you had your underwear on?

A. Yes, sir.

Q. And you were leaning against the chair when you were changing clothes; is that right?

A. Sir?

Q. And you were leaning against a chair when you were changing your clothes; is that right?

A. Only when I was taking my shoes off.

Q. Uh-huh. And you never saw a yellow blanket, though; right?

A. No, sir. You could not distinguish any colors down there.

. . . .

Q. All right, sir. Could you tell us how all three of those types of fibers from that black seat cover got on her clothes?

A. No, sir, I can't.

MR. MCCLELLAN: Objection, Your Honor.

THE COURT: Objection overruled.

A. Not unless she had been down there.

Q. Pardon me?

A. Not unless she had been down there. I don't know. But she was not there with me nor of anyone else that I know of.

Defendant claims the questions posed improperly required him, a layman, to draw conclusions and give opinions as if he were an expert. He further contends the questions improperly assumed the truth of the state's evidence which defendant was called on to explain. These arguments are without merit.

Under our accusatory system of criminal justice a defendant may never be required to take the stand and testify in his own behalf. If he does not choose to so testify, he may not be called upon to explain incriminating evidence offered against him by the state. But when a defendant chooses to testify in his own defense he subjects himself to cross-examination "on any matter relevant to any issue in the case, including credibility." N.C.G.S. § 8C-1, Rule 611(b) (1986).

"In North Carolina the substantive cross-examination is not confined to the subject matter of direct testimony plus impeachment, but may extend to any matter relevant to the issues." 1 Brandis on North Carolina Evidence § 35 (1982). Rule 611(b) of the North Carolina Rules of Evidence rejects the more restricted approach to cross-examination found in Federal Rule 611(b) and

adopts the traditional, broader North Carolina cross-examination rule. Commentary, N.C. R. Evid. 611(b).

Cross-examination may be employed to test a witness's credibility in an infinite variety of ways. "The largest possible scope should be given," and "almost any question" may be put "to test the value of his testimony." 1 Brandis on North Carolina Evidence § 42 (1982). The range of facts that may be inquired into is virtually unlimited except by the general requirement of relevancy and the trial judge's discretionary power to keep the examination within reasonable bounds. *State v. Burgin*, 313 N.C. 404, 329 S.E. 2d 653; 1 Brandis on North Carolina Evidence § 38 (1982).

Defendant here testified in his own behalf and denied his guilt. It was thus appropriate for the state to ask him to explain, if he could, the state's evidence which was inconsistent with this denial. This kind of cross-examination properly went to the credibility of defendant's denial of guilt and his testimony tending to support this denial. The cross-examination neither called for defendant to testify as an expert nor did it assume the truth of the state's evidence. Defendant's own responses to the questions refute these propositions. He explained the incriminating evidence at one point in his testimony by saying it must have been placed there by an agent of the state. The cross-examination properly challenged defendant's credibility, which ultimately was a question for the jury.

IV.

By his third assignment of error, defendant contends the trial court permitted him to be unconstitutionally convicted and sentenced twice for the same offense when it allowed his convictions for both first degree kidnapping and first degree rape to stand and when it sentenced him on both offenses. This is so, defendant argues, because under the trial court's jury instructions the jury could have used the rape offense to satisfy the "sexual assault" element of first degree kidnapping. To permit defendant's convictions for both crimes to stand and to sentence him for both crimes under these instructions means, defendant argues, that he has, or could have been convicted and punished twice for the rape. For thorough discussions of the law on this question, see *State v. Belton*, 318 N.C. 141, 347 S.E. 2d 755 (1986); *State v. Freeland*, 316

N.C. 13, 340 S.E. 2d 35 (1986); and *State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986).

**[3]** Defendant failed to raise this issue at trial. He did not at trial move to arrest judgment in either the rape or kidnapping convictions and did not otherwise object to the convictions or sentences on double jeopardy grounds. He has, therefore, waived his right to raise the issue on appeal. *State v. Dudley*, 319 N.C. 656, 356 S.E. 2d 361 (1987); *State v. Mitchell*, 317 N.C. 661, 346 S.E. 2d 458 (1986); *State v. McKenzie*, 292 N.C. 170, 232 S.E. 2d 424 (1977).

We elect, nevertheless, in the exercise of our supervisory power over the trial divisions, N.C. Const. art. IV, § 12; N.C.G.S. § 7A-32, and pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, to review this issue on appeal. *See State v. Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975); *State v. Hewitt*, 270 N.C. 348, 154 S.E. 2d 476 (1967).

**[4]** On the merits of this issue defendant relies on *State v. Belton*, 318 N.C. 141, 347 S.E. 2d 755, and *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35. Defendant maintains that under these cases his convictions of first degree kidnapping and first degree rape cannot both stand. There was here, as there was in *Belton*, evidence of an unindicted sexual offense (a rape in addition to the rape for which defendant was indicted and convicted). There was also evidence of a first degree sexual offense for which defendant was indicted but not convicted and the rape for which defendant was both indicted and convicted. The trial court did not specify in its instructions to the jury in the kidnapping case which of these sexual assaults the jury might use to satisfy the "sexual assault" element of first degree kidnapping. It simply told the jury it would have to find, among other things, that the kidnapping victim "had been sexually assaulted" in order to convict defendant of first degree kidnapping. The state concedes, and we agree, that under these circumstances *Belton* controls this issue in defendant's favor.

As we did in *Belton*, therefore, we remand the rape (84CRS5368) and kidnapping (84CRS5369) cases to the trial court for further proceedings. On remand the trial court may either arrest judgment on the first degree kidnapping charge and enter a verdict of guilty of second degree kidnapping, or it may arrest

judgment on the first degree rape conviction and let the first degree kidnapping conviction stand. The trial court will then resentence defendant accordingly.

V.

**[5]** By his final assignment of error, defendant contends the trial court erred in denying his motion to dismiss at the close of all the evidence and in entering judgments against defendant on the ground the evidence was insufficient to support any of his convictions. In support of this assignment of error, defendant merely "requests the Court to review the evidence and record for any other prejudicial error committed" at trial. The law is clear that exceptions brought forward in defendant's brief but for which no argument or authority is stated are deemed abandoned. *State v. Samuels*, 298 N.C. 783, 260 S.E. 2d 427 (1979); N.C. R. App. P. 28(a), (b)(3). Therefore, we need not address this issue.

Nevertheless, it is clear the evidence is sufficient to support all of defendant's convictions. The victim's testimony as well as the physical evidence presented at trial tended to show that defendant unlawfully removed the victim from one place to another without her consent, forced her at gunpoint into an abandoned house and coerced her under threat of death to engage in sexual intercourse without her consent.

This assignment of error is overruled.

CONCLUSION

In the nonfelonious larceny case (84CRS5366) we find no error. In the first degree rape (84CRS5368) and first degree kidnapping (84CRS5369) cases we find no error in the trial, but we remand these cases for new sentencing proceedings consistent with this opinion.

Case No. 84CRS5366—no error.

Case Nos. 84CRS5368 and 84CRS5369—remanded for new sentencing proceedings.

STATE OF NORTH CAROLINA v. VIRGINIA ANN DAVIS

No. 322A86

(Filed 2 June 1987)

**Criminal Law § 10.3— homicide—accessory before the fact—instructions**

The jury in a prosecution for second degree murder as an accessory before the fact was not adequately instructed with respect to the chain of causation necessary to a conviction of accessory before the fact to murder where the instructions made no mention of the necessary causal connection between defendant's alleged statements and the murderer's admitted actions. Causation of a crime by an alleged accessory is not inherent in the accessory's counsel, procurement, command or aid of the principal perpetrator.

APPEAL by defendant from the judgment of *John, J.*, entered at the 17 February 1986 Session of GUILFORD County Superior Court, Greensboro Division, imposing a life sentence following defendant's conviction of second degree murder as an accessory before the fact. Heard in the Supreme Court on 13 April 1987.

*Lacy H. Thornburg, Attorney General, by George W. Boylan, Special Deputy Attorney General, for the state.*

*Walter E. Clark, Jr., for defendant-appellant.*

EXUM, Chief Justice.

Defendant was convicted of the second degree murder of her husband, Joseph Marvin Davis, as an accessory before the fact. She argues, *inter alia*, that her conviction must be overturned because the trial judge failed to instruct the jury that she could be found guilty only if her alleged counseling of the principal perpetrator caused him to murder the decedent. We agree and order a new trial. Defendant's remaining assignments of error may not arise at her new trial and therefore will not be discussed in this opinion.[1]

1. Defendant also contends that the trial court erred in denying her motion for sanctions for failure of the state to provide discovery; in denying her request for sequestration and segregation of the state's witnesses; in admitting evidence relating to the activities of her daughter, Angel Lilly; in sustaining the state's objection to her cross-examination of Kenneth Creed; in admitting objectional hearsay and opinion testimony; in allowing the state to harass her on cross-examination; in denying her motion to dismiss at the close of all the evidence; and in finding that she occupied a position of leadership or dominance in the commission of this crime.

The state's evidence tended to show that Joseph Marvin Davis died of shotgun wounds outside his home near Highway 62 in Guilford County. Winford Day, an acquaintance of defendant, admitted shooting the victim on the evening of 17 July 1984.

Several witnesses testified that defendant often spoke with them about her desire to have her husband killed. Winford Day stated that he first met defendant and her daughter, Angel Lilly, in early 1984, while living with members of the Platt family in Elgin, South Carolina. Defendant told Day that her husband beat her and was "bad" to her. Later, in Columbia, South Carolina, defendant approached Day "wanting to have Joe Davis killed." Several other people were in the room during this conversation, including Angel Lilly and the victim's former business partner, Mike Platt. According to Day, defendant said "she could get her hands on $2,000 to have Joe Davis killed." On another occasion Mike Platt came to Winford Day and asked if he knew anyone who might kill Joe Davis. Day gave Platt the name "Thunder," a fictitious member of a motorcycle gang.[2] Sometime after this, defendant approached Day "wanting to know about Thunder, wanting to know how much he would charge to have Joe Davis killed, and how it would be done." Defendant allegedly said she could "get her hands on $2,000 before he was killed, and after he was killed she could get her hands on some more." Still later, at defendant's home in North Carolina, defendant asked Day when Thunder was going to kill her husband. When Day replied that he was thinking about doing it himself, defendant told him that she attended karate classes on Tuesday and Thursday nights, and "that would be a good night to have it done."

Day also testified that he had been sexually involved with Angel Lilly, defendant's daughter. Sometimes Angel would tell him that if he did not kill Joe Davis she would do it herself. Both Angel and defendant told Day how the decedent "beat on them and slapped them around." Angel also told Day that Joe Davis had been sexually assaulting her, which Day said "made me mad." On the night before Joe Davis was killed, Angel called Day in South Carolina and told him that the decedent "had got her up against the wall [of a storage shed] and stated that if she would

2. Day testified that he made the name up because he wanted to end the conversation with Platt.

be good to daddy, daddy would be good to her." Day told her not to worry about it because "it would be done the next night." The next day, Winford Day borrowed a shotgun, drove up from South Carolina, waited in the woods for Joe Davis to return home, and shot him twice when he arrived at the front porch and stuck his keys in the door.

When asked why he killed Joe Davis, Day said:

> Well, some of me wants to say about what he done to Angel, but I can't say that was the only reason. I don't believe if Virginia and them would have kept pressuring me about killing Joe or having someone kill Joe, I don't think I would have done it if they hadn't been pressuring me.

Day admitted, however, that he previously had denied defendant's involvement in the murder.

Herman Waddell, defendant's business associate, testified concerning a conversation he had with Winford Day at the Guilford County Jail:

> After I got to the county jail there, I began to talk with Winford Day. I told Winford that I had several questions that I wanted to ask him. Then I asked him if he'd mind if I would tape this conversation.
>
> He said, "No, I have no objection to it."
>
> So then I took out the little mike and I placed it on the phone and I began talking with it. . . .
>
> I said, "Did Virginia Davis have anything to do with the killing of her husband?"
>
> He said, "No, she did not."
>
> I said, "Do you think she's capable of having anybody killed?"
>
> He said, "No, I do not." He said, "Tell her that she don't have anything to worry about." He said, "She didn't have anything to do with it and she doesn't have anything to worry about."

Edward Cobbler, a private investigator hired by defendant, testified that he had interviewed Day at the Guilford County Jail. Day told him that he shot Joe Davis because of "the sexual assault that had occurred on Angel." According to Cobbler, Day had "specifically and emphatically said that Virginia Davis did not have anything to do with it."

Defendant testified in her own behalf and denied complicity in the murder of her husband.

During the charge conference the trial judge informed the parties that he intended to tell the jury that they could find defendant guilty of second degree murder if they found (1) that Winford Day committed the second degree murder of Joe Davis, and (2) that defendant knowingly instigated, counseled or procured Day to commit this murder. Defendant's counsel, in accordance with R. App. P. 10(b), objected to this instruction on the grounds that it might cause the jury to return a guilty verdict even though defendant's actions and statements had no causal connection with Day's crime. The trial judge overruled the objection and instructed the jury as follows:

> In this case, members of the jury, the defendant has been accused of second-degree murder. Second-degree murder is the unlawful killing of a human being with malice. A person may be guilty of second-degree murder, although she personally does not do any of the acts necessary to constitute second-degree murder, and even though she may not have been present at the scene of the crime.
>
> Now, I charge that for you to find the defendant guilty of second-degree murder under the facts of this case, the State must prove beyond a reasonable doubt: First of all, that second-degree murder was committed by Winford Day. . . .
>
> In addition, members of the jury, for you to find the defendant guilty of second-degree murder under the facts of this case, the State must prove beyond a reasonable doubt that the defendant—that is, Virginia Ann Davis—knowingly instigated, counseled or procured Winford Day to commit that crime. . . .

> So I charge, members of the jury, that if you find from the evidence beyond a reasonable doubt that on or about the day in question Winford Day committed second-degree murder—that is that Winford Day unlawfully killed Joseph Marvin Davis with malice—and that Virginia Ann Davis knowingly instigated, counseled or procured Winford Day to commit second-degree murder, it would be your duty to return a verdict of guilty of second-degree murder as to Virginia Ann Davis.

Defendant contends that this instruction fails to state the necessity of a causal connection between the actions of defendant and those of Winford Day. In particular, defendant argues that the jury could find that defendant "counseled" Winford Day about killing Joe Davis, but that her counseling had nothing to do with the shooting itself. The state, in response, contends that the instruction given substantially provides "the direct causal connection requested by defendant."

This Court has stated the elements of accessory before the fact to murder as follows:

> 1) Defendant must have counseled, procured, commanded, encouraged, or aided the principal to murder the victim;
>
> 2) the principal must have murdered the victim; and
>
> 3) defendant must not have been present when the murder was committed.

*State v. Sams*, 317 N.C. 230, 237, 345 S.E. 2d 179, 184 (1986); *State v. Woods*, 307 N.C. 213, 218, 297 S.E. 2d 574, 577 (1982); *State v. Hunter*, 290 N.C. 556, 576, 227 S.E. 2d 535, 547 (1976), *cert. denied*, 429 U.S. 1093, 51 L.Ed. 2d 539 (1977). It is generally recognized, however, that "[a] person is criminally responsible for a homicide only if his act caused or directly contributed to the death of the victim." *State v. Brock*, 305 N.C. 532, 539, 290 S.E. 2d 566, 571 (1982); *State v. Luther*, 285 N.C. 570, 206 S.E. 2d 238 (1974). In cases where a defendant is prosecuted as an accessory before the fact to murder, the state must prove beyond a reasonable doubt that the actions or statements of the defendant somehow caused or contributed to the actions of the principal, which in turn

caused the victim's death. *See State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535; *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970).[3]

In *State v. Benton*, defendant was charged as an accessory before the fact to the murder of her husband. The principal felon, Raymond Epley, testified that he shot defendant's husband because defendant " 'asked him to and told him that [the victim] was going to kill him if he didn't do it, and she kept pushing him and he went and done it.' " *Benton*, 276 N.C. at 647, 174 S.E. 2d at 797. Defendant argued that the trial judge failed to inform the jury of the necessity of a causal connection between her statements and the actions of the principal. This Court held that the judge's charge, taken as a whole, was adequate. The judge told the jury

> that before they could convict defendant they must find that her request and demands that Epley murder Benton caused him to commit the crime. . . . [T]he jurors were instructed that for the State to prove that defendant procured Epley to murder Benton it must first show that he had sufficient mental capacity to understand and carry out defendant's commands; that, lacking such capacity, he could not have killed Benton as the result of defendant's procurement, and she would not be guilty. *Inter alia*, the judge also told the jury that to be guilty as an accessory before the fact to murder "a defendant must (have) incited, procured or encouraged the commission of the crime so as to participate therein by some words or acts," and must have given instructions, directions or counsel which were "substantially followed."

*Id.* at 654, 174 S.E. 2d at 802.

The defendant in *State v. Hunter* made an identical assignment of error, and we again found that "the trial court in fact required an immediate causal connection" between the actions of the accessory and those of the principal. *Hunter*, 290 N.C. at 578, 227 S.E. 2d at 548. *Hunter* involved an attempted armed robbery

3. Generally there is little or no dispute over whether an accessory's statements or actions, *if they occurred*, caused or contributed to the principal's actions. *See State v. Sams*, 317 N.C. 230, 345 S.E. 2d 179; *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574; *State v. Mozingo*, 207 N.C. 247, 176 S.E. 582 (1934). Instead, the factual issue is likely to focus on whether the alleged accessory "counseled, procured, or commanded the principal *at all*." *State v. Hunter*, 290 N.C. at 578, 227 S.E. 2d at 549 (emphasis added).

that resulted in the murder of William Potts. The trial judge, in his final mandate,

> charged that the jury must find the defendant not guilty unless they found that "before the killing was committed the defendant . . . pointed out the Potts residence and store to Billy Devine and told Billy Devine . . . that he would have to rob Mr. Potts when he was at home, and that defendant was to get part of the money, and that *in so doing* the defendant, Harry Hunter, counseled or procured, or commanded or knowingly aided Billy Devine to attempt to commit armed robbery. . . .

*Id.* 227 S.E. 2d at 548-49 (emphasis added). Thus, the trial judge pointed to specific actions of the defendant which, if the jury found they had occurred, would clearly establish a causal connection between the defendant and the murder of Mr. Potts.

The *Hunter* opinion does, at one point, seem to suggest that the jury instructions given in the present case would be adequate because a causal connection between the actions of an accessory and those of the principal is "inherent" in the accessory's "counsel, procurement, command, or aid" of the principal. "Otherwise," we said, "there would be no real counsel, procurement, command, or aid." *Hunter*, 290 N.C. at 578, 227 S.E. 2d at 548. This statement has been the source of some confusion, and we hereby disavow it. Causation of a crime by an alleged accessory is not "inherent" in the accessory's counsel, procurement, command or aid of the principal perpetrator.

In the present case there was conflicting evidence as to whether the statements of defendant caused or directly contributed to the shooting of her husband by Winford Day. At trial, Day said that he did not think he would have done it if defendant had not been pressuring him. On the other hand, he indicated that he acted at least partly in response to the victim's alleged abuse of Angel Lilly. In addition, Day told two people before trial that defendant had nothing to do with the murder of her husband.

The trial court's instructions in this case, even when viewed as a whole, made no mention of the necessary causal connection between defendant's alleged statements and Winford Day's admitted actions. Moreover, no specific reference to the actions or

statements allegedly made by defendant was included in the charge. The judge simply stated that defendant should be found guilty if the jury found that Day murdered Joe Davis, and that defendant "knowingly instigated, counseled or procured" the murder.

We hold that the jury in this case was not adequately instructed with respect to the chain of causation necessary to a conviction of accessory before the fact to murder. Given the charge that appears in the record, the jury could have found defendant guilty even though her "counseling" of Winford Day had nothing to do with Day's subsequent murder of Joe Davis. Defendant therefore must have a

New trial.

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TONY C. HARRIS v. DUKE POWER COMPANY, A CORPORATION

No. 697A86

(Filed 2 June 1987)

**Master and Servant § 10.2— wrongful discharge—violation of management policy manual—not applicable to employees**

In an action in which plaintiff alleged that he had been wrongfully discharged without cause in violation of defendant's termination policy as stated in its management procedure manual, the trial court did not err by granting defendant's motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6), where plaintiff did not allege that the management manual upon which he relied contained any promise or representation that an employee would be subject to dismissal only for violations of specific Class A, Class B, or Class C offenses, and the manual was directed toward management personnel and could not be reasonably interpreted as a manual of rules of conduct to be followed by employees.

Chief Justice EXUM concurring.

Justice MARTIN joins in the concurring opinion.

BEFORE *Saunders, J.*, at the 27 January 1986 Session of Superior Court, MECKLENBURG County, the court granted defendant's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. A divided panel of the Court of

Appeals affirmed, 83 N.C. App. 195, 349 S.E. 2d 394 (1986). Plaintiff appeals to this Court pursuant to N.C.G.S. § 7A-30(2) and Rule 14(a) of the Rules of Appellate Procedure, based on a dissent in the Court of Appeals. Heard in the Supreme Court 16 April 1987.

*Russell & Sheely, by Michael A. Sheely, and Edelstein & Payne, by M. Travis Payne, for plaintiff-appellant.*

*Mullins & Van Hoy, by Philip M. Van Hoy, and Duke Power Company Legal Department, by Robert M. Bisanar, for defendant-appellee.*

*Ogletree, Deakins, Nash, Smoak and Stewart, by Stuart M. Vaughan, Jr., for North Carolina Associated Industries, amicus curiae.*

MEYER, Justice.

In his complaint, plaintiff alleged that he had been employed as a welder by Duke Power Company at the Catawba Nuclear Power Plant and that he was discharged without cause in November 1984. Plaintiff further alleged that defendant's termination policy, as contained in its management procedure manual on the subject of "Rules of Conduct," was incorporated and became an integral part of his contract of employment. A copy of the management procedure pamphlet was attached to the complaint.

Plaintiff alleged that he was discharged from his employment in violation of the employer's Rules of Conduct as contained in the management procedure manual. He did not allege that he was employed for a fixed term or that he had furnished any special consideration for the incorporation of these rules in his employment contract.

The sole question presented on this appeal is whether the trial court erred in dismissing plaintiff's complaint. We hold that under the facts and circumstances of this case, plaintiff has failed to allege a cause of action sufficient to withstand defendant's motion to dismiss, and we therefore affirm the opinion of the Court of Appeals.

The superior court granted defendant's motion to dismiss, and the Court of Appeals affirmed, based upon plaintiff's status as an employee-at-will. The majority of the panel below held that

even if the provisions of the management procedure were made part of plaintiff's contract of employment, plaintiff had no right to relief because the procedure did not contain any promise or representation that defendant would discharge plaintiff only for cause. Judge Phillips dissented, arguing that the plaintiff's complaint raised the issue of whether his employment was subject to conditions set forth in defendant's management procedure manual.

North Carolina courts have repeatedly held that absent some form of contractual agreement between an employer and employee establishing a *definite* period of employment, the employment is presumed to be an "at-will" employment, terminable at the will of either party, irrespective of the quality of performance by the other party, and the employee states no cause of action for breach of contract by alleging that he has been discharged without just cause. *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971).

The "employee-at-will" rule is subject to some well-defined exceptions. First, statutory authority often dictates that an otherwise terminable-at-will employee shall not be discharged in retaliation for certain protected activities, e.g., filing workers' compensation claims, N.C.G.S. § 97-6.1 (1985); engaging in labor union activities, N.C.G.S. § 95-83 (1985); instituting an Occupational Safety and Health Act proceeding, N.C.G.S. § 95-130(8) (1985). Second, if an employee furnishes "additional consideration" or gives something additional of value, such consideration may take the case out of the usual employment-at-will rule. *Tuttle v. Kernersville Lumber Co.*, 263 N.C. 216, 139 S.E. 2d 249 (1964) (setting forth exception, but declining to apply to the facts); *Sides v. Duke University Hospital*, 74 N.C. App. 331, 328 S.E. 2d 819, *disc. rev. denied*, 314 N.C. 331, 333 S.E. 2d 490 (1985) (plaintiff's moving from Michigan to North Carolina to accept position with defendant was additional consideration which took contract out of traditional employment-at-will rule). *Cf. Malever v. Jewelry Co.*, 223 N.C. 148, 25 S.E. 2d 436 (1943). *See also* L. Larson, *Unjust Dismissal* § 10.34 (1985 and Supp. 1987).

Plaintiff does not fall within any of the well-recognized exceptions to the general rule that an employment contract of indefinite duration is terminable at the will of either employer or employee. He contends, however, that this Court should join those jurisdictions in which an employer's personnel policy is in-

corporated by reference into an employment contract. *See* Annot., "Right to Discharge Allegedly 'At Will' Employee as Affected by Employer's Promulgation of Employment Policies as to Discharge," 33 A.L.R. 4th 120, §§ 3-4 (1984 and Supp. 1986); Note, *Continued Resistance to Inclusion of Personnel Policies in Contracts of Employment*, 62 N.C.L. Rev. 1326 (1984); Note, *Employee Handbooks and Employment At Will Contracts*, 1985 Duke L.J. 196 (1985); Parker, *The Uses of the Past: The Surprising History of Terminable-at-Will Employment in North Carolina*, 22 Wake Forest L. Rev. 167 (1987).

Several cases decided by the Court of Appeals, and federal courts applying North Carolina law, hold that an employer's personnel manual is not part of an employee's contract of employment. *Walker v. Westinghouse*, 77 N.C. App. 253, 335 S.E. 2d 79 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E. 2d 39 (1986) (handbook not part of employment contract, notwithstanding language that the handbook would "become more than a handbook . . . it will become an understanding"); *Smith v. Monsanto Corp.*, 71 N.C. App. 632, 322 S.E. 2d 611 (1984) (company policy not incorporated in employment contract); *Griffin v. Housing Authority*, 62 N.C. App. 556, 303 S.E. 2d 200 (1983) (defendant-employer's personnel manual not expressly incorporated into plaintiff's contract of employment); *Williams v. Biscuitville, Inc.*, 40 N.C. App. 405, 253 S.E. 2d 18, *cert. denied*, 297 N.C. 457, 256 S.E. 2d 810 (1979) (operations manual unilaterally adopted by employer and could be changed; employer could discharge plaintiff in manner not set forth in manual); *Rupinsky v. Miller Brewing Co.*, 627 F. Supp. 1181 (W.D. Pa. 1986) (applying North Carolina law). We have not been persuaded to depart from the rules developed and applied in our prior decisions.

It is noteworthy that in those jurisdictions in which statements in employment handbooks have been treated as binding on the employer, making the traditional rule of employment-at-will inoperative, the handbook, policy manual, or personnel manual contains an express representation that employees will be dismissed only for "just cause." *Toussaint v. Blue Cross and Blue Shield of Michigan*, 408 Mich. 579, 292 N.W. 2d 880, *reh'g denied*, 409 Mich. 1101 (1980). *Compare Weiner v. McGraw Hill*, 57 N.Y. 2d 458, 443 N.E. 2d 441, 457 N.Y.S. 2d 193 (1982) (handbook indicated that employer would resort to dismissal for "just and suf-

ficient cause only") *with Sabetay v. Sterling Drug, Inc.*, 69 N.Y. 2d 329, 506 N.E. 2d 919, 514 N.Y.S. 2d 509 (1987) (personnel manual merely suggests standards for dismissal; employee fails to demonstrate express limitation on employer's unfettered right to discharge). *See*, L. Larson, *Unjust Dismissal*, § 8.02 (1985 and Supp. 1987).

Plaintiff relies on *Trought v. Richardson*, 78 N.C. App. 758, 338 S.E. 2d 617, *disc. rev. denied*, 316 N.C. 557, 344 S.E. 2d 18 (1986). There, the plaintiff alleged, *inter alia*, that the hospital's policy manual provided that *employees could be discharged only for cause*; that when she was hired as a nurse, she was required to sign a statement that she had been read the policy manual; and that she had been discharged without cause. The Court of Appeals held that such allegations were sufficient to defeat defendant's motion to dismiss. While this Court has not addressed the issue presented in *Trought* and does not do so here, that case is readily distinguished from the case at bar by reason of the specific no-discharge-except-for-cause allegation in *Trought*. The management procedure in question here, and upon which plaintiff relies, contains no such express representation, and plaintiff does not so allege.

Plaintiff's complaint alleges that he performed a particular weld or "tack" at the request of a fitter. This procedure was investigated by management employees, and plaintiff was then discharged for Class B and Class C violations. Plaintiff alleges that his actions in making the weld were, at most, a Class B (concealing defective work) violation.

On a motion to dismiss pursuant to Rule 12(b)(6), we treat the factual allegations of the complaint as if they were established. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Thus, for the purposes of review, deeming as true plaintiff's allegations that he specifically relied upon the terms of the management procedure in question in entering into employment with Duke, we hold that the trial court properly dismissed the complaint, because plaintiff does not allege, nor does the procedure contain, any promise or representation that employee will be subject to dismissal *only* for violations of specific Class A, Class B, or Class C offenses.

Plaintiff's complaint also alleges, with respect to defendant's management procedure manual, that defendant represented to

him that "as long as he followed said rules he would not be terminated for violating said rules." From our detailed review of the management procedure relied upon by the plaintiff, we conclude that it could not be reasonably interpreted as a manual of rules of conduct to be followed by employees.

The six-page manual or pamphlet in question is labeled "Duke Power Company Management Procedure Number 8901-0016 CONS 010; Subject: Rules of Conduct." The entire content of the manual is directed towards management personnel and relates solely to carrying out disciplinary actions against employees. In the prefatory statement, which describes the Construction Department's rules relating to disciplinary action, the procedure states:

> The Construction Department's rules are limited to the basic minimums necessary for orderly and efficient operations. They are not intended to be all-inclusive. They serve as examples of the types of offenses that require disciplinary action.

The section labeled "Rules of Conduct" categorizes or classifies disciplinary action offenses as "Class A," "Class B," or "Class C." These classes of offenses are said to "provide a general framework for taking consistent corrective action." Class A offenses are the least serious and will result in discharge after the third offense, if warranted upon review; Class B offenses are more serious and will result in discharge after the second offense, if warranted upon review; Class C offenses are the most serious and will result in discharge after the first offense, if warranted upon review.

As already noted, the pamphlet referred to was labeled a *management procedure*; it contains no rules by which employees are to conduct themselves; it thus sets forth no manner by which plaintiff could have "followed said rules," without being a management employee charged with carrying out the disciplinary procedures specified therein. Indeed, rather than setting out rules of conduct by which employees are to conduct themselves in their work, it contains descriptions of acts which are prohibited; uses the terms "offenses," "violations," etc.; provides for "warnings"; and instructs the reader as to how to word the warnings and notices of disciplinary action and where to file and how to

distribute them. Therefore, even taking plaintiff's allegation as true—that defendant represented that he would not be terminated if he followed the "Rules of Conduct"—he fails to state a cause of action, because the "Rules of Conduct," under the most liberal reading, set forth no rules for plaintiff to follow.

For the foregoing reasons, we affirm the judgment of the Court of Appeals.

Affirmed.

Chief Justice EXUM concurring.

I do not understand the Court to hold that personnel policy manuals distributed, or personnel policies explained, to employees by employers can never be part of the contract of employment binding on the employer. Rather I read the Court's opinion to say that the "Management Procedure" brochure relied on by plaintiff and attached to the complaint cannot in law be a part of plaintiff's employment contract because the brochure makes no promises, express or implied, to defendant's employees. Rather the brochure because of its unambiguous, plain terms is as a matter of law a guide for defendant's managers, creates no benefits for defendant's employees, and imposes no limitations on defendant's power to discharge plaintiff at will. Neither could the plaintiff reasonably rely on the brochure as limiting the circumstances under which he could be discharged. I concur in the Court's legal construction of the brochure and in the result reached on the basis of that construction.

In my view an employer's personnel policies, if couched in language that either expressly or by implication makes promises to employees, may bind the employer to these promises and restrict the employer's power to discharge even if the policies are unilaterally promulgated and are supported by no consideration apart from the employee's acceptance or continuation of employment. *See Trought v. Richardson*, 78 N.C. App. 758, 338 S.E. 2d 617, *disc. rev. denied*, 316 N.C. 557, 344 S.E. 2d 18 (1986); *Pine River State Bank v. Mettille*, 333 N.W. 2d 622 (Minn. 1983); *Toussaint v. Blue Cross and Blue Shield of Michigan*, 408 Mich. 579, 292 N.W. 2d 880, *reh'g denied*, 409 Mich. 1101 (1980); *see generally*, Note, *Employee Handbooks and Employment at Will Con-*

*tracts*, 1985 Duke L.J. 196 (1985). I do not understand our decision today to hold to the contrary.

Justice MARTIN joins in this concurring opinion.

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STATE OF NORTH CAROLINA v. MARTHA JEAN ISLEIB

No. 397PA86

(Filed 2 June 1987)

1. **Searches and Seizures § 11— search of automobile—probable cause—time to obtain warrant**

The fact that an officer has probable cause to secure a search warrant and adequate time to obtain one, but fails to do so, does not vitiate the automobile exception to the search warrant requirement.

2. **Searches and Seizures § 11— warrantless search of motor vehicle—vehicle itself as exigent circumstance**

No exigent circumstances other than the motor vehicle itself are required in order to justify a warrantless search of a motor vehicle if there is probable cause to believe that it contains the instrumentality of a crime or evidence pertaining to a crime and the vehicle is in a public place.

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

Justice FRYE concurs in the result only.

ON the State of North Carolina's petition for discretionary review of the decision of the Court of Appeals, 80 N.C. App. 599, 343 S.E. 2d 234 (1986), which affirmed the order of *Barefoot, J.*, granting defendant's motion to suppress evidence, signed on 5 September 1985 in Superior Court, DARE County. Heard in the Supreme Court 9 March 1987.

*Lacy H. Thornburg, Attorney General, by John H. Watters, Assistant Attorney General, for the state, appellant.*

*Aldridge, Seawell & Khoury, by G. Irvin Aldridge, for defendant.*

*North Carolina Association of Police Attorneys, by Robert F. Thomas, Jr., Randolph B. Means, and Stephanie W. Harris, amicus curiae.*

MARTIN, Justice.

The issue before us on appeal is whether, under the facts of this case, a valid search warrant was necessary to conduct a lawful search of a vehicle. For the reasons which follow, we hold that a search warrant was not required.

The evidence presented at voir dire on defendant's motion to suppress tended to establish the following: Sometime between 2:00 and 4:00 p.m. on 5 April 1985, Dare County Deputy Sheriff C. H. Midgette and another deputy met in the county courthouse with a confidential informant. Midgette had received information from this informant on approximately three prior occasions; on each of these occasions, the information provided had yielded arrests and convictions in drug cases involving marijuana. During the course of their 5 April meeting, the informant told the deputies that a woman named "Martha" would be coming to Hatteras Island from the beach area north of Oregon Inlet the following day, that she would be driving her Army-green Dodge or Plymouth station wagon with letters or a decal on the door, that she would be accompanied by a white male whom the informant did not know, and that she would be delivering quarter-ounce bags of marijuana. The informant did not know Martha's last name, nor did he know her address other than the fact that she lived "at the beach." Midgette testified that upon receiving the information, he realized that he was familiar with the car described, that he knew who Martha was, that he had known her for seven or eight years, and that she lived at the beach north of Oregon Inlet. He did not attempt to secure a search warrant.

At about 12:35 p.m. on 6 April, about twenty hours after having received the tip from the informant, Midgette was northbound in his patrol car on N.C. Highway 12 just north of the village of Waves on Hatteras Island when he saw a green station wagon similar to that described by the informant proceeding in a southerly direction. He recognized the driver was Martha. Midgette went to his residence, telephoned Deputy John Gray, who was off duty, advised him as to the whereabouts of the green car, and told him to "get dressed and hit the road." Shortly thereafter, Gray radioed Midgette and informed him he had spotted the suspect car. Midgette advised Gray that he was about a mile away and to "go ahead and stop her," and Gray thereupon intercepted

the vehicle. Midgette arrived minutes later to find Gray and the defendant standing beside the green station wagon and the white male still seated on the passenger's side. Midgette told defendant that he possessed information that she was en route to Hatteras to deliver quarter-ounce bags of marijuana and that he was going to search her car on the basis of an "emergency stop." Defendant asked him if he had a search warrant, and he responded that he did not. Defendant was not arrested at that time and did not consent to the search.

Although no contraband was in plain view, Midgette proceeded to conduct a search of the car. He first took defendant's pocketbook from the front seat and handed it to Gray, who got in his patrol car with defendant. Upon a search of the pocketbook, Gray announced that he had found a bag of marijuana. When Midgette asked the passenger if he had anything in his pockets, the man reached into his left trousers pocket and pulled out a very small amount of marijuana. Thereupon defendant said, "Do not arrest Randy. I gave him the herb this morning." Midgette then got into the car and saw a small, multi-colored bag from which several smaller bags protruded. Each of the smaller bags contained a quarter-ounce of marijuana. Defendant and her companion were then arrested and transported to Manteo. The contents of the bags were analyzed by the State Bureau of Investigation and were found to total forty-two grams of marijuana. Defendant was indicted for felonious possession of marijuana and felonious possession of marijuana with intent to sell.

Following the suppression hearing, the trial judge made findings of fact and conclusions of law holding that the warrantless search of defendant's car was illegal and ordered the suppression of all evidence obtained as a result of the search. Upon appeal by the state, the Court of Appeals affirmed the ruling of the trial court. We reverse the Court of Appeals.

In a series of decisions beginning with *Carroll v. United States*, 267 U.S. 132, 69 L.Ed. 343 (1925), the United States Supreme Court has held that a search warrant is not a prerequisite to the carrying out of a search based upon probable cause of a

motor vehicle on public property.[1] The so-called "automobile exception" to the warrant requirement carved out by *Carroll* and its progeny is founded upon two separate but related reasons: the inherent mobility of motor vehicles which makes it impracticable, if not impossible, for a law enforcement officer to obtain a warrant for the search of an automobile while the automobile remains within the officer's jurisdiction, *id.*, and the decreased expectation of privacy which citizens have in motor vehicles, *United States v. Ross*, 456 U.S. 798, 72 L.Ed. 2d 572 (1982), which results from the physical characteristics of automobiles and their use. *Cardwell v. Lewis*, 417 U.S. 583, 41 L.Ed. 2d 325 (1974). In *California v. Carney*, 471 U.S. 386, 85 L.Ed. 2d 406 (1985), the Supreme Court elaborated on its rationale for the warrant exception, saying that warrantless searches of motor vehicles were sanctioned because "the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met."[2] 471 U.S. at 392, 85 L.Ed. 2d at 414. This statement served to reiterate, clarify, and reinforce the Court's earlier statement in *Cardwell v. Lewis*, 417 U.S. 583, 595, 41 L.Ed. 2d 325, 338, that

> [a]ssuming that probable cause previously existed, we know of no case or principle that suggests that the right to search

1. The following are United States Supreme Court opinions filed since the decision in *Carroll* was announced in 1925 which have approved warrantless probable cause searches of motor vehicles in public areas: *California v. Carney*, 471 U.S. 386, 85 L.Ed. 2d 406 (1985); *United States v. Johns*, 469 U.S. 478, 83 L.Ed. 2d 890 (1985); *Florida v. Meyers*, 466 U.S. 380, 80 L.Ed. 2d 381 (1984); *Michigan v. Thomas*, 458 U.S. 259, 73 L.Ed. 2d 750 (1982); *United States v. Ross*, 456 U.S. 798, 72 L.Ed. 2d 572 (1982); *Colorado v. Bannister*, 449 U.S. 1, 66 L.Ed. 2d 1 (1980); *Texas v. White*, 423 U.S. 67, 46 L.Ed. 2d 209 (1975); *Cardwell v. Lewis*, 417 U.S. 583, 41 L.Ed. 2d 325 (1974); *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed. 2d 419 (1970); *Brinegar v. United States*, 338 U.S. 160, 93 L.Ed. 1879 (1949); *Scher v. United States*, 305 U.S. 251, 83 L.Ed. 151 (1938); *Husty v. United States*, 282 U.S. 694, 75 L.Ed. 629 (1931).

2. Such governmental regulations and controls include, for example, periodic inspection and licensing requirements. In addition, "[a]s an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order." *South Dakota v. Opperman*, 428 U.S. 364, 368, 49 L.Ed. 2d 1000, 1004 (1976); *see also New York v. Class*, 471 U.S. 1003, 89 L.Ed. 2d 81 (1986) (discussion of the pervasive schemes of regulations pertaining to motor vehicles).

> on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest. . . . The exigency may arise at any time . . . .

A search of a motor vehicle which is on a public roadway or in a public vehicular area is not in violation of the fourth amendment if it is based on probable cause, even though a warrant has not been obtained. *United States v. Ross*, 456 U.S. 798, 809, 72 L.Ed. 2d 572, 584.

**[1, 2]** In the case sub judice, the Dare County Sheriff's Department had sufficient information to constitute probable cause on 5 April after receiving the informant's tip. However, the officer acted reasonably, prudently, and responsibly in delaying any attempt to locate the vehicle and search it until he actually observed the automobile on the highway and recognized it and its occupants. The officer had no information that a search immediately after he received the tip would be fruitful. Moreover, he was not required, under the circumstances of this case, to obtain a search warrant, because the suspect's car was moving along the public highway. Once Midgette saw and recognized the moving automobile which had been described to him in the informant's tip, he could properly execute a valid search under the automobile exception to the warrant requirement under *Carroll* and its progeny. The fact that the officer has probable cause to secure the search warrant and adequate time to obtain one, but fails to do so, does not vitiate the rule of *Carroll*. We hold that no exigent circumstances other than the motor vehicle itself are required in order to justify a warrantless search of a motor vehicle if there is probable cause to believe that it contains the instrumentality of a crime or evidence pertaining to a crime and the vehicle is in a public place.

Nothing in our decision today alters in any respect the requirements for establishing probable cause in motor vehicle cases; we are following the well-established rule that a search warrant is not required before a lawful search on probable cause of a motor vehicle in a public area may take place. *United States v.*

*Ross*, 456 U.S. 798, 72 L.Ed. 2d 572. As we have explained, this result obtained because of the two factors which set motor vehicles apart from most other places and things which could be subject to a search—their inherent mobility and the decreased expectation of privacy in them. In short, the inherent mobility of the automobile is itself the exigency. *See State v. Jones*, 295 N.C. 345, 245 S.E. 2d 711 (1978); *State v. Russell*, 84 N.C. App. 383, 352 S.E. 2d 922 (1987); *United States v. Hensler*, 625 F. 2d 1141 (4th Cir. 1980), *cert. denied*, 450 U.S. 980, 67 L.Ed. 2d 814 (1981); *United States v. Whitfield*, 629 F. 2d 136 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1086, 66 L.Ed. 2d 812 (1981); *United States v. Gooch*, 603 F. 2d 122 (10th Cir. 1979); *United States v. Bain*, 736 F. 2d 1480 (11th Cir. 1984), *cert. denied*, 469 U.S. 937, 83 L.Ed. 2d 275 (1984); *State v. Lowe*, 485 So. 2d 99 (La. App. 1986), *writ denied*, 488 So. 2d 199 (La. 1986); *State v. Banner*, 685 S.W. 2d 298 (Tenn. Crim. App. 1984); *Williams v. State*, 173 Ga. App. 207, 325 S.E. 2d 783 (1984); *State v. Gardner*, 10 Kan. App. 2d 408, 701 P. 2d 703 (1985); *People v. Futrell*, 125 Mich. App. 568, 336 N.W. 2d 834 (1983); *State v. Camargo*, 126 N.H. 766, 498 A. 2d 292 (1985). However, this is not to say that every automobile case will involve exigent circumstances; the situation in *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564 (1971), is a case in point. In *Coolidge*, the automobile which officers desired to search was parked in defendant's driveway on private property and within the curtilage of defendant's home. Further, the other case upon which defendant relies, *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed. 2d 527 (1983), is not applicable to the facts of this case. The automobile exception to the warrant requirement was not implicated in *Gates*, where officers obtained a search warrant for the vehicle.

Although Deputy Midgette had probable cause to secure a search warrant based upon the informant's tip, he was not required to apply immediately for the warrant. An officer can wait, investigate further, and secure additional information before applying for a search warrant. We see no reason to put officers on a timetable within which to apply for search warrants. If twenty hours is too long to wait, as defendant insists, what about sixteen hours, or ten hours? The courts should not decide the validity of searches on this basis. Further, there are often valid reasons to delay the issuance of warrants. Usually, search warrants are issued as close as possible to the time of execution of the warrant

because the longer a warrant is outstanding the greater the likelihood that a defendant will be apprised of the proposed search.

We further conclude that the law and reasoning applicable to the fourth amendment in this case is also determinative of defendant's rights under the Constitution of North Carolina. We hold that none of defendant's rights under the fourth amendment of the Constitution of the United States or the Constitution of North Carolina were violated by the search of her vehicle.

We hold that both the trial court and the Court of Appeals erred in holding that the seized evidence should be suppressed. Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded to that court for remand to the Superior Court of Dare County for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

Justice FRYE concurs in result only.

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BETTY B. FORTNER, EMPLOYEE, PLAINTIFF v. J. K. HOLDING COMPANY, EMPLOYER, AND AMERICAN INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 685A86

(Filed 2 June 1987)

1. **Appeal and Error § 45— Supreme Court briefs—incorporation of Court of Appeals arguments not allowed**

Under the present Rules of Appellate Procedure, briefs filed in the Supreme Court may not incorporate by reference arguments contained in briefs before the Court of Appeals.

2. **Master and Servant § 55.4— workers' compensation—disposing of employer's plants—accident while hanging plants at home—injury not arising out of and in course of employment**

Where plaintiff was instructed to pack up office materials and dispose of hanging plants in preparation for permanently closing the employer's office, plaintiff took the plants and their hanger to her home during working hours,

plaintiff climbed onto a chair and placed the hanger on a nail, and plaintiff decided the hanger was not level, climbed back onto the chair to straighten it, and fell and injured her hip, plaintiff's accident did not arise out of and in the course of her employment, even if plaintiff's taking of the plants to her home qualifies as a "special errand" or falls under the "dual purpose" doctrine and hanging the plants was a reasonable extension of disposing of them, since plaintiff's further action in attempting to insure that they would hang straight was of no benefit to her employer but was for her sole benefit.

APPEAL by plaintiff from the decision of a divided panel of the Court of Appeals, 83 N.C. App. 101, 349 S.E. 2d 296 (1986), affirming an opinion and award of the Industrial Commission denying plaintiff's claim for benefits. Heard in the Supreme Court 14 April 1987.

*Homesley, Jones, Gaines & Fields, by Edmund L. Gaines and Cliff W. Homesley, for plaintiff-appellant.*

*Hedrick, Eatman, Gardner & Kincheloe, by Thomas E. Williams, for defendant-appellees.*

FRYE, Justice.

The sole question on appeal before this Court is whether the plaintiff's accident arose out of and in the course of her employment. We hold that it did not, and accordingly affirm the decision of the Court of Appeals.

**[1]** Before turning to a consideration of this issue, however, we must first address one preliminary matter. In plaintiff's new brief filed with this Court, in place of a new argument, her attorney included a statement incorporating by reference into the new brief the argument contained in plaintiff's brief before the Court of Appeals. Defendant moved to dismiss plaintiff's appeal for failure to comply with N.C.R. App. P. 28. Plaintiff's attorney submitted a response explaining that he had relied upon the Commentary to Subdivision (d) of Rule 28, which states that that subdivision allows incorporation of argument by reference. The current N.C.R. App. P. 28(d), however, concerns appendices to briefs and makes no reference to incorporation by reference. The commentary refers to former subsection (d). A note appearing in the 1987 volume of rules published by the Michie Company (*Annotated Rules of North Carolina*) explains that former N.C.R. App. P. 28(d), permitting such incorporation of argument by reference,

was repealed in 1981, and incorporation by reference is no longer permitted. However, in the equivalent 1987 volume published by the West Publishing Company and used by the plaintiff, the note was somewhat garbled (*North Carolina Rules of Court*).[1] Deferring action on defendant's motion, the Court issued an order allowing plaintiff fifteen days within which to file an amended brief. Plaintiff complied with this order, and defendant has not been prejudiced thereby. Accordingly, defendant's motion to dismiss plaintiff's appeal is denied. However, we call to the attention of the Bar the fact that incorporation by reference of arguments contained in briefs before the Court of Appeals is not permitted under our present Rules of Appellate Procedure.

Plaintiff filed a claim for workers' compensation benefits as the result of an accident that occurred on 31 August 1984. The claim was denied by the deputy commissioner and again by the Full Commission, which adopted the deputy commissioner's opinion and award as its own. Commissioner Clay dissented. Plaintiff appealed to the Court of Appeals, which affirmed the Commission's decision, with a dissent by Judge Phillips. Plaintiff appealed to this Court.

The facts as found by the Commission show that on 31 August 1984, the date of the accident, plaintiff had been working for defendant employer for about five years. Defendant employer is owned by J. C. Kivett. Plaintiff worked for another company owned by Kivett before working for defendant. Kivett spent most of his time traveling on defendant employer's business, and plaintiff, who was the sole employee in the office, took care of the office. Her duties were varied and variable. *Inter alia*, she did necessary office work, picked up mail, went to the bank, purchased supplies, cleaned the office, took care of the hanging plants which decorated the office, and ran errands for Kivett. She was allowed a tank of gas per month as a travel allowance.

Sometime prior to 31 August 1984, Kivett decided to close the office and rent the building effective 1 September 1984. Because he was going to be out of town at the time, he instructed plaintiff to pack the office materials and move them to another

1. West Publishing Company has corrected this in its 1 March Supplement to the 1987 Volume.

location and to dispose of all the hanging plants except one that he wished to keep. These plants were grown from cuttings that Kivett had brought from home. They had been in the office for about five years. Kivett expected plaintiff to give the plants away or else to keep them. He knew that she would not choose to throw them away as the form of disposal.

On 31 August 1984, the last day the office was to be open, plaintiff put the plants and their hanger in her car and drove home. She intended to return to the office to finish packing and to vacuum. When she arrived at her home, she unloaded the plants and their hanger from her car and set them on the porch. She climbed onto a chair and hung the hanger on a nail that she had previously driven to hold the hanger. She stepped down, decided that the hanger was not level, and stepped back up onto the chair to straighten it. She fell and injured her hip. Neither party takes exception to the findings containing these basic facts; they are accordingly binding upon this Court on appeal. *Pollock v. Reeves Bros., Inc.*, 313 N.C. 287, 292, 328 S.E. 2d 282, 286 (1985).

**[2]** Plaintiff excepts only to the Commission's final finding, that the accident did not arise out of and in the course of her employment, and the Commission's conclusion of law to the same effect. As this Court has stated before on many occasions, " '[w]hether an injury arose out of and in the course of employment is a mixed question of law and fact, and where there is evidence to support the Commissioner's findings in this regard, we are bound by those findings.' " *Id.* quoting *Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 506, 293 S.E. 2d 807, 809-10 (1982), quoting *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E. 2d 676, 678 (1980). If the detailed findings of fact compel a conclusion different from that reached by the Commission, it is the duty of the appellate courts to reverse the Commission. *Alford v. Chevrolet Co.*, 246 N.C. 214, 97 S.E. 2d 869 (1957). Far from compelling a conclusion different from that reached by the Commission, the detailed facts found by the Commission in the instant case support the finding that plaintiff's accident did not arise out of and in the course of her employment.

In order for an employee to be entitled to workers' compensation benefits for accidental injury, the employee must prove that the accident arose out of and in the course of the employment. N.C.G.S. § 97-2(6) (1985). The term "arising out of" refers to

the origin or cause of the accident, and the term "in the course of" refers to the time, place, and circumstances of the accident. *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 293 S.E. 2d 196 (1982); *Cole v. Guilford County*, 259 N.C. 724, 131 S.E. 2d 308 (1963). An accident arises "in the course of" the employment when

> the injury occurs during the period of employment at a place where an employee's duties are calculated to take him, and under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further directly or indirectly, the employer's business.

*Powers v. Lady's Funeral Home*, 306 N.C. 728, 730, 295 S.E. 2d 473, 475 (1982).

Plaintiff contends that the facts in her case meet these two requirements. She was specifically instructed to dispose of the plants. The method by which she did so was left up to her. Her employer was aware that she would not merely throw the plants away but would either give them away or keep them herself. The plants had to be disposed of on that particular day and the office cleaned. Plaintiff chose to dispose of the plants by taking them to her home. She contends that the manner in which she carried out her assigned task was not unreasonably dangerous, nor did it violate any rule of her employment. She argues that at the least she is protected under either the "special errand" doctrine, *see* 1 A. Larson, *The Law of Workmen's Compensation* § 16.10 (1985); *see also Powers v. Lady's Funeral Home*, 306 N.C. 728, 295 S.E. 2d 473, or by the "dual purpose" doctrine, *see Pollock v. Reeves Bros., Inc.*, 313 N.C. 287, 328 S.E. 2d 282.

Assuming, *arguendo*, that plaintiff is correct that her action in taking the plants to her home qualifies as a "special errand" or falls under the "dual purpose" doctrine, we hold that her accident is nonetheless not compensable. "Basically, whether plaintiff's claim is compensable turns upon whether the employee acts for the benefit of his employer to any appreciable extent or whether the employee acts solely for his own benefit or purpose . . . ." *Guest v. Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E. 2d 596, 600 (1955); *see also Pollock v. Reeves Bros., Inc.*, 313 N.C. 287, 328 S.E. 2d 282; *Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 293 S.E. 2d 807. When plaintiff's accident occurred, she had already de-

posited the plants at her home. She was then free to return to the office to finish packing and vacuum up any remaining debris, including plant debris. She chose instead to hang the plants. Even assuming that hanging them was a reasonable extension of the task of disposing of them, her further action in attempting to insure that they would hang straight, and thus appear aesthetically pleasing in their new position in her home, was of no conceivable benefit to her employer. Plaintiff at that point was acting solely for her own benefit. "Where an employee at the time of his injury is performing acts for his own benefit, and not connected with his employment, the injury does not arise out of his employment." *Lewis v. Tobacco Co.*, 260 N.C. 410, 412, 132 S.E. 2d 877, 880 (1963) (although cooking and chauffering for his supervisor on a hunting trip was one of deceased's duties, his act in going hunting with the supervisor's two sons was done exclusively for his own benefit); *see also Bell v. Dewey Brothers, Inc.*, 236 N.C. 280, 72 S.E. 2d 680 (1952) (plaintiff's act in washing his personal car while on the job, although with his employer's knowledge, was for his personal benefit and did not arise out of and in the course of his employment); *cf. Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596 (plaintiff's act in helping service station attendant who had agreed to give him free air for a tire for employer's vehicle was beneficial to the employer). Accordingly, the Commission did not err in finding that plaintiff's accident did not arise out of and in the course of her employment.

For the reasons stated in this opinion, the decision of the Court of Appeals is affirmed.

Affirmed.

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STATE OF NORTH CAROLINA v. STEPHEN LOUIS MOORE

No. 352A85

(Filed 2 June 1987)

**Criminal Law § 15.1— pretrial publicity—motion for change of venue—standard of proof**

The trial court applied an incorrect standard of proof in ruling against defendant on his motion for a change of venue or for a special venire in a first

degree murder case because of pretrial publicity when the court concluded that defendant had the burden to prove that the pretrial publicity had been so extensive and inflammatory that it would be "virtually impossible or at least highly unlikely" that an impartial jury could be drawn from the county rather than requiring defendant to establish a "reasonable likelihood" that he would not receive a fair trial in the county.

APPEAL by the defendant from judgment entered by *Wood, J.*, at the February 1985 Criminal Session of Superior Court, RUTHERFORD County.

The defendant was indicted for first degree murder. His case was tried as a capital case. A jury found him guilty as charged and recommended a life sentence, which was imposed. The defendant appealed to this Court as a matter of right. Heard in the Supreme Court on 11 February 1987.

*Lacy H. Thornburg, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Geoffrey C. Mangum, Assistant Appellate Defender, for the defendant appellant.*

MITCHELL, Justice.

The defendant contends, *inter alia*, that the trial court erred in denying his motion for a change of venue or for a special venire. N.C.G.S. §§ 15A-957 and 958 (1983). He argues that the trial court applied an incorrect standard of proof to the evidence he introduced in support of his motion. We agree and hold that the defendant is entitled to a new trial.

A complete review of the evidence is not necessary for an understanding of the legal issues involved in this case. Briefly, evidence for the State tended to show that the defendant and the victim dated and lived together for a time. The defendant is black, the victim white.

A motion for change of venue, or for a venire from another county, is addressed to the sound discretion of the trial court. *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981). Such a motion may be based *inter alia* on grounds of prominence of the victim or inflammatory pretrial publicity. *See State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325, *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d

1211 (1976). "Publicity" includes publication by word-of-mouth. *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976).

At the hearing on his motion, the defendant offered substantial affirmative evidence tending to show that, at the time of his trial, (1) prospective jurors in his case were reasonably likely to base their verdict upon conclusions induced by outside influences, rather than evidence introduced at trial, and (2) as a result, there was a reasonable likelihood that he would not receive a fair trial in Rutherford County. *See State v. McDougald*, 38 N.C. App. 244, 248 S.E. 2d 72 (1978), *appeal dismissed*, 296 N.C. 413, 251 S.E. 2d 472 (1979). His evidence, if believed, demonstrated extensive inflammatory media coverage of this case, pervasive discussion of it throughout the county, and the social prominence of the victim and her family within Rutherford County.

The defendant submitted affidavits of fifty-three citizens of Rutherford County that the case against the defendant had been discussed throughout their communities, and people had formed opinions concerning the case. The affiants believed that the defendant could not receive a fair trial in Rutherford County at that time. The defendant also presented the live testimony of one witness to the same effect.

The defendant tendered newspaper accounts of the case, which recounted that the defendant was "a former prison inmate." Rutherford County Sheriff Damon Huskey was quoted as having said the defendant harassed the victim, broke into her house, and was dangerous. Sheriff Huskey "believed Moore was waiting for [the victim] outside her home, then followed her inside." The newspaper accounts stated that the defendant was serving a five-year sentence for a 1977 assault on a police officer in Watauga County, although he had been originally charged with kidnapping. The prosecutor in Watauga County was quoted as saying of the 1977 incident, "It was an armed camp . . . . We could have had a shootout of mammouth [sic] proportions. He finally surrendered . . . . The crimes we prosecuted him for were very violent crimes, usually with a gun." The defendant was identified as having been paroled in 1979, but later convicted of discharging a firearm into an occupied motor vehicle and assault on a police officer. The head of the FBI in North Carolina was

quoted as saying the defendant is "extremely dangerous" and a "Dr. Jeckyll [sic] and Mr. Hyde type."

Front-page headlines in the Forest City *Daily Courier* included, "Lawmen wait for a break: In search for killer of ICC instructor" and "Moore put on most wanted list." The defendant also tendered the affidavit of the publisher of the *Daily Courier* that it has a daily circulation of 9,092 within Rutherford County. The trial court found that Rutherford County has a population of 55,000.

The prosecutor called eleven witnesses at the hearing on the defendant's motion. Each of these witnesses opined that the defendant could receive a fair trial in Rutherford County. Upon cross-examination, however, each corroborated the defendant's showing of extensive pre-trial media and word-of-mouth discussion of the case.

The first witness for the State, for example, testified that there had been little discussion of the case in his community. On cross-examination, however, he admitted hearing the case discussed among his church members based upon newspaper accounts and people saying, "I hope they catch him." Additionally, his wife had mentioned to him that the FBI described the defendant as "extremely dangerous" and a "Dr. Jeckyll [sic] and Mr. Hyde type."

Another witness knew the defendant was an ex-felon and recalled Sheriff Huskey describing him as "dangerous." The witness had read that the defendant was on the FBI's most wanted list, heard people say they hoped law enforcement caught him, and heard "all the time" from "everybody" that they disapproved of interracial dating.

One witness had read several newspaper accounts of the case. He had read that the defendant was an ex-felon, that he was placed on the most wanted list, that the FBI said the defendant was "extremely dangerous" and a "Dr. Jeckyll [sic] and Mr. Hyde type." He thought he could have read that Sheriff Huskey described the defendant as "dangerous." He had heard the defendant and the victim were living together. At the least, people were aware that the defendant and the victim dated. He had heard people expressing disapproval about black-white dating.

A resident of Rutherfordton had seen the defendant on television news a time or two. He had read newspaper accounts of the defendant's capture. He knew the defendant was an ex-felon.

Another witness for the State said that he was aware of the case "by the talk that was going on and being in the paper and so on." He knew the defendant and the victim had been living together because "[i]t was fairly common knowledge." District Attorney Alan C. Leonard, demonstrating commendable candor, recognized that the case had been "discussed quite a bit" among county residents, "No question about that." He also recognized that some people probably had made up their minds and that the newspaper accounts were "more than what they should be."

Ten prospective jurors had either read or heard about the case from others. One said that the newspapers were "full of it." One prospective juror said he had "heard a lot about this case." Two of his children were students at the school where the victim taught when the murder occurred. He was excused for cause. Each of twenty-seven prospective jurors said that they did not approve of interracial dating; only two said they felt it was up to the individual. Thirteen of the prospective jurors examined knew Sheriff Huskey. They all were excused. One prospective juror worked with the victim's father, one was a friend of her family, and the wife of another was a friend of the family. These people also were excused.

The defendant exhausted his peremptory challenges. *See State v. Dobbins*, 306 N.C. 342, 293 S.E. 2d 162 (1982). Of the twelve jurors eventually selected, all stated their disapproval of interracial dating except one who said it was an individual question. Six jurors knew at least one of the State's witnesses, including one juror who was acquainted with the victim's sister and her secretary. Ten of the twelve jurors selected knew Sheriff Huskey. He was, for example, a good customer in one juror's store and a distant cousin of another juror's mother.

Having reviewed the evidence introduced, the trial court concluded as a matter of law that:

> [T]he defendant has the burden of proof from a preponderance of the evidence to demonstrate that pretrial publicity has been so extensive and inflammatory that it would be *vir-*

> *tually impossible or at least highly unlikely* that a fair and impartial jury could be seated in this case drawn from a venire of Rutherford County jurors.

(Emphasis added.) This placed an unduly high burden of proof upon the defendant. In *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983), we stated:

> [T]he test for determining whether venue should be changed . . . is whether, due to pretrial publicity, there is a *reasonable likelihood* that the defendant will not receive a fair trial. Stated otherwise, a defendant's motion for a change of venue should be granted when he establishes that it is *reasonably likely* that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed.

309 N.C. at 254-55, 307 S.E. 2d at 347 (citations omitted) (emphasis added).

The trial court inadvertently applied an incorrect standard of proof in ruling against the defendant on his motion for a change of venue or for a special venire. The defendant was entitled to a consideration of the evidence offered in support of his motion under the correct standard. We are unable to ascertain with certainty what the trial court's ruling would have been had the proper standard been applied. In light of the totality of circumstances indicated by the evidence, failure to apply the correct standard when ruling on the defendant's motion was error requiring a new trial of this case.

If the defendant believes that any unfair prejudice resulting from publicity exists in Rutherford County at the time of his new trial, he will be free to present evidence and arguments in support of any new motion he may make for a change of venue or for a special venire. At that time, the trial court will have the opportunity to consider any evidence which may be introduced and to apply the correct standard before ruling on any such motion.

New trial.

STATE OF NORTH CAROLINA v. JIMMY LEE WALKER

No. 398A86

(Filed 2 June 1987)

**Criminal Law §§ 128.1, 102.5— improper questions—objections sustained and jury instructed—no mistrial**

The trial court did not err in a murder prosecution by denying defendant's motion for a mistrial, even though the prosecutor's questions had portrayed defendant by innuendo as a drug dealer with wide-ranging illicit associations, because the trial court had promptly sustained defendant's objection and instructed the jury that it was not to consider the implications of the prosecutor's questions; although the prosecutor persisted in the challenged line of questioning, he did not do so in nearly so persistent or damaging a manner as the prosecutor in *State v. Phillips*, 240 N.C. 516; and evidence of defendant's drug use and purchase of drugs had already been introduced during the State's case in chief without objection from defendant.

APPEAL by the defendant from judgment entered by *Long, J.*, at the 24 February 1986 Criminal Session of Superior Court, RUTHERFORD County. The defendant was indicted for first degree murder. The jury found him guilty under a felony-murder theory. He was sentenced to life imprisonment and appealed to the Supreme Court as a matter of right. Heard in the Supreme Court 13 April 1987.

*Lacy H. Thornburg, Attorney General, by Barry S. McNeill, Assistant Attorney General, for the State.*

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

MITCHELL, Justice.

The defendant contends that the trial court erred by denying his motions for a mistrial because, during cross-examination of the defendant's wife, the prosecutor "persistently injected incompetent and prejudicial innuendo into the trial." We disagree and hold that the trial court did not err.

The State's evidence tended to show that the defendant, Jimmy Lee Walker, visited Tony Philbeck several times a week, sometimes with a mutual acquaintance, Lisa Splawn, to use co-

caine. Usually, the defendant had the cocaine with him. When he did not, he would give Philbeck the necessary money and have Philbeck purchase cocaine for him.

Jerry Lee White, an automobile parts salesman and admitted drug dealer, testified that he owned a .380 caliber semi-automatic pistol, but had arranged for it to be pawned on 24 October 1984. Wishing to retrieve the pistol, White asked to borrow the necessary money from the defendant on 3 November 1984. White had been "pretty close friends" with the defendant for about fifteen years. The defendant told White he would pick up the gun and hold it until White could pay him. The defendant claimed the gun on 3 November 1984 and bought fifty rounds of Federal .380 caliber ammunition.

The defendant and his wife were in a bad financial situation. He had lamented in late October that he had spent all his money on cocaine, was "hurting" for money, and had made unsuccessful attempts to borrow money. He was thinking about selling a trailer and a couple of his houses. On 6 November 1984, his wife was denied a $3,000 consumer loan from a local bank. The bank informed him of its decision that afternoon.

That night, 6 November 1984, the defendant came to Philbeck's house around 8:00 or 8:30 p.m. He said he "needed money real bad" because he was "wanting to get high and was behind on his payments and all." The defendant believed that his automobile body repair shop business was down because people thought he was informing on drug users.

About 9:30 p.m., the defendant told Philbeck he wanted to "check something out" and proceeded to drive by Alvin Walker's home. A car was in Alvin's driveway. The defendant told Philbeck that, when the car left the residence, he wanted Philbeck to drive and let him out at Alvin's so the defendant could rob him. The defendant was Alvin Walker's cousin and knew that he always carried a large amount of money. The defendant was carrying a .380 caliber handgun.

Philbeck became scared and told the defendant to take him home so he could go to work. The defendant took Philbeck home around 10:00 or 10:30 p.m.

On Tuesday, 6 November 1984, Alvin Walker's son, Mark Walker, got off work and went to his father's house to watch the election returns on television. Larry Walker, Alvin's brother, also came by around 10:30 p.m. for about fifteen minutes. Alvin was alone when Mark left around 11:30 p.m.

Alvin always carried a billfold full of cash. Larry estimated Alvin's billfold was one and one-half inches to two inches thick and contained over 100 green bills. Larry and Mark both saw Alvin's billfold and saw him put it in his pocket on the night of 6 November 1984.

The defendant knocked on Alvin's door around 1:00 or 1:30 a.m. on 7 November 1984. He shot Alvin, but Alvin kept coming toward him, so he shot him again. The defendant stole Alvin's billfold and went home. The defendant then took his son's car and drove to a bridge where he threw away the gun he had used to kill Alvin Walker. The defendant twice told Philbeck what he had done.

Alvin Walker was found dead, lying face down on his front porch, on 7 November 1984. His billfold was gone. He had three bullet wounds: to the right shoulder, the right forearm, and the center of the chest. He also had a laceration on the top of his head over a small skull fracture. The wound to the right forearm possibly was inflicted by the same bullet that struck his chest. He had been shot at close range by a .380 caliber gun. The bullets were manufactured by Federal Firearms.

The defendant did not testify, but offered an alibi defense. His wife and son said that he was at home at 10:30 p.m. on the night Alvin Walker was killed and did not go out again on that night. The defendant also offered testimony which disputed Philbeck's statement that the defendant had told him about the murder by telephone after 8:30 a.m. and again in person around 9:30 a.m. on 7 November 1984.

During the defendant's presentation of evidence at trial, the prosecutor cross-examined the defendant's wife as follows:

> Q. Did you know of his dealings in the marijuana or cocaine business?
>
> MR. HARRIS: OBJECTION.

THE COURT: SUSTAINED. Members of the jury, you're not to consider the implications of that question.

Q. Was he dealing in the marijuana or cocaine business— . . . [objection sustained].

THE COURT: Just a minute. Motion [to strike] ALLOWED. Members of the jury, you're not to consider the implications of the question of the District Attorney.

The prosecutor then asked the defendant's wife whether she knew if the defendant associated with Greg Burleson, Doc Lamb, Troy Brown, or Danny Roach. The defendant's objections were sustained. The defendant's motion for mistrial was denied, and curative instructions were given. The prosecutor continued, asking if the wife knew Levi Arrowwood or of her husband's association with Lisa Splawn, Tammy Chapman, Connie Bradley, or Patty Beard. The defendant's objection was sustained, but his motion for mistrial was denied. The witness each time denied knowledge.

The defendant contends that the trial court should have granted his motions for a mistrial, because the prosecutor's questions portrayed him by innuendo as a drug dealer with wide-ranging illicit associations. He asserts that the trial court's rulings were too mild when compared to the damage done. He suggests that the trial court should have intervened more forcefully by forbidding the prosecutor from further improper cross-examination or by giving the jury a stronger admonition and instructing them that there was no evidence the defendant was a drug dealer.

The defendant places great reliance upon *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954), in which we ordered a new trial because of improper conduct by the prosecutor who purposely and persistently asked improper questions of the defendant and his witnesses which asserted in advance the untruth of their denials. In *Phillips*, the trial court overruled the defendant's objections to many of the improper questions. Here, the trial court sustained the defendant's objections as to all such questions and gave curative instructions to the jury. Additionally, the defendant in *Phillips* specifically requested the trial court put an end to the line of improper questioning on the ground that it was tanta-

mount to the prosecutor giving testimony. Here, the defendant made no such request for further curative instructions or additional remedial action. *See State v. Blackstock*, 314 N.C. 232, 245, 333 S.E. 2d 245, 253 (1985).

The trial court properly denied the defendant's motions for mistrial in the present case, especially since it had promptly sustained the defendant's objections and instructed the jury that it was not to consider the implications of the prosecutor's questions. The law assumes that jurors will follow their instructions and act in a rational fashion. *State v. McCraw*, 300 N.C. 610, 268 S.E. 2d 173 (1980). When a court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured. *State v. Smith*, 301 N.C. 695, 697, 272 S.E. 2d 852, 855 (1981). Because such steps had been taken in the present case, the trial court's refusal to grant a mistrial was not an abuse of discretion. *State v. Primes*, 314 N.C. 202, 215, 333 S.E. 2d 278, 286 (1985). *Accord, State v. Bright*, 301 N.C. 243, 258, 271 S.E. 2d 368, 378 (1980).

Although the prosecutor persisted in the challenged line of questioning after several objections had been sustained, he did not do so in nearly so persistent or damaging a manner as the prosecutor in *Phillips*. Evidence of the defendant's drug use and purchases of drugs had already been introduced during the State's case-in-chief without objection from the defendant. The questions complained of here did not result in "substantial and irreparable prejudice," considering the weight of the evidence against the defendant. *See State v. Smith*, 301 N.C. 695, 272 S.E. 2d 852 (1981); N.C.G.S. § 15A-1061 (1983). Therefore, the trial court properly denied the defendant's motions for a mistrial.

The defendant received a trial free from error.

No error.

STATE OF NORTH CAROLINA v. BRIAN KEITH DUDLEY

No. 129A86

(Filed 2 June 1987)

1. **Criminal Law § 128.1— inculpatory statement—no mistrial ex mero motu—no error**

The trial court did not err in a prosecution for kidnapping and rape by not declaring a mistrial on its own motion after testimony by an officer that defendant had said that he shouldn't live any longer if he had done this and that defendant thought he had done something like that before. Defendant did not contend that his *Miranda* rights were infringed upon, and assuming there was error in not furnishing defendant with the statement during pretrial discovery, any improper prejudice was cured by the court's instruction to the jury not to consider the testimony.

2. **Rape and Allied Offenses §§ 1, 5— two acts with one victim—separate offenses**

The trial court did not err in a prosecution for kidnapping and rape by not arresting judgment on one of two rape charges involving the first victim where the evidence showed that defendant completed intercourse with the first victim, was not successful with the second victim, and completed the act with the first victim for the second time. Each of the acts of forcible intercourse with the first victim was a separate rape rather than a continuing offense.

3. **Constitutional Law § 34— convictions for kidnapping and rape—double jeopardy**

Although a defendant convicted of kidnapping, rape, and first degree sexual offense did not move to arrest judgment on any of the charges on double jeopardy grounds and therefore waived his right to raise the issue on appeal, the Supreme Court elected to review the issue in the exercise of its supervisory powers and held that defendant was entitled to have judgment arrested on either the rape or kidnapping as to one victim and either the first degree sex offense or the kidnapping as to the other victim.

4. **Criminal Law § 138.10— two life sentences—credit for time served on both**

Where defendant was convicted of two counts of first degree rape and was given two life sentences to run concurrently, he should have been credited on both life sentences with time spent in jail awaiting trial. N.C.G.S. § 15-196.2.

Justice MARTIN concurring in part and dissenting in part.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing life sentences entered by *Griffin, Judge*, presiding at the 3 February 1986 Criminal Session of CARTERET County Superior Court, where defendant was convicted of two counts of first degree rape, one count of attempted first degree

rape and two counts of first degree kidnapping. Defendant's petition to bypass the Court of Appeals as to judgments imposing sentences for less than life was allowed. Heard in the Supreme Court 10 March 1987.

The defendant was tried on two counts of the first degree rape of one victim, one count of the attempted rape of a second victim, one count of the first degree kidnapping of the first victim, and one count of the first degree kidnapping of the second victim. The State's evidence showed that on 2 September 1985 at approximately 1:00 a.m. two young girls, one age 16 and the other age 17, were riding in an automobile being driven by the 16 year old. They drove into a driveway and began to turn around when their way was blocked by an automobile driven by the defendant. The defendant left his automobile and by threatening them with a shotgun forced the two girls to leave their automobile and accompany him. He put them in his automobile and drove to an isolated spot near Morehead City where he raped one of them. He then attempted to have intercourse with the other but was unsuccessful. The defendant then forced the first victim to have intercourse with him for a second time. The defendant then put the two girls in his automobile and returned them to a place near their automobile at Atlantic Beach.

The defendant offered no evidence. He was convicted of all counts upon which he was tried. He was sentenced to life on the two convictions of first degree rape with these sentences to be served concurrently. He was sentenced to twenty years on the conviction of attempted first degree rape with this sentence to commence at the expiration of the life sentences. The two convictions of first degree kidnapping were consolidated for sentencing and the defendant received a sentence of forty years to commence at the expiration of the other sentences.

*Lacy H. Thornburg, Attorney General, by Kaye R. Webb, Assistant Attorney General, for the State.*

*Reginald L. Frazier, for defendant appellant.*

WEBB, Justice.

**[1]** The defendant first assigns error to the court's failure to declare a mistrial *ex mero motu* after a statement on direct ex-

amination by James R. Rose, an officer with the Atlantic Beach Police Department, who investigated the case. After the defendant had been interrogated by the investigating officers he was transported to the Beaufort, North Carolina magistrate's office. Mr. Rose testified that on the way to the magistrate's office the defendant without being questioned said "that if he did this, that he shouldn't live any longer; he should die." When they arrived at the magistrate's office the defendant was allowed to call his grandmother and a detective told Mr. Rose that the defendant had made a similar statement to him. Mr. Rose then testified: "So I went in and asked Mr. Dudley, I said Brian, what did you say? And he told me at that particular point and time that he thinks he's done something like this before." The defendant objected to this statement. The court sustained the objection and instructed the jury to disregard it. The defendant did not move for a mistrial but contends on appeal that the statement was so prejudicial that the court should have on its own motion declared a mistrial.

It is not clear on what ground the defendant contends it was error for Mr. Rose to have testified as he did. He does not contend the defendant's rights as defined by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), were infringed upon. In the superior court he argued that he had not been provided this statement during pre-trial discovery as required by N.C.G.S. § 15A-903(a)(2). The State does not argue that it would not have been error to have allowed this testimony. Rather, the State argues that any error was cured by the court's allowing the motion to strike and instructing the jury to disregard it. Assuming it would have been error to have admitted this testimony, any improper prejudice was cured by the court's instruction to the jury not to consider it. *State v. Ray*, 212 N.C. 725, 194 S.E. 482 (1938). If the court had on its own motion declared a mistrial without the consent of the defendant, the defendant might well have been in a position to plead double jeopardy at a new trial. *State v. Lowery*, 286 N.C. 698, 213 S.E. 2d 255 (1975). This assignment of error is overruled.

**[2]** Defendant next assigns error to the failure of the superior court to arrest judgment on one of the two charges of rape on the first victim. The evidence showed that the defendant completed the intercourse with her but was not successful in his attempts with the second victim. He then completed the act with the first

victim for a second time. The defendant contends it was a single continuous incident with the first victim and that he can be convicted of only one charge of rape. Our Court of Appeals dealt with a similar case in *State v. Small*, 31 N.C. App. 556, 230 S.E. 2d 425, *cert. denied*, 291 N.C. 715, 232 S.E. 2d 207 (1977). In that case the court held that a defendant could be convicted of two separate charges of rape when he twice had intercourse with a woman against her will while she was within his power. The court said, quoting 75 C.J.S. Rape § 4, "[g]enerally rape is not a continuous offense, but each act of intercourse constitutes a distinct and separate offense." We believe the reasoning of the Court of Appeals is correct. We hold that each of the acts of forcible intercourse with the first victim was a separate rape rather than a continuing offense. This assignment of error is overruled.

**[3]** The defendant next assigns error to the court's failure to arrest judgment on the first degree kidnappings or the rape and attempted rape convictions. He relies on *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35 (1986), which holds that a person may not be convicted of both first degree kidnapping and a sexual assault if the sexual assault has to be proved to convict the defendant of kidnapping. We held that to do so would place the defendant in double jeopardy. Defendant did not at trial move to arrest judgment on first degree kidnappings or the rape and attempted rape convictions or sentences on double jeopardy grounds. He has, therefore, waived his right to raise the issue on appeal. *State v. Freeman*, 319 N.C. 609, 356 S.E. 2d 765 (1987); *State v. Mitchell*, 317 N.C. 661, 346 S.E. 2d 458 (1986); and *State v. McKenzie*, 292 N.C. 170, 232 S.E. 2d 424 (1977).

We elect, nevertheless, in the exercise of our supervisory power over the trial divisions, N.C. Const. Art. IV, § 12; N.C.G.S. § 7A-32 and pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, to review this issue on appeal. *See State v. Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975); and *State v. Hewett*, 270 N.C. 348, 154 S.E. 2d 476 (1967).

In this case the defendant was convicted of two counts of first degree rape and the first degree kidnapping of one victim. Under *State v. Belton*, 318 N.C. 141, 347 S.E. 2d 755 (1986), he is entitled to have judgment arrested as to one of the charges. He was convicted of first degree sexual offense and first degree kid-

napping of another victim. He is entitled under *Freeland* and *Belton* to have judgment arrested on one of these charges.

We remand the case to the superior court for further proceedings. On remand the superior court may as to the charges involving the first victim arrest judgment on one of the first degree rape convictions or on the first degree kidnapping conviction. As to the charges involving the second victim the court may arrest judgment on the attempted first degree rape or the first degree kidnapping conviction. If the court arrests judgment on either of the first degree kidnapping convictions it will enter a verdict of guilty of second degree kidnapping. The court will then resentence the defendant accordingly.

**[4]** The defendant next assigns error to the failure of the court properly to credit to his sentence the time he was in jail awaiting trial. The two life sentences which were imposed on the defendant are to run concurrently. The court ordered that the defendant receive 111 days credit on one life sentence for time spent in jail but did not order any credit on the other life sentence. N.C.G.S. § 15-196.2 provides in part:

> In the event time creditable under this section shall have been spent in custody as the result of more than one pending charge, resulting in imprisonment for more than one offense, credit shall be allowed as herein provided. . . . Each concurrent sentence shall be credited with so much of the time as was spent in custody due to the offense resulting in the sentence.

The defendant should have been credited on both life sentences with time spent in jail awaiting trial. At a new sentencing, the court may properly give the defendant credit for time spent in jail.

No error in the trial; remanded for new sentencing proceedings.

Justice MARTIN concurring in part and dissenting in part.

I concur in the majority holding that there was no error in the guilt phase of defendant's trial. I dissent to this Court's review of the double jeopardy issue that counsel concedes has

been waived by defendant. I do not find this to be a proper instance for this Court to grant extraordinary relief. No new principles of law are involved, nor do the actions of the trial court affect the general jurisprudence of the state. Without raising this issue before the trial court, defendant cannot argue it upon appellate review. *State v. Mitchell*, 317 N.C. 661, 346 S.E. 2d 458 (1986).

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STATE OF NORTH CAROLINA v. JAY ALEXANDER YOUNG, JR.

No. 451A86

(Filed 2 June 1987)

1. **Constitutional Law § 34; Criminal Law § 26.5— rape—first degree sexual offense, and kidnapping—judgment suspended on rape—not multiple punishment**

In a prosecution for first degree rape, first degree sexual offense, first degree kidnapping, and armed robbery where defendant was found guilty of first degree rape, first degree sexual offense, and kidnapping based on an underlying sexual assault, the jury did not identify which of the sexual assaults it used to support the verdict on the kidnapping case, and judgment was originally entered on all three offenses plus defendant's robbery conviction, the court did not err by arresting judgment in the rape case to avoid a multiple punishment problem.

2. **Rape and Allied Offenses § 6; Robbery § 5.2— instruction that knife a deadly weapon—no error**

The trial court did not err in a prosecution for rape, first degree sexual offense, kidnapping, and armed robbery by instructing the jury that a knife was a dangerous weapon where the weapon was a five-inch folding knife which was held to the victim's throat during the robbery and was used to threaten her during the sexual assault.

APPEAL by defendant from the judgment of *Ross, J.*, entered at the 14 April 1986 Criminal Session of IREDELL County Superior Court. Defendant was convicted of first degree rape, first degree sexual offense, first degree kidnapping and robbery with a dangerous weapon. Judge Ross sentenced defendant to concurrent terms of life imprisonment on the rape and sexual offense convictions, and to consecutive terms of 40 years imprisonment on the kidnapping and robbery charges (a total of life plus 80 years). By order dated 29 June 1986 Judge Ross arrested judgment in the

first degree rape case. Heard in the Supreme Court on 11 May 1987.

*Lacy H. Thornburg, Attorney General, by Christopher P. Brewer, Special Deputy Attorney General, for the state.*

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

EXUM, Chief Justice.

The questions presented in this appeal are whether the trial judge erred when he (1) arrested judgment in the first degree rape case, and (2) instructed the jury that a knife is a deadly weapon. We find no error and therefore affirm the actions of the trial court.

The state's evidence tended to show that on 6 May 1985 the victim was working the evening shift at Fast Phil's convenience store in Troutman, North Carolina. At approximately 11:30 p.m. a man the victim later identified as defendant ran behind her, put a knife to her throat, and demanded that she open the cash register. After removing approximately $60.49 from the register defendant led the victim away from the store and forced her into a car parked near a local church.

Defendant then drove to a secluded spot and, while pointing his knife at the victim, ordered her to remove her clothes. When she refused, defendant hit her on the head. The victim eventually complied with his orders and defendant forced her to perform fellatio. He then reclined the passenger seat and had vaginal intercourse with her. At this point the victim realized that defendant was no longer holding his knife. She grabbed it and managed to stab him once or twice in the back. A struggle ensued, during which defendant grabbed the blade of the knife and was bitten on the hand by the victim. The victim then told defendant that she would do anything he desired as long as he allowed her to throw the knife away, and defendant let her do so. He then attempted further intercourse, after which he told the victim to run away.

Defendant offered no evidence but did cross-examine the victim with respect to her identification of him as the perpetrator.

**[1]** The first assignment of error in this case concerns the trial court's attempt to avert a multiple punishment problem by ar-

resting judgment on defendant's conviction of first degree rape. The jury found defendant guilty of first degree rape and first degree sexual offense. In addition, the jury found defendant guilty of first degree kidnapping based on an underlying sexual assault.[1] The jury did not, however, identify which of the two sexual assaults it used to support its verdict in the kidnapping case. Judgment originally was entered on all three offenses, plus defendant's robbery conviction. A short time later the trial judge perceived a multiple punishment problem under this Court's decision in *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35 (1986), and arrested judgment in the first degree rape case.[2]

Defendant concedes that the trial court's effort to remedy the multiple punishment problem is consistent with this Court's suggestions in *Freeland*. In that case, as here, the defendant was convicted of both rape and sexual offense in addition to kidnapping. We remanded with instructions to either (1) arrest judgment in the first degree kidnapping case and resentence the defendant for second degree kidnapping, or (2) arrest judgment in one of the sexual assault cases. *Id.* at 24, 340 S.E. 2d at 41. Here the trial judge did the latter. Defendant nevertheless contends this was error because the judge did not know which sexual assault the jury used to support its verdict in the kidnapping case.

We need only point out that the situation here is precisely the situation faced by this Court in *Freeland*. It makes no difference which sexual assault the jury used. Each is sufficient to support the conviction of first degree kidnapping, and each carries a mandatory penalty of life imprisonment. Defendant therefore cannot be prejudiced when the trial judge averts the multiple punishment problem by arresting judgment on either one of the sexual assaults.

*State v. Belton*, 318 N.C. 141, 347 S.E. 2d 755 (1986), the case upon which defendant relies, is inapposite. In *Belton*, as here, defendants were convicted of first degree rape, first degree sex-

1. N.C.G.S. § 14-39(b) (1986) states in part: "If the person kidnapped either was not released in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree. . . .

2. Punishment for both first degree kidnapping and the underlying sexual offense unconstitutionally subjects a defendant to double punishment. *State v. Freeland*, 316 N.C. at 21, 340 S.E. 2d at 39.

ual offense and first degree kidnapping. The evidence, however, tended to show that one of the two victims had been sexually assaulted in three ways. Two of the sexual assaults resulted in defendant's convictions for first degree rape and first degree sexual offense. Defendants were not indicted for the third sexual assault, which also was a rape. The state argued that the unindicted rape could have been used by the jury to supply the sexual assault element of the first degree kidnapping, and therefore no multiple punishment problem was presented.

This Court rejected the state's argument for two reasons. First, to accept it we would have been required to assume that the jury unanimously found, without being instructed, that the unindicted rape was committed. Second, we would have had to assume that the jury, again without the benefit of instruction, used the unindicted rape as the underlying sexual assault in its first degree kidnapping verdict. Neither assumption, this Court held, is a permissible one. *Id.* at 162, 347 S.E. 2d at 768.

Here we are required to make no such assumptions. As in *Freeland*, "[t]he only sexual assaults committed by defendant . . . were the rape and sexual offense for which he was separately convicted. . . . [I]n finding defendant guilty of first degree kidnapping the jury must have relied on the rape or sexual offense to satisfy the sexual assault element." *Freeland*, 316 N.C. at 21, 340 S.E. 2d at 39. Thus, *Freeland* controls this case and defendant's first assignment of error must be overruled.

**[2]** Defendant next assigns error to the trial court's instructions concerning his use of a knife. The judge instructed the jury in the robbery case that "a knife is a dangerous weapon." Similarly, in the rape and sexual offense cases the judge stated that "a knife is a dangerous or deadly weapon." Defendant contends that these instructions violate his right to have a jury pass on every essential ingredient of a criminal offense.

This question is controlled by our recent decision in *State v. Torain*, 316 N.C. 111, 340 S.E. 2d 465, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 77 (1986). In *Torain*, which involved a utility knife with a one-inch razor blade, we found no error in a virtually identical instruction. Here the weapon was a folding knife with a five-inch blade. Defendant held the knife to the victim's throat during

the robbery and threatened her with it during the sexual assault. As we said in *Torain*,

> "[i]t has long been the law of this state that '[w]here the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . *is one of law, and the Court must take the responsibility of so declaring.*' "

*Id.* at 119, 340 S.E. 2d at 470. Defendant asks that we reconsider our decision in *Torain*. We decline to do so. This assignment of error therefore is overruled.

No error.

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STATE OF NORTH CAROLINA v. FREEMAN CARVER

No. 544A86

(Filed 2 June 1987)

1. **Criminal Law § 138.22— aggravating factor—use of weapon normally hazardous to more than one life—sufficient evidence**

The trial court properly found as an aggravating factor for second degree murder that defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person where the evidence showed that defendant fired multiple shots into a crowd of people with a semi-automatic rifle which would fire eight bullets without being reloaded. N.C.G.S. § 15A-1340.4(a)(1)g.

2. **Criminal Law § 138.42— mitigating factor—use of only necessary force—insufficient evidence**

The evidence did not support the trial court's finding as a mitigating factor for second degree murder that defendant was engaged in an affray and used only such force as was necessary where there was no evidence that anyone was firing at defendant when he fired indiscriminately into a crowd, and defendant could not have believed that it was necessary to fire a rifle as he did in order to defend himself.

3. **Criminal Law § 138.14— weighing of aggravating and mitigating factors—no abuse of discretion**

The trial court acted within its discretion in finding that two aggravating factors outweighed the two statutory and two non-statutory mitigating factors properly found by the court.

APPEAL by defendant pursuant to N.C.G.S. § 15A-1444(a1) and N.C.R. App. P. 4(d) from a judgment of imprisonment for life imposed by *Allen (C. Walter), Judge*, at the 7 April 1986 Session of Superior Court, GRAHAM County. The defendant originally appealed to the Court of Appeals and the case was transferred to this Court. Heard in the Supreme Court 14 April 1987.

The defendant pled guilty to second degree murder. The evidence at the sentencing hearing showed that the defendant attended a "cookout" in the Mill Creek area of Graham County with two friends Mike Roberts and Robert Crisp. The defendant had been drinking the entire day and when he was at the cookout he continued to consume alcoholic beverages. Defendant's friend Mike Roberts was asked to leave the party by one Comer Crisp. Roberts refused this request and a fight began between Roberts and Crisp. These two men were separated and a second fight began between Comer Crisp and defendant's friend Robert Crisp. The defendant did not participate in either of these two altercations.

As the fighting continued another guest at the party fired a .22 caliber rifle into the air, presumably to break up the altercation. The defendant, who had climbed into Roberts' truck in preparation for their departure, took a .308M-1 rifle from the cab of the truck, and being intoxicated and in fear of being fired upon, left the truck and began firing into the crowd. One of these shots killed Ned Nichols. The rifle used by the defendant was a semi-automatic which would fire eight bullets without being reloaded.

The court found two aggravating factors: (1) that the defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person, and (2) the defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement. The court found two statutory mitigating factors, that (1) at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer, and (2) the defendant has been honorably discharged from the United States armed services. The court also found three non-statutory mitigating factors which were (1) the defendant was impaired by the consumption of alcohol at the time of the crime,

which is insufficient to constitute a defense but did reduce his culpability, (2) the defendant and others were involved in an affray at the time and the defendant used such force as he reasonably believed was necessary, and (3) the defendant expressed remorse over the death of the victim and pleaded guilty. The court found the aggravating factors outweighed the mitigating factors and sentenced the defendant to life in prison.

*Lacy H. Thornburg, Attorney General, by James Wallace, Jr., Assistant Attorney General, and Jeffrey P. Gray, Associate Attorney General, for the State.*

*James L. Blomeley, Jr. and Joseph B. Roberts, III, for defendant appellant.*

WEBB, Justice.

**[1]** The appellant first assigns error to the finding of the aggravating factor that the "defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." N.C.G.S. § 15A-1340.4(a)(1)g. This aggravating factor has been dealt with in three cases. *State v. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984); *State v. Jones*, 83 N.C. App. 593, 351 S.E. 2d 122 (1986); and *State v. Bethea*, 71 N.C. App. 125, 321 S.E. 2d 520 (1984). *Moose* dealt with the aggravating factor involved in imposing the death sentence. N.C.G.S. § 15A-2000(e)(10). The language of the two sections is identical and we believe the interpretation of *Moose* is applicable to this case. Justice Meyer, writing in *Moose*, said that in interpreting this section the focus is on two considerations: (1) a great risk of death knowingly created, and (2) whether the weapon in its normal use is hazardous to the lives of more than one person. In *Moose* it was held that the aggravating factor could be found when the evidence showed the defendant had fired a shotgun into an automobile occupied by two people.

In this case we believe it is evident that a great risk of death is created to more than one person when a .308M-1 rifle is fired several times into a crowd of several persons. Any reasonable person should know this and we can conclude the defendant created this risk knowingly. A semi-automatic rifle may be used normally to fire several bullets, in this case eight, in rapid succes-

sion. Several bullets fired in rapid succession are hazardous to the lives of more than one person; therefore we hold that the evidence in this case supports a finding of the aggravating factor that the defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person.

In *Bethea* the defendant fired one shot from a bolt action rifle which wounded a deputy sheriff. In *Jones* the defendant shot the victim three separate times with a pistol. The Court of Appeals held it was error to find the aggravating factor in each case. We do not believe that our decision in this case is inconsistent with *Bethea* or *Jones*. If the defendant in this case had fired only one shot, as in *Bethea*, or had fired at one person three times, as in *Jones*, we might have a different result because it would be difficult to find the defendant knowingly created a great risk of death to more than one person. The use of the weapons in those two cases distinguishes *Bethea* and *Jones* from this case. The defendant's first assignment of error is overruled.

**[2, 3]** The defendant next assigns error to the court's determination that the aggravating factors outweighed the mitigating factors and its imposition of a sentence in excess of the presumptive sentence. He contends that the qualitative value of the factors was not properly weighed. He argues specifically that the court found two mitigating factors, that he was impaired by alcohol to such an extent that although it did not constitute a defense it did reduce his culpability, and that he was engaged in an affray and used only such force as he reasonably believed necessary. He says that these two factors found by the court raise a question as to whether the court should have accepted his plea of guilty to second degree murder. He contends that at the very least we should conclude that excessive weight was given to the aggravating factors and insufficient weight to the mitigating factors.

As to the mitigating factors found by the court, the defendant was engaged in an affray and used only such force as he reasonably believed necessary, there is not sufficient evidence to support such a finding. There is no evidence that anyone was firing at the defendant when he fired indiscriminately into the crowd. The defendant could not have reasonably believed it was necessary to fire the rifle as he did in order to defend himself. It

was error favorable to the defendant for the court to make this finding. The court acted within its discretion in determining that the two aggravating factors outweighed the mitigating factors that were properly found. *See State v. Penley*, 318 N.C. 30, 347 S.E. 2d 783 (1986); *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983); and *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).

The judgment of the superior court is

Affirmed.

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IN THE MATTER OF: WILLIAM VANCE STALLINGS, JUVENILE

No. 716PA85

(Filed 2 June 1987)

ON rehearing to review the decision of the Supreme Court previously rendered in this case, 318 N.C. 565, 350 S.E. 2d 327 (1986), reversing a decision of the Court of Appeals, 77 N.C. App. 592, 335 S.E. 2d 529 (1985). Reargurnents heard in the Supreme Court on 13 May 1987.

*Lacy H. Thornburg, Attorney General, by John H. Watters, Assistant Attorney General, for the State.*

*Susan K. Seahorn for the juvenile appellant.*

PER CURIAM.

On 6 January 1987, this Court allowed the petition of the juvenile, William Vance Stallings, for the rehearing of this case. On 23 April 1987, the State filed a motion to dismiss on the ground that rehearing had been improvidently allowed. Having thoroughly reviewed the very helpful new briefs filed on behalf of the juvenile and the State, we conclude that we neither over-

looked nor misapprehended any material points of fact or law when we first considered this case. Therefore the State's motion to dismiss the rehearing in this case as improvidently granted is well founded. *See Montgomery v. Blades*, 223 N.C. 331, 26 S.E. 2d 876 (1943); *Weisel v. Cobb*, 122 N.C. 68, 30 S.E. 312 (1898); *Devereux v. Devereux*, 81 N.C. 12 (1879).

Rehearing dismissed as improvidently allowed.

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

AETNA CASUALTY AND SURETY CO. v. YOUNTS

No. 141P87.

Case below: 84 N.C. App. 399.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987.

ALLSTATE v. SEALEY

No. 201P87.

Case below: 84 N.C. App. 700.

Petition by defendants (Shelby Darnell and Jerry M. Darnell) for writ of certiorari to the North Carolina Court of Appeals denied 2 June 1987.

ANDREWS v. DAVENPORT

No. 159P87.

Case below: 84 N.C. App. 675.

Petition by defendants (Davenports) for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987.

ARCHER v. TRI-CITY

No. 135P87.

Case below: 84 N.C. App. 567.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987.

BLISS v. CYRIL BATH

No. 122P87.

Case below: 84 N.C. App. 567.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987.

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

CLARK v. AMERICAN & EFIRD MILLS

No. 561P86.

Case below: 82 N.C. App. 192.

Motion by plaintiff pursuant to Rule 27, N. C. Rules of App. Procedure, for reconsideration of the petition for review of the decision of the Court of Appeals dismissed 2 June 1987.

EPPS v. EPPS

No. 134P87.

Case below: 84 N.C. App. 457.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987.

FOLEY v. FOLEY

No. 153P87.

Case below: 84 N.C. App. 457.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987.

GRIFFIN v. BD. OF COM'RS OF
LAW OFFICERS' RETIREMENT FUND

No. 143P87.

Case below: 84 N.C. App. 443.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 2 June 1987.

HARSHAW v. MUSTAFA

No. 109PA87.

Case below: 84 N.C. App. 296.

Petition by intervenor defendants for discretionary review pursuant to G.S. 7A-31 allowed 2 June 1987.

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

IN RE PAUL

No. 167P87.

Case below: 84 N.C. App. 491.

Petition by Jerome Paul for writ of certiorari to the North Carolina Court of Appeals denied 2 June 1987.

IN RE WILL OF HESTER

No. 184A87.

Case below: 84 N.C. App. 585.

Petition by propounders for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987.

IN THE MATTER OF APPEAL OF BUTLER

No. 104P87.

Case below: 84 N.C. App. 213.

Petition by taxpayers for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987.

LONG v. MORGANTON DYEING & FINISHING CO.

No. 168PA87.

Case below: 84 N.C. App. 81.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals allowed 2 June 1987.

MARSHBURN v. ASSOCIATED INDEMNITY CORP.

No. 103P87.

Case below: 84 N.C. App. 365.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987.

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

MARTIN v. SOLON AUTOMATED SERVICES AND WATTS v. SOLON AUTOMATED SERVICES

No. 118P87.

Case below: 84 N.C. App. 197.

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987. Motion by plaintiffs to dismiss appeal for lack of significant public interest allowed 2 June 1987.

PETTY v. CITY OF CHARLOTTE

No. 283P87.

Case below: 85 N.C. App. 391.

Petition by defendant (Housing Authority) for writ of supersedeas and temporary stay of the execution of judgment of the Court of Appeals allowed on condition supersedeas bond remains in effect 3 June 1987.

PINEWOOD MANOR MOBILE HOMES, INC. v. N.C. MANUFACTURED HOUSING BD.

No. 246P87.

Case below: 84 N.C. App. 564.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987. Petition by plaintiff for writ of supersedeas and temporary stay of the execution of judgment of the Court of Appeals denied 2 June 1987.

PREVETTE v. HOLLAR

No. 137P87.

Case below: 84 N.C. App. 457.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987.

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

STATE v. ADAMS

No. 116P87.

Case below: 84 N.C. App. 312.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 June 1987.

STATE v. AMANCHUKWA

No. 127P87.

Case below: 84 N.C. App. 567.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987. Temporary stay dissolved and writ of supersedeas denied 2 June 1987.

STATE v. EDWARDS

No. 191P87.

Case below: 84 N.C. App. 702.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987.

STATE v. FLOWERS

No. 152P87.

Case below: 84 N.C. App. 696.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987.

STATE v. JENKINS

No. 186P87.

Case below: 83 N.C. App. 616.

Petition by defendants for writ of certiorari to the North Carolina Court of Appeals denied 2 June 1987.

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

STATE v. JONES

No. 102P87.

Case below: 84 N.C. App. 458.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987.

STATE v. MCRAE

No. 207P87.

Case below: 85 N.C. App. 270.

Petition by defendant (McRae) for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987.

STATE v. MOORE

No. 117P87.

Case below: 84 N.C. App. 313.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987.

STATE v. NICHOLSON

No. 249P87.

Case below: 85 N.C. App. 539.

Petition by defendant for temporary stay allowed 20 May 1987.

STATE v. PERRY

No. 110P87.

Case below: 84 N.C. App. 309.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 June 1987.

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

STATE v. RUSSELL

No. 131P87.

Case below: 84 N.C. App. 383.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 June 1987.

STATE v. TYREE

No. 199P87.

Case below: 84 N.C. App. 703.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 June 1987.

STATE v. WIKE

No. 252P87.

Case below: 85 N.C. App. 516.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 May 1987. Petition by defendant for writ of supersedeas and temporary stay denied 27 May 1987.

STATE v. WORTHINGTON

No. 89P87.

Case below: 84 N.C. App. 150.

Petition by defendants (Worthington and Warren) for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987.

TRAVIS v. KNOB CREEK, INC.

No. 151PA87.

Case below: 84 N.C. App. 561.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 2 June 1987.

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

WHITE v. LOWERY

No. 132P87.

Case below: 84 N.C. App. 433.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987.

PETITIONS TO REHEAR

PEARSON v. MARTIN

No. 643PA86.

Case below: 319 N.C. 449.

Petition by plaintiff denied 2 June 1987.

SEIFERT v. SEIFERT

No. 553A86.

Case below: 319 N.C. 367.

Petition by defendant denied 2 June 1987.

# APPENDIXES

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AMENDMENT OF ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

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AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

# AMENDMENT OF ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

The ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS, adopted by this Court 21 September 1982, 306 N.C. 797, as amended 10 November 1982, 307 N.C. 741, is hereby amended as follows:

Rewrite subsection 2(a) to read as follows:

(a) The presiding justice or judge shall at all times have authority to prohibit or terminate electronic media and still photography coverage of public judicial proceedings, in the courtroom or the corridors immediately adjacent thereto.

Add a new subsection 3(c) to read as follows:

(c) The presiding judge may, however, exercise his or her discretion to permit the use of electronic media and still photography coverage without booths or other restrictions set out in 3(a) and 3(b) if the use can be made without disruption of the proceedings and without distraction to the jurors and other participants. Such permission may be withdrawn at any time.

Reletter present subsections (c) to read (d), (d) to read (e), and (e) to read (f).

Rewrite subsection 5(c) to read as follows:

(c) Not more than one wired audio system for radio broadcast purposes shall be permitted in any proceeding in a trial or appellate court. Audio pickup for all media purposes shall be accomplished with existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes may be installed and maintained at media expense. The microphones and wiring must be unobtrusive and shall be located in places designated in advance of any proceeding by the Senior Resident Superior Court Judge of the judicial district in which the court facility is located. Such modifications or additions must be approved by the governing body of the county or municipality which owns the facility. Provided, however, hand-held audio tape recorders may be used upon prior notification to, and with the

approval of, the presiding judge; such approval may be withdrawn at any time.

As amended the Order adopted 21 September 1982 shall be in effect from 1 July 1987 to 30 June 1988 unless earlier amended, rescinded, or extended by order of the Court.

This order shall be published in the advance sheets of the Supreme Court and of the Court of Appeals.

ADOPTED BY THE COURT IN CONFERENCE this the 24th day of June 1987.

WHICHARD, J.
For the Court

## AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to authority of N.C.G.S. § 7A-34, the General Rules of Practice for the Superior and District Courts are hereby amended to add a new Rule 2.1, *Designation of Exceptional Civil Cases*, as follows:

RULE 2.1 DESIGNATION OF EXCEPTIONAL CIVIL CASES

(a) The Chief Justice may designate any case or group of cases as "exceptional." A senior resident superior court judge, chief district court judge, or presiding superior court judge may ex mero motu, or on motion of any party, recommend to the Chief Justice that a case or cases be designated as exceptional.

(b) Such recommendation may include special areas of expertise needed by the judge to be assigned and may include a list of recommended judges.

(c) Such recommendation shall be communicated to the Chief Justice through the Administrative Office of the Courts.

(d) Factors which may be considered in determining whether to make such designation include: the number and diverse interests of the parties; the amount and nature of anticipated pretrial discovery and motions; whether the parties voluntarily agree to waive venue for hearing pretrial motions; the complexity of the evidentiary matters and legal issues involved; whether it will promote the efficient administration of justice; and such other matters as the Chief Justice shall deem appropriate.

(e) The Chief Justice may enter such orders as are appropriate for the pretrial, trial, and other disposition of such designated case or cases.

This amendment shall be effective on and after the fifth day of January, 1988, and shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

By order of the Court in Conference, this 5th day of January, 1988.

WHICHARD, J.
For the Court

# ANALYTICAL INDEX

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# 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

## ADMINISTRATIVE LAW

**§ 8. Scope and Effect of Judicial Review**

Although the 1985 amendment of G.S. 150A-51 deleted the phrase "in view of the entire record as submitted," the amendment maintains the whole record test for judicial review under the Administrative Procedure Act. *In re Appeal of K-Mart Corp.*, 378.

## APPEAL AND ERROR

**§ 9. Moot Questions**

Plaintiff's action to have the requirement of G.S. 7A-142 that persons nominated by the Bar to fill a vacancy for district court judge be "members of the same political party as the vacating judge" declared unconstitutional for the purpose of permitting him to be included in the selection process for a candidate to succeed to a specified judgeship was dismissed as moot. *Pearson v. Martin*, 449.

**§ 24. Necessity for Objections, Exceptions and Assignments of Error**

Rule 10(a) of the N.C. Rules of Appellate Procedure does not require a party against whom summary judgment has been entered to place exceptions and assignments of error into the record on appeal even where summary judgment was granted on several different causes of action. *Ellis v. Williams*, 413.

**§ 45. Form and Contents of Brief**

Briefs filed in the Supreme Court may not incorporate by reference arguments contained in briefs before the Court of Appeals. *Fortner v. J. K. Holding Co.*, 640.

## CONSTITUTIONAL LAW

**§ 34. Double Jeopardy**

There was no violation of double jeopardy from convictions of statutory rape, taking indecent liberties with a child, and incest arising from the same transaction, and convictions of crime against nature, taking indecent liberties with a child and second degree sexual offense arising from the same transaction with a different child. *S. v. Etheridge*, 34.

A defendant convicted of kidnapping, rape and first degree sexual offense was entitled to have judgment arrested on either the rape or kidnapping as to one victim and either the first degree sex offense or the kidnapping as to the other victim. *S. v. Dudley*, 656.

Where a defendant was found guilty of first degree rape, first degree sexual offense, and kidnapping based on underlying sexual assault, the trial court did not err by arresting judgment in the rape case to avoid a multiple punishment problem. *S. v. Young*, 661.

**§ 45. Right to Appear Pro Se**

The trial court did not err in a prosecution for robbery and murder by refusing to allow defendant to participate as co-counsel at trial. *S. v. Williams*, 73.

**§ 49. Waiver of Right to Counsel**

Defendant made a valid waiver of his Sixth Amendment right to the assistance of counsel during interrogation although he had not been informed that his appointed attorney had asked the police not to interrogate defendant further. *S. v. Reese*, 110.

## CONSTITUTIONAL LAW — Continued

**§ 60. Racial Discrimination in Jury Selection Process**

The Supreme Court declined to reconsider its opinion in *State v. Avery*, 325 N.C. 1, regarding quashing bills of indictment because of exclusion of non-whites from jury pools. *S. v. Robbins*, 465.

**§ 63. Exclusion from Jury for Opposition to Capital Punishment**

The practice of "death qualifying" the jury in a first degree murder case does not deny defendant a right to trial by a cross-section of the community. *S. v. Reese*, 110.

The trial court did not err in a murder prosecution by death qualifying the jury. *S. v. Evangelista*, 152; *S. v. Clark*, 215.

The constitution does not prohibit the death qualification of jurors. *S. v. Robbins*, 465.

**§ 67. Right of Confrontation; Identity of Informants**

The trial court did not err in a prosecution for robbery and murder by denying defendant's motion to disclose the identity of confidential informants. *S. v. Williams*, 73.

**§ 75. Self-Incrimination; Testimony by Defendant**

The trial court did not err by refusing to suppress incriminatory statements defendant made to law enforcement officers where defendant neither raised the theory nor argued in the trial court that he had manifested his desire that all questioning cease, and his statement to a detective did not indicate a desire that all questioning cease. *S. v. Robbins*, 465.

**§ 80. Death Sentences**

The North Carolina death penalty statute is constitutional. *S. v. Robbins*, 465.

## COURTS

**§ 15. Criminal Jurisdiction of Juveniles**

The contention of the seventeen-year-old defendant that the statute permitting persons sixteen or more years old to be prosecuted as adults, G.S. 7A-517(20), creates unconstitutional classifications has no bearing on defendant's prosecution for first degree murder because defendant was tried as an adult pursuant to G.S. 7A-608. *S. v. Stokes*, 1.

## CRIMINAL LAW

**§ 5.1. Determination of Issue of Insanity**

The trial court in a murder prosecution did not err by denying defendant's request that the jury be instructed to consider the issue of defendant's sanity before the issue of his guilt. *S. v. Evangelista*, 152.

**§ 9.5. Necessity of Determining Guilt of Principal in First Degree**

Where the State sought to convict defendant as an aider and abettor, the trial court erred by admitting testimony that two others had already been convicted of the crimes charged against defendant. *S. v. Brown*, 361.

## CRIMINAL LAW — Continued

**§ 10.3. Accessories before the Fact; Instructions**

The jury in a prosecution for second degree murder as an accessory before the fact was not adequately instructed with respect to the chain of causation necessary for a conviction of accessory before the fact to murder. *S. v. Davis*, 620.

**§ 15.1. Pretrial Publicity as Ground for Change of Venue**

The trial court did not err in a prosecution for murder and robbery by refusing to grant defendant's pretrial motions for change of venue. *S. v. Williams*, 73.

The trial court applied an incorrect standard of proof in ruling against defendant on his motion for a change of venue or for a special venire in a first degree murder case because of pretrial publicity. *S. v. Moore*, 645.

**§ 17. Jurisdiction; Federal and State Courts**

The state was not preempted from assuming jurisdiction of murders committed on an Amtrak train by the theory that the train was part of a federal enclave. *S. v. Evangelista*, 152.

**§ 26.5. Double Jeopardy; Particular Cases; Same Acts or Transactions Violating Different Statutes**

Where defendant was acquitted of second degree rape and his conviction of second degree sexual offense was reversed on appeal, the subsequent conviction of defendant for offenses of engaging in vaginal intercourse and another sexual act with a person over whom defendant's employer had assumed custody based on the same incidents did not violate double jeopardy provisions of the State and Federal Constitutions. *S. v. Raines*, 258.

Defendant's conviction and sentencing for both first degree kidnapping and first degree rape violated double jeopardy where there was evidence of three different sexual assaults but it cannot be determined whether the jury's verdict of first degree kidnapping was based upon a sexual assault other than the rape for which defendant was convicted. *S. v. Freeman*, 609.

**§ 33. Facts Relevant to Issues in General**

Testimony by an investigator that other suspects in the past had told him that someone else had committed the crime was not prejudicial because it was completely irrelevant. *S. v. Robbins*, 465.

**§ 33.1. Relevancy of Evidence as to Identity of Perpetrator**

Where defendant was charged with rape, armed robbery, kidnapping, and first degree sexual offense and the State sought to establish that defendant was the principal as to the rape, evidence of previous convictions of other men for these crimes was irrelevant and violated defendant's Sixth Amendment right to confront witnesses against him. *S. v. Brown*, 361.

**§ 34.8. Admissibility of Evidence of other Offenses to Show Common Plan or Scheme**

In a prosecution for first degree sex offense against defendant's nine-year-old stepson, evidence of defendant's prior sexual misconduct with the victim was admissible pursuant to Rule of Evidence 404(b) under a common scheme or plan theory to show that defendant was the perpetrator of the offense allegedly committed on the date in question. *S. v. Frazier*, 388.

**§ 43.4. Gruesome Photographs**

The trial court in a robbery-murder case did not err in admitting black and white photographs used to illustrate an SBI agent's verbal descriptions of the crime

**CRIMINAL LAW — Continued**

scene and color slides used to illustrate testimony by a pathologist concerning the location, type and size of the various wounds he observed on the victim. *S. v. Reese*, 110.

**§ 50.1. Admissibility of Expert Opinion Testimony**

The trial court did not err in a murder prosecution arising from a three-day siege of an Amtrak car by introducing testimony of an expert in psychology and psychopharmacology who analyzed tape recordings, reviewed reports, and interviewed witnesses and concluded defendant had used cocaine during the siege but that his perception of reality was good. *S. v. Evangelista*, 152.

**§ 55.1. Tests other than for Alcohol or Drugs**

There was no error in a prosecution for rape, taking indecent liberties with a child, and incest where a public health nurse testified at a voir dire in open court rather than in camera concerning defendant's statements while seeking treatment for a sexually transmitted disease. *S. v. Etheridge*, 34.

**§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identifications**

The trial court did not err by admitting a photographic and in-court identification of defendant by a precious metals dealer who had purchased a class ring which had belonged to a victim. *S. v. Robbins*, 465.

**§ 66.18. Voir Dire to Determine Admissibility of In-Court Identification; When Voir Dire Required**

Defendant waived his right to have the admission of an in-court identification considered on appellate review by failing to object at trial to the identification. *S. v. Jordan*, 98.

**§ 71. Shorthand Statements of Fact**

The trial court did not err in a prosecution for robbery and murder by failing to instruct the jury to disregard the portions of an officer's testimony in which he referred to gunshot wounds on the body of the victim. *S. v. Williams*, 73.

**§ 73.1. Admission of Hearsay Statement as Harmless Error**

The admission of testimony by a detective that a resident of the area where a body was found had pointed out to him the place she had found the victim's glasses was harmless error. *S. v. Robbins*, 465.

**§ 75.4. Confessions Obtained in Absence of Counsel**

Defendant's Fifth Amendment right to counsel during interrogation was not violated when defendant confessed after having previously invoked his right to counsel where defendant initiated the conversation which led to his confession. *S. v. Reese*, 110.

Defendant made a valid waiver of his Sixth Amendment right to the assistance of counsel during interrogation although he had not been informed that his appointed attorney had asked the police not to interrogate defendant further. *Ibid.*

The trial court could properly find that, after defendant had asserted his right to counsel, defendant initiated contacts with a social worker and a police officer which ultimately resulted in a voluntary confession. *S. v. Nations*, 318.

A social services worker's interview of defendant after defendant had invoked his fifth amendment right to counsel during interrogation did not amount to police initiated interrogation in violation of *Edwards v. Arizona* because the social serv-

**CRIMINAL LAW — Continued**

ices worker was not an agent of the police and his interview of defendant did not amount to interrogation. *S. v. Nations*, 329.

**§ 75.10. Waiver of Constitutional Rights Generally**

There was sufficient evidence to support the court's conclusion that defendant's waiver of his right to remain silent was voluntary although defendant presented evidence that his cell was cold due to a heat outage and that an officer told him that things would go better for him if he confessed. *S. v. Reese*, 110.

Defendant knowingly waived his right to remain silent when, upon twice being informed that his appointed counsel was out of town and would not be available to advise him, defendant stated that he still desired to make a statement. *Ibid.*

There was no merit to defendant's contention that he did not intelligently waive his right to remain silent because he had not been informed that his appointed attorney had told the appointing judge and the sheriff that he wanted no further interrogation of defendant until he had a chance to talk with him. *Ibid.*

The disclosure of defendant's failure to sign a waiver of rights form did not rise to the level of plain error. *S. v. Stanton*, 180.

**§ 75.11. Waiver of Constitutional Rights; Sufficiency of Waiver**

The trial court did not err in a prosecution for robbery and murder by failing to suppress incriminating statements made by defendant following his arrest. *S. v. Williams*, 73.

**§ 75.13. Confessions Made to Persons other than Police Officers**

In a prosecution for sexual offenses against his children, the lack of Miranda warnings and defendant's Fifth Amendment privilege against self-incrimination did not require the exclusion of statements concerning sexual contact with his children made to a public health nurse while seeking treatment for a sexually transmitted disease. *S. v. Etheridge*, 34.

The evidence supported the trial court's determination that a department of social services worker who interviewed defendant after his right to counsel attached was not an agent of the police and that his interview of defendant did not amount to interrogation prohibited by *Michigan v. Jackson*. *S. v. Nations*, 318.

**§ 76.3. Confession; Failure to Object to Admission of Confession or to Request Hearing**

Defendant's failure to object to the State's introduction of his out-of-court statement during the *Enmund* issues phase of a capital sentencing proceeding waived his right to complain of its admission on appeal. *S. v. Stokes*, 1.

**§ 76.8. Confession; Voir Dire Hearing; Evidence Sufficient to Support Findings**

Failure of the trial court to find that defendant "intelligently" waived his right to counsel did not invalidate the waiver. *S. v. Nations*, 318.

**§ 77.2. Self-Serving Declarations of Defendant**

The trial court did not err in a prosecution for burglary and rape by refusing to allow defendant to cross-examine the arresting officer about whether defendant had made a statement to the officer. *S. v. Stanton*, 180.

**§ 82.2. Physician-Patient and Similar Privileges**

The trial court in a prosecution for rape, taking indecent liberties with a child, and incest properly admitted the testimony of a public health nurse that defendant

**CRIMINAL LAW — Continued**

had disclosed sexual contact with his children while seeking treatment for a sexually transmitted disease. *S. v. Etheridge*, 34.

**§ 86.1. Impeachment of Defendant**

The State's cross-examination of defendant concerning how certain hairs and fibers could have been found on articles linking defendant with a kidnapping and rape did not require defendant to testify as an expert and was properly permitted to challenge defendant's credibility. *S. v. Freeman*, 609.

**§ 86.8. Credibility of State's Witnesses**

Defendant should have been permitted to cross-examine a State's witness concerning the details of a larceny for which he had been convicted to show the witness's character for untruthfulness. *S. v. Clark*, 215.

The trial court erred in refusing to permit defendant to ask a State's witness on cross-examination whether he had disposed of stolen goods for a second State's witness since such testimony was relevant to the first witness's credibility. *Ibid.*

**§ 89.8. Impeachment of Witnesses; Promise or Hope of Leniency**

The trial court did not err in sustaining the State's objections to defendant's attempts to establish that a State's witness was testifying in exchange for concessions in a pending trial in another county where there was other extensive testimony about the concessions. *S. v. Clark*, 215.

**§ 92.5. Severance**

The *Bruton* rule did not require the severance of defendant's trial from that of his codefendant where all references to defendant were removed from the codefendant's confession and the codefendant took the stand and was cross-examined by defendant. *S. v. Rasor*, 577.

The trial court did not err in denying defendant's motion to sever based on antagonistic defenses. *Ibid.*

**§ 101.2. Conduct Affecting Jurors; Exposure to Publicity**

Any exposure of the jury to a newspaper article concerning matters inquired into during a voir dire hearing on the first day of defendant's trial was not so prejudicial as to require a new trial where defendant himself placed information substantially similar to that contained in the article before the jury during the course of the trial. *S. v. Langford*, 332.

**§ 102.1. Latitude and Scope of Jury Argument**

There was no error in the prosecutor's closing argument that the felony murder rule was aimed at criminals who eliminate witnesses. *S. v. Robbins*, 465.

**§ 102.6. Particular Conduct and Comments in Jury Argument**

The trial court did not err in a murder prosecution arising from an attempted rape by not intervening ex mero motu to stop the prosecutor's argument to the jury. *S. v. Harris*, 383.

The trial judge in a prosecution for first degree murder was not required to act ex mero motu when the prosecutor argued that defendant in his own words thought of killing the shopkeeper before he entered the store, but defendant had not testified and his statement contained no such admission. *S. v. Quesinberry*, 228.

**§ 111. Particular Miscellaneous Instructions**

The trial court did not err in a prosecution for first degree murder by giving the jury written instructions on self-defense. *S. v. Stocks*, 437.

## CRIMINAL LAW — Continued

**§ 113.1. Recapitulation of the Evidence**

The trial court did not commit prejudicial error in a prosecution for first degree murder by instructing the jury that the evidence for the State tended to show that the victim was struck ten times and sustained ten injuries to the head where a pathologist had testified that the victim's head had ten lacerations which were so separate that one blow could not have caused them all. *S. v. Quesinberry*, 228.

**§ 114.2. No Expression of Opinion in Statement of Evidence or Contentions**

The trial court's instructions in a sexual offense case did not unequally weigh the strength of the state's case against defendant's "contentions" so as to constitute an expression of opinion on the evidence. *S. v. Griffin*, 429.

**§ 117.2. Charge on Credibility of Interested Witnesses**

The trial judge did not err by not giving defendant's requested instruction that a particular person might be an interested witness. *S. v. Robbins*, 465.

**§ 119. Requests for Instructions**

The trial court's failure to give defendant's requested instruction on prior inconsistent statements was not prejudicial error. *S. v. Pakulski*, 562.

**§ 124.2. Whether Particular Verdicts Ambiguous**

Defendant is entitled to a new trial on a felony murder charge where armed robbery and felonious breaking or entering were submitted in the disjunctive as possible underlying felonies but the evidence was insufficient for submission of felonious breaking or entering. *S. v. Pakulski*, 562.

**§ 128.1. Mistrial**

The trial court did not abuse its discretion in a first degree murder prosecution by denying defendant's motion for a mistrial where defendant was ill during the trial. *S. v. Stocks*, 437.

The trial court did not err in a prosecution for kidnapping and rape by not declaring a mistrial on its own motion after an officer testified that defendant had said he shouldn't live any longer if he had done this and that he had thought that he had done something like that before. *S. v. Dudley*, 656.

The trial court did not err in a murder prosecution by denying defendant's motion for a mistrial based on the prosecutor's questions which portrayed defendant by innuendo as a drug dealer with wide-ranging illicit associations. *S. v. Walker*, 651.

**§ 128.2. Particular Grounds for Mistrial**

There was a jury deadlock warranting a mistrial in defendants' original trial for first degree murder so that their second and third trials did not violate their rights against double jeopardy. *S. v. Pakulski*, 562.

The trial court properly denied defendant's motion for a mistrial made when the codefendant's counsel objected to testimony concerning the codefendant's sanitized confession on the ground that "that's not his complete statement." *S. v. Rasor*, 577.

**§ 135.4. Separate Sentencing Proceeding**

The State's burden of proof on an *Enmund* issue in a capital sentencing proceeding is proof beyond a reasonable doubt. *S. v. Stokes*, 1.

**CRIMINAL LAW — Continued**

The evidence in a phase of a capital sentencing hearing directed to *Enmund* issues was sufficient to permit the jury to find beyond a reasonable doubt that defendant himself delivered fatal blows to the victim. *Ibid.*

North Carolina's death penalty statute is not unconstitutional because it prohibits the jury from considering defendant's eligibility for parole. *S. v. Robbins*, 465.

The Supreme Court declined to require the trial court to not only admonish the jury to disregard parole but to also instruct the jury as to the truth regarding parole. *Ibid.*

A prosecutor's remarks during closing arguments in the sentencing phase of a death case were not improper taken in context. *Ibid.*

**§ 135.7. Separate Sentencing Proceeding; Instructions**

In paragraph (c) of the "Enmund" Pattern Jury Instruction, the word "would" should be substituted for the word "might" in the phrase "contemplated that deadly force might be used." *S. v. Reese*, 110.

The trial court did not err in a murder prosecution by instructing the jury that it would be the jury's duty to return a sentence of death if the mitigating factors were insufficient to outweigh the aggravating circumstances and the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. *S. v. Robbins*, 465.

**§ 135.8. Separate Sentencing Proceeding; Aggravating Circumstances**

Submission of the "especially heinous" aggravating circumstance in defendant's first degree murder trial was supported by evidence of the nature and extent of the fatal wounds inflicted and the victim's lingering death. *S. v. Stokes*, 1.

The trial court erred in the submission of the aggravating factor that a first degree murder was committed during an armed robbery where defendant was properly convicted only on the theory of felony-murder. *S. v. Reese*, 110.

The trial court did not err in the submission of the heinous, atrocious or cruel aggravating factor in a first degree murder case. *Ibid.*

The trial court erred in the submission of the aggravating factor that a first degree murder was committed to avoid a lawful arrest. *Ibid.*

The trial court in a first degree murder prosecution arising from a robbery erred by submitting both the aggravating factor that the murder was committed while defendant was engaged in the commission of a robbery and the factor that the murder was committed for pecuniary gain where the jury had found defendant guilty based on both felony-murder and premeditation and deliberation. *S. v. Quesinberry*, 228.

There was no error in a prosecution for two murders, kidnappings, and robberies in the submission of armed robbery as an aggravating factor for the murders. *S. v. Robbins*, 465.

**§ 135.10. Separate Sentencing Proceeding; Review**

A sentence of death imposed on defendant for first degree felony murder was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *S. v. Stokes*, 1.

A death sentence was vacated in a prosecution for murder, kidnapping, and robbery where the jury had found the aggravating circumstance that one of the murders was committed while defendant was engaged in a robbery and kidnapping

**CRIMINAL LAW — Continued**

and the kidnapping conviction was reversed for insufficient evidence. *S. v. Robbins*, 465.

The trial court did not err in the sentencing phase of a murder prosecution in its instructions on the burden of proof. *Ibid.*

A sentence of death imposed for a first degree murder was not disproportionate. *Ibid.*

**§ 138.7. Severity of Sentence; Particular Matters and Evidence Considered**

The trial court's statement that "I'm aware that I could have avoided this trial had I been willing at the outset of the trial to commit myself to concurrent sentences" did not show that the court made defendant's life sentence for first degree rape run consecutively to a life sentence entered against defendant in another rape case in retaliation for defendant's decision to plead not guilty in the present case. *S. v. Langford*, 340.

The trial court's comment during the sentencing hearing that both the prosecutor and defense counsel had "said things that are relevant and ought to be considered in passing judgment" did not show that the trial court agreed with the prosecutor's improper argument concerning the likelihood of parole and that the court's decision to impose a consecutive life sentence in this case was improperly based on a consideration of the possibility of parole. *Ibid.*

**§ 138.10. Severity of Sentence; Credit for Time in Custody Awaiting Trial**

A defendant convicted on two counts of first degree rape who received two life sentences to run concurrently should have been credited on both sentences with time spent in jail awaiting trial. *S. v. Dudley*, 656.

**§ 138.14. Severity of Sentence; Consideration of Aggravating and Mitigating Factors in General**

In sentencing defendant for second degree murder, the trial court did not abuse its discretion in finding that the single aggravating factor that defendant shot the victim with premeditation and deliberation and with specific intent to kill outweighed the seven mitigating factors found by the court. *S. v. Daniels*, 452.

The trial court did not abuse its discretion by finding that the one aggravating factor of prior convictions outweighed several mitigating factors. *S. v. Parker*, 444.

The trial court acted within its discretion in finding that two aggravating factors outweighed the two statutory and two non-statutory mitigating factors properly found by the court. *S. v. Carver*, 665.

**§ 138.22. Severity of Sentence; Aggravating Factor of Use of Weapon Normally Hazardous to Lives of More than One Person**

The trial court properly found as an aggravating factor for second degree murder that defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person. *S. v. Carver*, 665.

**§ 138.23. Severity of Sentence; Aggravating Factor of Armed with Deadly Weapon**

The trial court erred when sentencing defendant for involuntary manslaughter by finding as an aggravating factor that defendant was armed with a deadly weapon. *S. v. Evangelista*, 152.

CRIMINAL LAW — Continued

**§ 138.27. Severity of Sentence; Aggravating Factor of Position of Trust or Confidence**

In a sentencing hearing for second degree murder of defendant's child, the trial court did not improperly use the same evidence of the victim's infancy in finding as aggravating factors that the victim was very young and that defendant took advantage of a position of trust or confidence in order to commit the offense. *S. v. Daniel*, 308.

The trial court erred in finding as an aggravating factor for custodial sexual offense that "defendant took advantage of a position of trust or confidence to commit the offense" since the evidence that proved the aggravating factor was necessary to prove the custodial element of the offense. *S. v. Raines*, 258.

**§ 138.28. Severity of Sentence; Aggravating Factor of Prior Convictions**

The court's finding as an aggravating factor for second degree murder that the victim was handcuffed with her hands behind her back at the time she was stabbed was not improper on the ground that it was based upon evidence necessary to prove the restraint element of first degree kidnapping for which defendant was contemporaneously convicted. *S. v. Wright*, 209.

**§ 138.29. Severity of Sentence; Other Aggravating Factors**

The trial court's finding as an aggravating factor for second degree murder that the victim was handcuffed with her hands behind her back when she was stabbed was supported by the evidence, notwithstanding the victim's body was found with the handcuffs only on her left wrist and with cuts on her right wrist. *S. v. Wright*, 209.

**§ 138.30. Severity of Sentence; Mitigating Factors in General**

Whenever there is error in a sentencing judge's failure to find a statutory mitigating circumstance and a sentence in excess of the presumptive is imposed, the matter must be remanded for a new sentencing hearing. *S. v. Daniel*, 308.

**§ 138.33. Severity of Sentence; Mitigating Factor of Passive Participant**

The trial court did not err in a second degree murder prosecution by not finding that defendant was a passive participant or played a minor role in the commission of the murder. *S. v. Parker*, 444.

**§ 138.40. Severity of Sentence; Mitigating Factor of Acknowledgment of Wrongdoing**

An acknowledgment of wrongdoing is "voluntary" within the meaning of the statutory voluntary acknowledgment of wrongdoing mitigating circumstance if the acknowledgment is admissible against defendant even if defendant's motives for the acknowledgment are suspect. *S. v. Daniel*, 308.

The trial court in a prosecution for murder, kidnapping and robbery did not err by failing to find as a mitigating factor for armed robbery and kidnapping that defendant voluntarily acknowledged wrongdoing at an early stage. *S. v. Robbins*, 465.

**§ 138.42. Severity of Sentence; Other Mitigating Factors**

The evidence did not support the trial court's finding as a mitigating factor for second degree murder that defendant was engaged in an affray and used only such force as was necessary. *S. v. Carver*, 665.

## CRIMINAL LAW — Continued

**§ 146.1. Appeal Limited to Questions Raised in Lower Court**

Defendant waived his right to raise on appeal the issue of whether his conviction and sentencing for both first degree kidnapping and first degree rape violated double jeopardy where he failed at trial to object to the convictions or sentences on double jeopardy grounds, but the Supreme Court elected to review the issue in the exercise of its supervisory power. *S. v. Freeman*, 609.

**§ 162. Necessity for Objections**

The Supreme Court considered defendant's argument that the evidence established a prima facie case of purposeful racial discrimination in the selection of the jury even though defendant neither objected to the district attorney's use of peremptory challenges nor made a challenge to the jury before the jury was empaneled. *S. v. Robbins*, 465.

## DAMAGES

**§ 16.3. Loss of Earnings or Profits**

The "new business" rule, which precludes an award of damages for lost future profits where the allegedly damaged party has no recent record of profitability, is not the law in North Carolina. *Olivetti Corp. v. Ames Business Systems, Inc.*, 534.

The trial court erred in finding that defendant dealer lost an opportunity to make profits as an NBI dealer because of plaintiff's misrepresentations concerning the nature and status and agreement between plaintiff and NBI. *Ibid.*

The trial court erred in using a former employee's sales of NBI word processors for another dealer as a measure of damages for defendant's lost future profits from its failure to become an NBI dealer because of misrepresentations by plaintiff. *Ibid.*

## DEEDS

**§ 20.2. Restrictive Covenants in Subdivisions; Lot and Building Size Restrictions**

The trial court erred by granting summary judgment for plaintiffs, and not for defendants, in an action in which a developer had waived a subdivision restrictive covenant involving setbacks. *Rosi v. McCoy*, 589.

## DIVORCE AND ALIMONY

**§ 30. Equitable Distribution**

A separation agreement fully disposed of the parties' property rights arising out of the marriage and acted as a bar to equitable distribution even though equitable distribution was not mentioned in the agreement. *Hagler v. Hagler*, 287.

A court cannot order the immediate or periodic payment of a distributive award of vested pension and retirement benefits prior to actual receipt absent agreement, but may order an in kind or monetary distribution which takes into account the anticipated pension and retirement benefits. *Seifert v. Seifert*, 367.

Both the present value and fixed percentage methods of evaluating pension and retirement benefits and arriving at an equitable distribution of marital property are permissible where the value of the total marital estate is sufficient. *Ibid.*

## EXECUTION

**§ 1. Property Subject to Execution**

The trial court did not err by failing to transfer an action which sought to have a remainder interest under a will sold under execution from the county of judgment to the county of probate. *NCNB v. C. P. Robinson Co., Inc.*, 63.

Contingent future interests are subject to execution by a judgment creditor of a remainderman. *Ibid.*

## FRAUD

**§ 12. Sufficiency of Evidence**

There was competent evidence before the trial judge from which he could find that plaintiff made material misrepresentations to defendant, a dealer in word processors distributed by plaintiff, concerning the nature and status of an agreement between plaintiff and a word processor manufacturer, and that defendant reasonably relied on the misrepresentations. *Olivetti Corp. v. Ames Business Systems, Inc.*, 534.

## HOMICIDE

**§ 4.1. Murder in the First Degree; Torture**

The evidence in a murder prosecution would have supported a conviction for first degree murder by means of starvation without proof of a specific intent to kill. *S. v. Evangelista*, 152.

**§ 7. Insanity Defense**

The trial court in a murder prosecution did not err by failing to direct verdicts of not guilty by reason of insanity. *S. v. Evangelista*, 152.

The trial court did not err in a prosecution for murder by instructing the jury that defendant had the burden of proving his insanity. *Ibid.*

**§ 8.1. Evidence of Intoxication; Instructions**

The evidence did not warrant an instruction on the effect of voluntary intoxication on the element of specific intent to kill. *S. v. Robbins*, 465.

**§ 15. Relevancy of Evidence in General**

Testimony by the victim's daughter that the victim was sufficiently large and able-bodied to have struggled with a single assailant was relevant to the State's contention that two people actively participated in the killing. *S. v. Reese*, 110.

Testimony about the general characteristics of the victims in a prosecution for robbery, kidnapping and murder was not prejudicial. *S. v. Robbins*, 465.

**§ 18.1. Particular Circumstances Showing Premeditation and Deliberation**

While the felony murder rule allows the court to dispense with proof of premeditation and deliberation, and while the number of wounds inflicted on the victim will support a determination that a killing was premeditated and deliberate, neither of these principles allows the imputation of premeditation and deliberation from the person inflicting the wounds to one who is held culpable for the murder only by reason of his participation in the underlying felony. *S. v. Reese*, 110.

An inference that defendant and a codefendant both intended from the start to kill a robbery victim because both men entered the victim's store unmasked was speculative inference stacking and was thus insufficient to support defendant's conviction of a premeditated and deliberate murder. *Ibid.*

**HOMICIDE — Continued**

There was insufficient evidence to permit a jury finding that defendant knew that a codefendant intended to kill a robbery victim so as to allow the imputation of premeditation and deliberation to defendant. *Ibid.*

The evidence was sufficient to support a reasonable inference of premeditation and deliberation. *S. v. Robbins*, 465.

**§ 20.1. Photographs**

The trial court in a robbery-murder case did not err in admitting black and white photographs used to illustrate an SBI agent's verbal descriptions of the crime scene and color slides used to illustrate testimony by a pathologist concerning the location, type and size of the various wounds he observed on the victim. *S. v. Reese*, 110.

**§ 21.4. Sufficiency of Evidence of Identity of Defendant**

There was substantial evidence in a prosecution for first degree murder that defendant was the murderer of both victims. *S. v. Robbins*, 465.

**§ 21.5. Sufficiency of Evidence of Guilt of First Degree Murder**

The trial court did not err by denying defendant's motion to dismiss charges of first degree murder and armed robbery. *S. v. Williams*, 73.

The evidence in a first degree murder case raised only a suspicion that defendant stabbed the victim or held her as she was being stabbed and was insufficient for submission to the jury on the issue of defendant's guilt of a premeditated and deliberate murder on the theory that he participated in the stabbing. *S. v. Reese*, 110.

The evidence in a murder prosecution was sufficient to show that defendant deprived the deceased infant of liquids with the specific intent to kill. *S. v. Evangelista*, 152.

The evidence in a murder prosecution was sufficient to prove that bodies found inside a train compartment were the two victims alleged in the indictments. *Ibid.*

There was sufficient evidence in a first degree murder prosecution to prove a specific intent to kill, premeditation and deliberation, and that defendant proximately caused the victim's death. *S. v. Quesinberry*, 228.

The trial court did not err by failing to dismiss a charge of first degree murder for insufficient evidence of premeditation and deliberation. *S. v. Stocks*, 437.

There was sufficient evidence to support defendant's conviction for a premeditated and deliberate first degree murder of an elderly man who found defendant and a companion hiding in a tool shed. *S. v. Rasor*, 577.

**§ 21.6. Sufficiency of Evidence of Felony Murder**

The evidence was sufficient to support defendant's conviction of first degree murder under the felony murder rule. *S. v. Reese*, 110.

There was sufficient evidence of armed robbery to support submission of a felony murder charge to the jury where defendants shot a security guard and then took money from his person. *S. v. Pakulski*, 562.

Where the State failed to prove possession of a deadly weapon at the time of a felonious breaking or entering, that felony could not be used as a predicate to a felony murder charge. *Ibid.*

## HOMICIDE — Continued

**§ 21.8. Sufficiency of Evidence of Second Degree Murder Where Defendant Enters Plea of Self-Defense**

The evidence was sufficient for the jury to find defendant guilty of second degree murder of a person who had earlier in the day shot into defendant's truck. *S. v. Blake*, 599.

**§ 28.8. Instructions on Defense of Accidental Death**

The defendant in a first degree murder prosecution was not entitled to an instruction on the defense of accident. *S. v. Lytton*, 422.

**§ 30.3. Submission of Lesser Offense of Manslaughter**

A defendant in a first degree murder prosecution was entitled to have the lesser included offense of involuntary manslaughter submitted to the jury. *S. v. Lytton*, 422.

## HOSPITALS

**§ 3. Liability of Charitable Hospital for Negligence of Employees**

A corporation can only act through its agent and, if it is liable for negligence, it has to be through the doctrine of respondeat superior. *Blanton v. Moses H. Cone Hosp.*, 372.

**§ 3.3. Liability for Negligence of Physicians**

The trial court should have denied defendant's Rule 12(b)(6) motion to dismiss an action against a hospital arising from the performance of an unqualified physician in the hospital. *Blanton v. Moses H. Cone Hosp.*, 372.

## HUSBAND AND WIFE

**§ 1. Mutual Rights and Duties Generally**

The doctrine of necessaries is made applicable to medical services provided to either spouse, and a wife may thus be held responsible for the necessary medical expenses incurred by her husband even in the absence of an express undertaking on her part. *N.C. Baptist Hospitals v. Harris*, 347.

## INDIANS

**§ 1. Generally**

Federal laws and regulations did not preempt the exercise of state court subject matter jurisdiction over actions to establish paternity, to collect a debt to the State for past AFDC payments, and to obtain future child support involving a mother, child and putative father who all reside on the Cherokee Indian reservation. *Jackson Co. v. Swayney*, 52.

The exercise of state court jurisdiction over actions against a Cherokee Indian to recover debts for the payment of past public assistance under the AFDC program and to secure payments for future child support mandated by the AFDC program does not unduly infringe on the self-governance of the Eastern Band of Cherokee Indians. *Ibid.*

The exercise of state court jurisdiction over a paternity action when the mother, child and putative father are all members of the Eastern Band of Cherokee Indians living on the reservation unduly infringes on tribal self-governance. *Ibid.*

## INDICTMENT AND WARRANT

**§ 17.2. Variance Between Indictment and Proof; Time**

There was no fatal variance between indictment and proof in a prosecution for first degree rape of a child in which the indictment alleged that the offense occurred "on or about and between the months of" January through March 1985. *S. v. Hicks*, 84.

## INFANTS

**§ 11. Jurisdiction under Juvenile Court Statutes**

The contention of the seventeen-year-old defendant that the statute permitting persons sixteen or more years old to be prosecuted as adults. G.S. 7A-517(20), creates unconstitutional classifications has no bearing on defendant's prosecution for first degree murder because defendant was tried as an adult pursuant to G.S. 7A-608. *S. v. Stokes*, 1.

## JURY

**§ 6. Voir Dire Examination; Generally; Practice and Procedure**

There was no merit to defendant's contention in a first degree murder case that a potential "domino effect" required individual voir dire and sequestration of potential jurors. *S. v. Reese*, 110.

**§ 6.4. Voir Dire Examinations; Questions as to Belief in Capital Punishment**

The trial court properly refused to permit defendant to ask a potential juror questions which attempted to "stake out" the juror's position on situations in which he would vote for the death penalty. *S. v. Reese*, 110.

**§ 7.11. Challenges for Cause; Scruples against or Belief in Capital Punishment**

The trial judge did not err in refusing to permit defendant to rehabilitate certain jurors before ruling on the prosecutor's challenge for cause on *Witherspoon* grounds. *S. v. Reese*, 110.

The trial court did not abuse its discretion in a first degree murder prosecution by seating a juror who expressed his belief that every murderer should receive the death sentence after that juror indicated that he would follow the court's instructions, or by excusing for cause a juror who expressed uncertainty about whether he could impose the death penalty. *S. v. Quesinberry*, 228.

**§ 7.12. Challenges for Cause; What Constitutes Disqualifying Scruples or Beliefs with Regard to Capital Punishment**

The trial court properly excused certain jurors based on answers regarding the death penalty. *S. v. Reese*, 110.

**§ 7.14. Manner and Time of Exercising Peremptory Challenges**

When the issue of discrimination in the use of peremptory challenges is raised for the first time after the jury is empaneled, in order to make out a prima facie showing of discrimination the defendant must show that he or she is a member of a cognizable racial group, that the prosecutor used the peremptory challenges to exclude members of that group, and that the facts and circumstances raise an inference of racially discriminatory intent. *S. v. Robbins*, 465.

The defendant did not establish a prima facie case of purposeful discrimination in the prosecutor's use of peremptory challenges. *Ibid.*

## KIDNAPPING

**§ 1. Elements of Offense**

Defendant's conviction and sentencing for both first degree kidnapping and first degree rape violated double jeopardy where there was evidence of three different sexual assaults but it cannot be determined whether the jury's verdict of first degree kidnapping was based upon a sexual assault other than the rape for which defendant was convicted. *S. v. Freeman*, 609.

**§ 1.2. Sufficiency of Evidence**

The evidence was insufficient to support a kidnapping charge. *S. v. Robbins*, 465.

## MASTER AND SERVANT

**§ 10.2. Actions for Wrongful Discharge**

The trial court did not err by granting defendant's motion for dismissal in an action in which plaintiff alleged that he had been wrongfully discharged without cause in violation of defendant's termination policy as stated in its management procedure manual. *Harris v. Duke Power Co.*, 627.

**§ 55.4. Workers' Compensation; Relation of Injury to Employment**

Plaintiff's fall from a chair while hanging plants she had taken to her home during working hours after being instructed by her employer to dispose of the plants did not arise out of and in the course of her employment. *Fortner v. J. K. Holding Co.*, 640.

**§ 66. Workers' Compensation; Mental Disorders**

The evidence was sufficient to support an Industrial Commission conclusion that plaintiff was entitled to compensation for total disability due to stress induced depression. *Hill v. Hanes Corp.*, 167.

**§ 69. Workers' Compensation; Amount of Recovery Generally**

An employee may be compensated for both a scheduled compensatory injury under G.S. 97-31 and total incapacity for work under G.S. 97-29 where the total incapacity is caused by a psychiatric disorder brought on by the scheduled injury. *Hill v. Hanes Corp.*, 167.

The Industrial Commission did not err by making an award for total incapacity to begin on 8 November 1982, even though plaintiff had reached maximum improvement on 1 November 1980. *Ibid.*

Where claimant was permanently and totally disabled because of damage to his heart muscle resulting from the combined effects of a compensable heart attack and three subsequent heart attacks, he is entitled to compensation under the total incapacity statute, G.S. 97-29, rather than under the partial incapacity statute, G.S. 97-30, but the award must be apportioned to reflect the extent to which claimant's permanent total disability was caused by the compensable heart attack. *Weaver v. Swedish Imports Maintenance, Inc.*, 243.

**§ 77.1. Workers' Compensation; Modification and Review of Award; Grounds; Change of Conditions**

Claimant was entitled to a modification of award for change of condition pursuant to G.S. 97-47 where he was initially awarded compensation for temporary total disability as a result of a compensable heart attack and thereafter became permanently and totally disabled after suffering three subsequent heart attacks. *Weaver v. Swedish Imports Maintenance, Inc.*, 243.

## MASTER AND SERVANT — Continued

**§ 108. Right to Unemployment Compensation Generally**

An employee who quits a job upon being informed that he will be terminated four days later and applies immediately for unemployment benefits is disqualified for such benefits for the four-day period during which he could have continued to work but is not disqualified subsequent to the date on which his employment would in any event have terminated. *In re Poteat v. Employment Security Comm.*, 201.

## PERJURY

**§ 5. Sufficiency of Evidence**

Where defendant contended that the State obtained his murder conviction and death sentence by the knowing use of perjured testimony by the Chief Medical Examiner, the defendant did not carry his burden of showing that the testimony was in fact false, material, and knowingly and intentionally used to obtain his conviction. *S. v. Robbins*, 465.

## RAPE AND ALLIED OFFENSES

**§ 1. Elements of the Offense**

As used in the custodial sexual offense statute, the word "custody" applies to voluntary patients in private hospitals. *S. v. Raines*, 258.

The trial court did not err in a prosecution for kidnapping and rape by not arresting judgment on one of two rape charges involving the first rape victim where the evidence showed that defendant completed intercourse with the first victim, was not successful with the second victim, and again completed the act with the first victim. *S. v. Dudley*, 656.

**§ 2. Offenses**

G.S. 14-27.2 does not require a showing that a dangerous or deadly weapon was used in a particular manner in order to sustain a conviction for first degree rape. *S. v. Langford*, 340.

The first degree sexual offense statute was not partially repealed by the enactment as part of the same legislative act of the substitute parent sexual offense statute. *S. v. Nations*, 318.

**§ 3. Indictment**

Indictments for various sexual offenses against a child were not fatally flawed because they indicated the alleged offenses had occurred "on or about" 7-9 May rather than on 8-10 May as shown by the evidence at trial. *S. v. Griffin*, 429.

**§ 4. Relevancy and Competency of Evidence**

The trial court did not err in permitting a physician to testify that vigorous genital and anal stimulation could cause a urinary tract infection where the physician further testified repeatedly that he had no opinion as to any causal connection between the victim's infection and the alleged offenses. *S. v. Griffin*, 429.

**§ 4.1. Evidence of Improper Acts or Threats; Proof of Other Acts and Crimes**

There was no prejudice in a prosecution for first degree rape from the admission of evidence of defendant's prior alleged sexual misconduct. *S. v. Clemmons*, 192.

A rape victim's testimony that defendant fumbled with ropes hanging from a pipe but never tied her up, that she was terrified and thought she was going to die

**RAPE AND ALLIED OFFENSES — Continued**

The evidence in a first degree rape case was not conflicting as to whether defendant "employed or displayed" the knife in his possession to the victim so as to require the trial court to instruct on the lesser offense of second degree rape. *S. v. Langford*, 340.

**§ 9. Carnal Knowledge of Female under Twelve; Indictment**

An indictment for first degree sexual offense which alleged that the victim was a child under 12 years of age sufficiently alleged that she was a child under the age of 13 years. *S. v. Gainey*, 391.

**§ 11. Carnal Knowledge of Female under Twelve; Sufficiency of Evidence**

The jury could properly find defendant guilty of attempted first degree rape based on evidence that defendant rubbed his private parts against the 9-year-old victim's private parts and stopped doing so only when she started to cry. *S. v. Griffin*, 429.

**§ 19. Taking Indecent Liberties with Child**

The State presented sufficient evidence of five counts of taking indecent liberties with a child. *S. v. Etheridge*, 34.

Defendant's conviction of taking indecent liberties with a child was supported by the evidence. *S. v. Griffin*, 429.

**ROBBERY**

**§ 4.3. Armed Robbery Cases where Evidence Held Sufficient**

The trial court did not err by denying defendant's motion to dismiss charges of armed robbery and first degree murder. *S. v. Williams*, 73.

There was sufficient evidence of armed robbery to support submission of a felony murder charge to the jury where defendants shot a security guard and then took money from his person. *S. v. Pakulski*, 562.

The evidence was sufficient to support defendant's conviction of armed robbery where it tended to show a continuous transaction in which defendant critically wounded the victim and removed his wallet a short time later. *S. v. Rasor*, 577.

The evidence was sufficient to support a verdict of guilty in an armed robbery prosecution. *S. v. Robbins*, 465.

**§ 4.7. Insufficiency of Evidence**

In a prosecution for armed robbery, there was insufficient evidence that defendant had the requisite specific intent to unlawfully deprive the store owner of personal property. *S. v. Allison*, 92.

**§ 5.2. Instructions Relating to Armed Robbery**

The trial court did not err by giving the pattern jury instruction on armed robbery rather than defendant's requested instruction that the jury must find that defendant intended to steal the victims' property at the time he threatened or endangered their lives. *S. v. Robbins*, 465.

**RULES OF CIVIL PROCEDURE**

**§ 23. Class Actions**

A class exists under G.S. 1A-1, Rule 23 when each of the members has an interest in either the same issue of law or of fact and that issue predominates over

## SEARCHES AND SEIZURES — Continued

**§ 23. Requisites of Affidavit; Sufficiency of Showing of Probable Cause**

The affidavit used in obtaining a search warrant in a prosecution for robbery and murder contained facts sufficient to support a probable cause finding. *S. v. Williams*, 73.

## SOCIAL SECURITY AND PUBLIC WELFARE

**§ 2. Recovery of Amount Paid to Recipient**

A grandmother who received public assistance for her granddaughter did not assign all support rights to the State as a condition of receipt of public assistance, but only her right to that support necessary to reimburse the State for the amount of public assistance it expended on behalf of the child. *State ex rel. Crews v. Parker*, 354.

## TAXATION

**§ 19.1. Exemption from Taxation; Construction of Exemptions**

Appellant was entitled to a property tax exemption for 1978 and 1979 for large appliances placed in a public warehouse where appellant shipped the warehoused property ordered by customers directly to the customers' homes from the warehouse during those years. *In re Appeal of K-Mart Corp.*, 378.

**§ 25.10. Ad Valorem Taxes; Proceedings; State Board of Assessment**

A discretionary decision by a county board of equalization and review to grant or deny a property tax exemption is reviewable by the Property Tax Commission. *In re Appeal of K-Mart Corp.*, 378.

## UNFAIR COMPETITION

**§ 1. Unfair Trade Practices in General**

Actions for unfair and deceptive trade practices may be maintained as class actions. *Crow v. Citicorp Acceptance Co.*, 274.

## USURY

**§ 3. Parties Entitled to Invoke Relief**

Actions for usury may be maintained as class actions. *Crow v. Citicorp Acceptance Co.*, 274.

## WITNESSES

**§ 1.2. Competency of Children as Witnesses**

The trial court did not err in finding that a seven-year-old sexual assault victim was competent to testify notwithstanding the voir dire record reveals that she did not understand her obligation to tell the truth from a religious point of view and she had no fear of certain retribution for mendacity. *S. v. Hicks*, 84.

# WORD AND PHRASE INDEX

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