NORTH CAROLINA REPORTS

VOLUME 320

SUPREME COURT OF NORTH CAROLINA

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IN MEMORIAM

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ASSOCIATE JUSTICE
1 DECEMBER 1969-31 DECEMBER 1978

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

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

On April 26, 1988 the following individuals were admitted:

REX DUNN ..... Durham, applied from the State of Kentucky
MICHAEL JEFFREY HACKELING ..... Centerport, New York
applied from the State of New York, Second Department
TERRY G. HARN ..... Chapel Hill, applied from the State of Illinois
JERRY G. HESS ..... Charlotte, applied from the State of Minnesota
MARK DAVID HOCKMAN ..... Fayetteville, applied from the State of Illinois
LOUIS JORDAN MITCHELL ..... Atlanta, Georgia
applied from the State of Georgia
EDWARD WELLINGTON RILEE ..... Greensboro, applied from the State of Ohio
DONALD J. ST. JOHN ..... Redding, Connecticut
applied from the State of Connecticut
JULIAN RAYMOND SPARROW, JR. ..... Oakton, Virginia
applied from the State of Virginia
JUSTIN ALLEN THORNTON ..... Washington, District of Columbia
applied from the District of Columbia
ROBERT R. TEALL ..... Hickory, applied from the State of Ohio
JUDITH WELCH WEGNER ..... Chapel Hill, applied from the District of Columbia

Given over my hand and Seal of the Board of Law Examiners this the 29th day of April, 1988.

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

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

On June 8, 1988, the following individuals were admitted:

JOSEPH A. BAMBURY, JR. ..... Charlotte, applied from the State of New York
DAVID SHEPARDSON CAYER ..... Annandale, Virginia
applied from the State of Virginia
MARGARET B. DARDESS ..... Research Triangle Park
applied from the State of Pennsylvania and the District of Columbia
IRVING MELVIN FREEDMAN ..... Chapel Hill, applied from the District of Columbia
STEVEN DOUGLAS HEDGES ..... Greensboro, applied from the State of Virginia
HOWARD ARTHUR MACCORD, JR. ..... Greensboro
applied from the District of Columbia

MARCIA HELEN MOREY ..... Carrboro, applied from the State of Illinois
ARTHUR D. PERSCHETZ ..... Charlotte, applied from the State of New York Second Department
JOHN MORGAN SIMPSON ..... Washington, District of Columbia applied from the District of Columbia
DAVID M. WINER ..... Chapel Hill, applied from the State of Connecticut
NORA E. HERNDON ..... Garner, applied from the State of Indiana

Given over my hand and Seal of the Board of the Law Examiners this the 15th day of June, 1988.

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

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

On June 10, 1988 the following individuals were admitted:

ELAINE SUE MAKO ..... Wilmington, applied from the State of Ohio
FREDERICK SNYDER WILKERSON ..... Charlotte, applied from the States of West Virginia and Wisconsin

On June 29, 1988 the following individuals were admitted:

JAMES A. ALEXY ..... Cherry Hill, New Jersey applied from the State of Pennsylvania
GREGORY BARTKO ..... Alexandria, Virginia, applied from the State of Michigan
THOMAS MARK GALVIN ..... Research Triangle Park applied from the State of New York, Second Department
JEFFREY MARK KLEIN ..... Matthews, applied from the State of New York Second Department
THOMAS J. OVERTON ..... Denver, Colorado applied from the State of Colorado
JEANNE SCHULTE SCOTT ..... Clemmons, applied from the District of Columbia
JANE L. WILSON ..... Asheville, applied from the State of Ohio

On July 27, 1988 the following individuals were admitted:

LISA PORTA WILLIS ..... Wilson, applied from the State of Kentucky
JANET MARIE HARDING ..... Durham, applied from the State of Tennessee
PATRICIA SPAULDING MOORE ..... Chicago, Illinois applied from the State of Illinois

LEONARD CASTILLO ..... Cary, applied from the State of Michigan
BARBARA ANN HATCHER ..... Greensboro, applied from the District of Columbia
RALPH LEE MCCAUGHAN ..... Durham, applied from the District of Columbia
JAMES LEE LESTER ..... Greensboro, applied from the State of Virginia
CHARLES W. SMITH ..... Keyser, West Virginia
applied from the State of West Virginia
ANDREA KATE SIGMAN ..... Durham, applied from the District of Columbia
LOU ANN PHELPS ..... Durham, applied from the State of Pennsylvania
NORMAN E. JORGENSEN .... Biltmore Forest, applied from the District of Columbia

Given over my hand and Seal of the Board of the Law Examiners this the 28th day of July, 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 EX REL. UTILITIES COMMISSION v. CAROLINA POWER & LIGHT COMPANY, APPLICANT; CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC., INTERVENOR; KUDZU ALLIANCE, INTERVENOR; PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION, INTERVENOR; AND LACY H. THORNBURG, ATTORNEY GENERAL, INTERVENOR

No. 591A85

(Filed 7 July 1987)

1. **Electricity § 3; Utilities Commission § 38— electric rates—adjustment of test period data—effect of management prudence**

Although management prudence may be an important factor considered by the Utilities Commission in a general rate case, management prudence *vel non* does not control the Commission's decision as to whether to adjust test period data to reflect abnormalities having a probable impact on the utility's revenues and expenses during the test period in order that it may set reasonable rates in compliance with N.C.G.S. § 62-133.

2. **Electricity § 3; Utilities Commission § 38— electric rates—normalizing nuclear capacity factor**

The Utilities Commission did not err in a general rate case by normalizing the nuclear capacity factor component of CP&L's generation mix for the test periods to reflect the average lifetime nuclear capacity factors actually achieved by CP&L as of the end of each of the test periods in question where the Commission found that the nuclear capacity factors for the test years were abnormal and not reasonably representative of an acceptable system nuclear capacity factor for rate making purposes, notwithstanding the Commission also found that CP&L's fuel procurement practices were prudent during the test periods. N.C.G.S. § 62-133(c) and (d) (1982).

3. Electricity § 3; Utilities Commission § 38— electric rates—fuel costs and rates—adoption of accounting method

Competent, material and substantial evidence supported the Utilities Commission's findings in applying accounting methods proposed by a witness for CP&L rather than by other expert witnesses in calculating the fuel costs and rates that CP&L should have collected during the disputed periods had the regulatory statutes been properly applied at the time the cases were originally heard.

4. Electricity § 3; Utilities Commission § 38— electric rates—calculation of fuel adjustments

The Utilities Commission properly calculated fuel adjustments in accordance with the formula approved in *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 327, 230 S.E. 2d 651 (1976). The *Edmisten* fuel adjustment formula was not invalidated by the enactment of N.C.G.S. § 62-134(e), and the Commission was not required by public policy or legislative intent to use a formula by which fuel expense adjustments are made only on the basis of changes in the unit prices of fossil fuels.

5. Electricity § 3; Utilities Commission § 38— electric rates—surcharge to cover fuel costs—no estoppel

CP&L was not estopped from seeking in the proceeding on remand a surcharge to cover its fuel related costs because it defended the Commission's two-track rate making system in the original appeals of general rate cases and the two-track system has been held unlawful.

ON appeal from an order of the North Carolina Utilities Commission entered on 10 September 1985. Heard in the Supreme Court on 9 March 1987.

Richard E. Jones, Robert W. Kaylor and Robert S. Gilliam for Carolina Power & Light Company.

Thomas R. Eller, Jr. and Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Sam J. Ervin, IV, for Carolina Utility Customers Association, Inc.

Edelstein and Payne, by M. Travis Payne, for Kudzu Alliance.

Robert P. Gruber, Antoinette R. Wike and Gisele L. Rankin for Public Staff.

Lacy H. Thornburg, Attorney General, and Karen E. Long, Assistant Attorney General.

MITCHELL, Justice.

The questions before us on appeal arise from an order of the North Carolina Utilities Commission entered after reconsideration of three general rate cases[1] and six fuel adjustment proceedings.[2] All of the cases were originally filed by Carolina Power & Light Company (hereinafter "CP&L") and initially heard by the Commission during the period 1979-82. Five of the cases were appealed by one or more intervenors. This Court or the Court of Appeals remanded each of those cases to the Commission after holding its order erroneous.[3]

The Commission consolidated the five cases on remand. In its effort to comply with the instructions of this Court and the Court of Appeals, the Commission also reopened one additional general rate case (Sub 366)[4] and three fuel adjustment proceedings (Sub 420, Sub 434 and Sub 452) and consolidated them with the remanded cases.[5]

1. The three general rate cases are reported at Carolina Power & Light Co., Docket No. E-2, Sub 366, *Seventieth Report of the North Carolina Utilities Commission: Orders and Decisions* 207 (22 April 1980); Carolina Power & Light Co., Docket No. E-2, Sub 391, *Seventy-First Report of the North Carolina Utilities Commission: Orders and Decisions* 212 (15 January 1981); and Carolina Power & Light Co., Docket No. E-2, Sub 416, *Seventy-Second Report of the North Carolina Utilities Commission: Orders and Decisions* 121 (12 February 1982).

2. The six fuel adjustment proceedings—of which only two are reported in the Commission's Official Reports—are: Carolina Power & Light Co., Docket No. E-2, Sub 402 (24 October 1980); Carolina Power & Light Co., Docket No. E-2, Sub 411, *Seventy-First Report of the North Carolina Utilities Commission: Orders and Decisions* 221 (27 February 1981); Carolina Power & Light Co., Docket No. E-2, Sub 420 (18 June 1981); Carolina Power & Light Co., Docket No. E-2, Sub 434 (22 October 1981); Carolina Power & Light Co., Docket No. E-2, Sub 446, *Seventy-Second Report of the North Carolina Utilities Commission: Orders and Decisions* 148 (26 February 1982); and Carolina Power & Light Co., Docket No. E-2, Sub 452 (17 June 1982).

3. *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 306 S.E. 2d 435 (1983) (Sub 402 and Sub 411); *State ex rel. Utilities Commission v. N.C. Textile Mfrs. Assoc.*, 309 N.C. 238, 306 S.E. 2d 113 (1983) (Sub 391); *State ex rel. Utilities Commission v. Public Staff*, 64 N.C. App. 609, 307 S.E. 2d 803 (1983) (Sub 416); *State ex rel. Utilities Commission v. Kudzu Alliance*, 64 N.C. App. 183, 306 S.E. 2d 546 (1983) (Sub 446).

4. The general rate cases and fuel adjustment cases heard and decided by the Commission are referred to throughout this opinion by the docket numbers given them by the Commission, e.g., "Sub 366."

5. Under the procedure followed by the Commission at the time the cases resulting in this appeal were heard originally, rates in effect at any given time

A panel of the Commission held hearings in February and March of 1985. After additional hearings were held in May, a Recommended Order On Remand was filed on 18 June 1985. The intervenors, the Attorney General, the Public Staff, Kudzu Alliance (hereinafter "Kudzu") and Carolina Utility Customers Association, Inc. (hereinafter "CUCA")[6] filed exceptions to the Recommended Order. The Commission heard oral arguments in August and entered its Final Order on Remand Requiring Customer Refunds on 10 September 1985. CP&L and all intervenors appealed to this Court.

The three primary issues before this Court on appeal are (1) whether the Commission erred by "normalizing" CP&L's fuel costs for test periods involved in the general rate cases, (2) whether the Commission erred by applying accounting methods proposed by a witness for CP&L, and (3) whether the Commission erred by applying an improper formula for fuel cost adjustments. We find no error and affirm the order of the Commission.

We do not undertake a complete review of all of the evidence introduced as it is in the form of several thousand pages of transcripts and exhibits. Specific evidence and what it tended to show is discussed throughout this opinion where pertinent and necessary.

A brief historical review is necessary to an understanding of the issues presented and the unique posture of the cases before us on appeal. Public utilities were first permitted to make interim adjustments to their rates in North Carolina in response to rapidly rising fossil fuel costs resulting from the effects of an oil embargo imposed by the Organization of Petroleum Exporting Countries in the mid-1970s. The first "fuel adjustment clauses" approved by the Commission operated automatically. Rather than being required to apply to the Commission for every rate adjustment, public utilities were permitted to adjust their rates unilaterally once each month to reflect changes in their fuel costs.

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were based on two cases—one general rate case and one fuel adjustment proceeding.

6. The record reflects that CUCA is the successor organization to the former North Carolina Textile Manufacturers Association.

In 1975, the General Assembly enacted former N.C.G.S. § 62-134(e) (repealed 17 June 1982) which provided that rates could be adjusted on the basis of changes in fuel costs only with approval of the Commission after a public hearing. 1975 N.C. Sess. Laws ch. 243, § 8; repealed 1981 N.C. Sess. Laws ch. 1197, § 2. The statute also provided for expedited hearings in fuel adjustment proceedings.

In its efforts to implement N.C.G.S. § 62-134(e), the Commission adopted regulations and a fuel cost formula which were amended occasionally in light of experience. By 1978, a "two-track" rate making system had evolved. Under that system, all fuel related costs were considered in fuel adjustment proceedings, but excluded in general rate cases. Other operating costs, together with a proper rate of return, were considered in general rate cases but excluded from consideration in fuel adjustment proceedings.

In 1980 our Court of Appeals held that issues relating to management prudence should be considered only in general rate cases and not in fuel adjustment proceedings under N.C.G.S. § 62-134(e). *State ex rel. Utilities Commission v. Virginia Electric & Power Co.*, 48 N.C. App. 453, 269 S.E. 2d 657, *disc. rev. denied*, 301 N.C. 531, 273 S.E. 2d 462 (1980). While recognizing the correctness of that holding by the Court of Appeals, this Court thereafter determined that the Commission's two-track rate making system was inconsistent with the requirements of N.C.G.S. § 62-133 and former N.C.G.S. § 62-134(e). *See generally, State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 306 S.E. 2d 435 (1983). In reviewing the Commission's prior orders in two of the fuel adjustment proceedings presently before us—Sub 402 and Sub 411—we held that the Commission had erred by failing to establish a new base cost of fuel in each general rate case. *Id.* We also held that it had erred by including purchased power costs and nuclear fuel costs in fuel adjustment proceedings. *Id.* We recognized, however, that even though purchased power costs and nuclear fuel costs had been improperly considered in fuel adjustment proceedings before the Commission, they had also been improperly excluded from consideration in general rate cases to the detriment of public utilities. *Id.* Therefore, we remanded the fuel adjustment proceedings before us for a hearing "in the nature of" a general rate case. *Public Staff*, 309 N.C. at 213, 306

S.E. 2d at 445. We also directed the Commission to consider the reasonableness and prudence *vel non* of CP&L's management in incurring the costs for the purchases and exchanges of power in question. We instructed the Commission to contrast the rates actually collected with those which should have been collected and to make such adjustments as necessary to correct any discrepancy. *Public Staff*, 309 N.C. at 214, 306 S.E. 2d at 446.

The appellate opinions in the other cases remanded to the Commission and dealt with in its order giving rise to this appeal were quite brief and cited our decision in *Public Staff* as controlling.[7] Those cases and *Public Staff* represent practical applications, in cases remanded for recalculations, of the principle that a public utility must be given at least one fair opportunity at some point to recover all of its reasonably and prudently incurred fuel and purchased power costs,[8] if rates are to "be fair both to the public utility and to [consumers]" as required by N.C.G.S. § 62-133(a).

On remand, the Commission consolidated the five remanded cases with four reopened cases that had affected CP&L's rates during the rate periods in dispute here—the 22 months from 1 December 1980 to 23 September 1982. The Commission held hearings to determine the rates that should have been collected during those rate periods.

CP&L introduced extensive testimony and numerous exhibits through expert witnesses with regard to its practices in purchasing fuel and power. It also introduced expert testimony as to the efficiency of the operation of its generating plants. CP&L's evidence tended to show that, at all pertinent times, its fuel and power purchasing practices were reasonable and prudent, it operated its generating plants in a prudent manner, and no fuel or purchased power costs were incurred unreasonably or imprudently.

The Commission's hearings were conducted "in the nature of" a general rate case according to our instructions in *Public Staff*.

7. *See* cases cited *supra* note 3.

8. In *State ex rel. Utilities Commission v. N.C. Textile Mfrs. Assoc.*, 309 N.C. 238, 306 S.E. 2d 113 (1983) (Sub 391), for example, we found *Public Staff* controlling and remanded to the Commission with instructions to determine the reasonableness of CP&L's expenses for fuel and purchased power.

However, the intervenors offered no evidence of imprudence on the part of CP&L.

CP&L introduced evidence in the form of testimony and exhibits by an accounting expert, David R. Nevil, to show how he had recalculated the rates for each of the general rate cases and fuel adjustment proceedings in question. He testified that his recalculations showed that the rates which should have been collected by CP&L for the disputed rate periods exceeded the rates actually collected by $7,366,019.

The intervenors introduced evidence concerning their own recalculations of the rates in question. The Public Staff introduced evidence through an accounting expert, Candace A. Paton, who testified that CP&L had actually collected $72,487,741 in excess of the rates it should have collected. Accounting experts for CUCA, John W. Wilson and Charles E. Johnson, testified that CP&L had actually collected $120,515,060 in excess of the rates it should have collected.

A major area of dispute during the hearings before the Commission involved the concept of "normalizing" the nuclear capacity factor component of CP&L's test period generation mix. The intervenors argued that allowable fuel costs for the general rate cases should not be calculated on the basis of the actual test period fuel costs incurred by CP&L, but instead on the basis of the costs CP&L would have experienced if its nuclear plants had operated at a "normal capacity factor" selected by the Commission. The intervenors argued that the correct normal capacity factor was the capacity factor CP&L should have been expected to achieve in the "future" at the time when the rates would apply—a time in fact past when the Commission's hearings giving rise to this appeal were held. CP&L contended that such normalization of test period nuclear capacity factors, while appropriate in projecting anticipated fuel costs in an ordinary rate case, was impractical and improper in these cases, where the Commission was forced to fix rates for a period which had already passed. CP&L argued that rates in such cases should take into account actual fuel costs during the periods to which the rates apply, unless they were imprudently incurred.

In its Final Order on Remand Requiring Customer Refunds entered on 10 September 1985, the Commission "normalized" the

nuclear capacity factor component of CP&L's generation mix for the test periods in question. In its final order, the Commission concluded that the total of the rates actually collected by CP&L during the periods at issue exceeded the total amount it should have collected by $1,512,523. Accordingly, the Commission ordered CP&L to refund that amount plus interest to the rate payers. CP&L and all intervenors appealed to this Court.

CP&L'S APPEAL

On appeal, CP&L contends that the Commission erred by normalizing the nuclear capacity factor component of CP&L's generation mix for the test periods involved. We hold that the Commission did not err in this regard.

This Court has given its specific approval to the process of normalizing the nuclear capacity factor component of a public utility's test period generation mix in a general rate case. *State ex rel. Utilities Commission v. Thornburg*, 316 N.C. 238, 342 S.E. 2d 28 (1986). We did so because we concluded that the practice complied with N.C.G.S. § 62-133 requiring the Commission "to adjust test period data to reflect abnormalities which had a probable impact on the utility's revenues and expenses during the test period." We also felt that the practice would be of assistance in setting the utility's future rates, because it would aid the Commission in more accurately anticipating the utility's future expenses for purchased power and fuel. Accordingly, we indicated that such normalization is appropriate when test period fuel costs are affected by abnormalities in the test period nuclear capacity factor affecting the generation mix used by the utility. 316 N.C. at 253, 342 S.E. 2d at 38.

In its final order of 10 September 1985 giving rise to this appeal, the Commission made proper findings upon substantial evidence and specifically determined that CP&L's fuel procurement practices and its power purchasing practices were prudent during the test periods for the general rate cases in question here. Nevertheless, the Commission found *inter alia*:

> 11. In determining the base fuel component which should have been established in each of CP&L's general rate cases in Docket Nos. E-2, Sub 366, E-2, Sub 391, and E-2, Sub 416, it is reasonable and appropriate to use a normalized generation

mix which reflects the lifetime historical average level of CP&L's nuclear generation. The lifetime historical average level of nuclear generation should be calculated as of the end of the test period utilized by the Commission in each reopened general rate case docket to which said average level of nuclear generation is applied. The resulting lifetime historical average levels of nuclear generation in these proceedings are 60.79% for Docket No. E-2, Sub 366, 58.96% for Docket No. E-2, Sub 391, and 57.05% for E-2, Sub 416. The normalized level of sources of supply should be calculated in a manner consistent with previous practices. These normalization adjustments are tailored specifically to CP&L's own nuclear generating units and the Company's historical operating experience in order to adopt *reasonable* and *representative* fuel costs in these proceedings on remand which are fair and equitable to both CP&L and its rate-paying customers.

(Emphasis added.)

At a later point in its order, the Commission reviewed the evidence in support of this finding and entered conclusions including the following:

As to the appropriate normalized level of nuclear generation, the Commission notes that the lifetime capacity factors actually achieved by nuclear units nationwide as reported by the North American Electric Reliability Council Equipment Availability Report for the 10 year periods ending in the periods involved in the proceeding averaged 60% in 1979, 59.8% for 1980, 61.5% for 1981, and 60.3% for 1982.

CP&L's average *lifetime* nuclear capacity factors actually achieved for the three general rate case test periods involved in the case compare favorably to those actually achieved by all nuclear units in the United States. They are 60.79% for general rate case Docket No. E-2, Sub 366, 58.96% for general rate case Docket No. E-2, Sub 391, and 57.05% for Docket No. E-2, Sub 416. The average achieved *lifetime* capacity factor for CP&L's nuclear plants for the period involved in these proceedings is only one to two percentage points less than that achieved nationally by all nuclear plants and closely approximates the 60% target or objective specified in Rule R8-46.

CP&L's average *actually achieved* nuclear capacity factor for the test year used in general rate case Docket No. E-2, Sub 366 was 70.7%; for the test year used in general rate case Docket No. E-2, Sub 391, it was 56.8%; and for the test year used in general rate case Docket No. E-2, Sub 416, it was 45.75%. The average capacity factor *actually achieved for the test years* in the three general rate cases was only one to two percentage points below CP&L's average achieved *lifetime* system nuclear capacity factor for the period.

Upon review of CP&L's *actual test year* nuclear capacity factors on remand, the Commission concludes that it is appropriate to use a normalized generation mix which reflects the *lifetime historical average level of CP&L's nuclear generation* in determining the base fuel component which should have been established in each of the reopened general rate cases in Docket Nos. E-2, Sub 366, E-2, Sub 391, and E-2, Sub 416. The *lifetime historical average level of nuclear generation* should be calculated as of the end of the test period utilized by the Commission in each reopened general rate case docket to which said average level of nuclear generation is applied. The Commission concludes that such normalization will establish CP&L's generation mix for ratemaking purposes on remand at *reasonable* and *representative* levels which are fair to both the Company and its ratepayers. In particular, the Commission concludes that the 45.75% nuclear capacity factor which CP&L experienced during the test years for Docket No. E-2, Sub 416 was abnormally low and not reasonably representative of an acceptable system nuclear capacity factor for ratemaking purposes and should not reasonably be expected to reoccur in subsequent periods. Thus, normalization is clearly appropriate and justified, *even in the absence of a finding of management imprudence related to nuclear plant performance.* Normalization of CP&L's nuclear capacity factor at 60.79% in Docket No. E-2, Sub 366 also serves to establish a more reasonable and representative nuclear capacity factor for ratemaking purposes to the benefit of CP&L in that case since the test year nuclear generation of 70.7% was, in effect, abnormally high. Normalization in Docket No. E-2, Sub 391 is generally of little consequence in view of the Company's actual test year

> nuclear generation. For purposes of these proceedings on remand, the normalization adjustments adopted by the Commission *are tailored specifically to CP&L's own nuclear generating units and the Company's historical operating experience* in order to adopt *reasonable* and *representative* fuel costs which are fair and equitable to both CP&L and its rate-paying customers.

(Emphasis added.)

CP&L contends, and we agree, that the Commission made no finding of management imprudence and, to the extent it made findings concerning such questions, the Commission's findings are to the effect that the actions of CP&L's management were prudent. CP&L argues that, given the absence of any finding of management imprudence, the Commission was required to use CP&L's actual fuel expenses when fixing rates for the three general rate cases involved in this appeal (Sub 366, Sub 391 and Sub 416). We do not agree.

In *State ex rel. Utilities Commission v. Morgan*, 278 N.C. 235, 236-37, 179 S.E. 2d 419 (1971), we explained that:

> The basic, underlying theory of using the Company's operating experience in a test period, recently ended, in fixing rates to be charged by it for its service in the near future is this: Rates for service, in effect throughout the test period, will, in the near future, produce the same rate of return on the company's property, used in rendering such service, as was produced by them on such property in the test period, *adjusted for known changes and conditions.*

(Emphasis added.)

[1] In *State ex rel. Utilities Commission v. City of Durham*, 282 N.C. 308, 193 S.E. 2d 95 (1972), we dealt with a situation in which the Commission had adjusted test period fuel expenses to reflect substantially abnormal weather conditions which had occurred during the test period. Although abnormal weather conditions are a factor clearly unrelated to management prudence, we found no error in the Commission's adjustment of test period expenses and revenues to take such abnormalities into account when setting rates for the near future. To the contrary, we stated that:

> The actual experience of the company during the test period, both as to revenues produced by the previously established rates and as to operating expenses, is the basis for a reasonably accurate estimate of what may be anticipated in the near future if, *but only if*, appropriate *pro forma* adjustments are made for abnormalities which existed in the test period and for changes and conditions occurring during the test period and, therefore, not in operation throughout its entirety.

Id. at 320, 193 S.E. 2d at 104 (emphasis added). Therefore, although management prudence may be an important factor considered by the Commission in a general rate case, management prudence *vel non* does not control the Commission's decision as to whether to adjust test period data to reflect abnormalities having a probable impact on the utility's revenues and expenses during the test period, in order that it may set reasonable rates in compliance with N.C.G.S. § 62-133. We implied as much in *Thornburg*, where we applied the statute in upholding an adjustment by the Commission to the test period nuclear capacity factor, and stated that:

> Since fuel costs comprise a large portion of a utility's expenses, the statutory mandate to normalize test period data includes a requirement that the Commission adjust the test period fuel cost for any abnormalities established by competent, material, and substantial evidence. Since the system nuclear capacity factor directly impacts upon the generation mix, which in turn affects fuel costs, *any* abnormality in the system nuclear capacity which is shown to have existed during the test year must be adjusted.

316 N.C. at 253, 342 S.E. 2d at 38 (emphasis added). However, the statute does not require the Commission to normalize where the variation between the test period experience and the average experience is slight. "The maxim, *de minimis non curat lex*, is applicable to what might be called normal variations from the average." *City of Durham*, 282 N.C. at 321, 193 S.E. 2d at 104-105.

CP&L also contends that normalization is not justified under the peculiar facts involved in this remand proceeding before the Commission. CP&L argues that normalization is used in the ordinary general rate case for estimating what may be anticipated

in the near future. Given the peculiar situation faced by the Commission here, however, CP&L argues that the Commission was not called upon to estimate or anticipate future events. Instead, it was required to recalculate rates at a time when the fuel costs actually incurred during the period to which the rates applied were already known. CP&L argues, therefore, that the Commission should have considered the fuel costs actually incurred during the rate periods in these general rate cases when fixing the rates. We do not agree.

We find it unnecessary to belabor the point to conclude that the legislature did not intend that the Commission consider fuel expenses actually occurring during the rate period when it required the Commission to consider evidence of certain matters "based upon circumstances and events occurring up to the time the hearing is closed." N.C.G.S. § 62-133(c) (1982). Nor do we believe that the legislature intended the Commission to consider actual fuel expenses incurred during the rate period when it required the Commission to "consider all other material facts of record that will enable it to determine what are reasonable and just rates." N.C.G.S. § 62-133(d) (1982). We have recognized in this regard that the Commission may in certain situations consider changes in costs and revenues expected to occur within a reasonable time after the test period. *State ex rel. Utilities Commission v. Carolina Utilities Customers Assoc.*, 314 N.C. 171, 199-200, 333 S.E. 2d 259, 276-77 (1985). To hold that the Commission was required to rely upon the actual fuel expenses incurred during the period to which the rates applied in setting reasonable rates would, however, tend to render completely meaningless the legislative directive that the test period "shall consist of 12 months' historical operating experience prior to the date the rates are proposed to become effective . . . ." N.C.G.S. § 62-133(c) (1982). We conclude that the legislature intended no such result, even in a remand proceeding such as that involved here.

[2] In its order the Commission reviewed in considerable detail the substantial competent evidence supporting its findings as to CP&L's average *lifetime* nuclear capacity factors actually achieved and CP&L's actual *test year* nuclear capacity factors for the test periods involved in each of the three general rate cases. The findings support the Commission's conclusions that the nuclear capacity factors for these test years were abnormal and

"not reasonably representative of an acceptable system nuclear capacity factor for ratemaking purposes and should not reasonably be expected to reoccur in subsequent periods." Having made such findings and conclusions, the Commission did not err by normalizing the nuclear capacity factors for the test periods to reflect the average *lifetime* nuclear capacity factors actually achieved by CP&L as of the end of each of the test periods in question. *See Thornburg*, 316 N.C. 238, 342 S.E. 2d 28. This is particularly true, since the Commission found on competent evidence that CP&L's lifetime achieved nuclear capacity factors as of the end of each test period did not vary significantly from the national average. *See generally, id.*

INTERVENORS' APPEAL

[3] An issue raised and argued on appeal by all intervenors is whether the Commission erred by selecting CP&L witness Nevil's accounting method rather than adopting accounting methods advocated by witnesses for the intervenors. The various intervenors have given us the benefit of several hundred pages of briefs on this issue, and the Public Staff has stated that it "may well be the single most complicated and . . . conceptually difficult question ever put to the Commission or this Court." The question before us on appeal actually is not quite so difficult and may be disposed of in a manner akin to that used by Alexander in dealing with the Gordian Knot.

In our opinion in *Public Staff*, we directed the Commission on remand to calculate and contrast the rates actually collected by CP&L with the rates that it should have collected had the regulatory statutes been properly applied, then make adjustments as necessary. 309 N.C. at 213-14, 306 S.E. 2d at 445-46. The cases giving rise to this appeal were controlled on remand by our opinion in *Public Staff*. *See, e.g., N.C. Textile Mfrs. Assoc.*, 309 N.C. 238, 306 S.E. 2d 113 (1983).

No party has excepted to the Commission's calculation that the fuel-related revenues actually collected by CP&L during the disputed period were $531,194,993. However, the intervenors excepted to the Commission's use of the accounting method advocated by CP&L witness Nevil for calculating the fuel costs and the rates that CP&L should have collected, as well as the results it

reached using that method. They contended that both the method used and the results were erroneous.

CP&L witness Nevil testified at length in support of the accounting method eventually adopted by the Commission. CUCA witness Wilson testified in favor of another accounting method for calculating the rates that should have been collected. Wilson's method was endorsed by Public Staff witness Paton. The Commission ultimately determined that the proper accounting method to be used was that of Nevil.

The difficult issue the Commission was required to decide was whether Nevil's or Wilson's accounting method more correctly calculated the total fuel related revenue CP&L would have collected during the disputed periods if, at the time the cases before it were originally heard, the Commission had considered test period fuel costs in each general rate case and had excluded nuclear fuel and purchase power costs from fuel adjustment proceedings. In our view, that question was a question of fact and not of law.

We have frequently indicated that findings of the Commission on questions of fact must be upheld on appeal if supported by competent, material and substantial evidence in light of the entire record. *E.g., State ex rel. Utilities Commission v. Carolina Utilities Customers Association*, 314 N.C. 171, 190, 333 S.E. 2d 259, 271 (1985). As a general rule, it is for the Commission, not the reviewing court, to determine the credibility of and the weight to be given to all competent evidence. The rule is fully applicable when there is conflicting testimony by experts as to which method among those available to experts in their field is best suited for use in resolving a particular question they are asked to address as experts. *See State ex rel. Utilities Commission v. Telephone Co.*, 281 N.C. 318, 371, 189 S.E. 2d 705, 739 (1972). A reviewing court may neither retry such disputed questions of fact nor substitute its judgment for that of the Commission. *State ex rel. Utilities Commission v. City of Durham*, 282 N.C. 308, 193 S.E. 2d 95 (1972).

The evidence in support of the Commission's findings on the issue of the proper accounting method to be used here was competent, material and certainly substantial. It was composed primarily of the testimony of CP&L witness Nevil. In his direct

testimony, Nevil explained in detail the accounting method he used. He testified that he had recalculated rates in each of the cases for the period in dispute and had determined the difference between the rates actually collected and the rates that should have been collected. He further testified that in making his recalculations, he corrected the two errors identified by the courts in the original rate orders in these cases. These were the error of considering nuclear fuel and purchased power costs in fuel adjustment proceedings and the error of failing to consider fuel costs in general rate cases. He also testified in detail as to how he had recalculated the rates for the general rate cases so as to reverse certain accounting adjustments made at the original hearings, because those adjustments had been made in order to avoid considering fuel costs in the general rate cases. The adjustments, therefore, did not comply with the more recent opinions of this Court and the Court of Appeals.

Nevil was cross-examined by the intervenors for more than four days. His testimony takes up more than 800 pages of the record before us. His testimony, found credible by the Commission, was sufficient to support the Commission's determination that the accounting method he used in recalculating the rates in question was proper and better suited to the task than the accounting methods advocated by the other expert witnesses.

The discussion of the question of the preferable accounting method took up twelve pages in the Commission's final order. The Commission first summarized the testimony of each witness as to the issue. The Commission discussed in detail the differences between the accounting methods and the testimony of the experts as to the strengths and weaknesses of each method. The Commission then compared the methods and found that Nevil's method was most consistent with the directions of this Court in *Public Staff* and with traditional rate making procedures. It is clear from the Commission's lengthy and logical discussion of the issue, that it gave full consideration to Wilson's testimony on behalf of his accounting method and considered all factors required by law. Without belaboring the issue further, it suffices to say here that the Commission's findings as to the proper accounting method to be used in fixing CP&L's rates were supported by competent, material and substantial evidence. The Commission did not err in this regard.

[4] The Attorney General, Kudzu and CUCA also assign error to the Commission's determination of the increases to be allowed in the fuel adjustment proceedings. They contend that the fuel adjustment formula used by the Commission for such purposes was improper. We do not agree.

The Commission recalculated fuel adjustments in these proceedings strictly according to the formula[9] approved by this Court in *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 327, 230 S.E. 2d 651 (1976) (applying law in effect prior to 1975 enactment of N.C.G.S. § 62-134(e)). Under this formula the Commission determines the total fossil fuel costs incurred by the utility during the four month fuel adjustment test period, then divides that total by the number of kilowatt hours (kwh) sold during the test period to establish a fossil fuel cost per kwh. It then contrasts this per-kwh cost with the base fossil fuel factor fixed in the previous general rate case. The difference, adjusted for gross receipts tax, establishes the proper increase or decrease required to adjust rates to allow for changes in prices of fossil fuels burned.

In *Edmisten*, we recognized that use of the formula permits rates to be changed under the fuel clause to reflect both variations in the amount of each fuel burned and fluctuations in unit coal and oil prices. 291 N.C. at 336, 230 S.E. 2d at 657. Nevertheless, we approved use of the formula. In so doing, we implicitly rejected the argument, now advanced by the Attorney General, Kudzu and CUCA, that the Commission is required to use a formula by which fuel expense adjustments are made only on the basis of changes in the unit prices of fossil fuels.

After our opinion in *Edmisten*, the Commission made only one significant change in the fuel adjustment formula. In 1976, the

9. This formula is as follows:

$$F = E - \frac{(B \times G)}{S} \times \frac{1}{1 - T}$$

"F" represents the fuel adjustment. "E" represents the utility's test period burned fossil fuel costs. "B" represents the base fossil fuel cost calculated in the preceding general rate case. "G" represents the number of kilowatt hours (kwh) generated by the utility's fossil fuel plants during the test period. "S" represents the number of kwh sold by the utility during the test period. "T" represents the applicable state gross receipts tax rate. In *Edmisten*, we used the figure .000513 instead of the letter "B", because the base fossil fuel cost for the test period in that case was $00.0513 per kwh.

Commission added two new elements to the formula to reflect the cost of nuclear fuel and a portion of the cost of purchased power. The inclusion of those two elements in the formula used for fuel adjustment proceedings was held improper by this Court in *Public Staff*. The Commission responded to our *Public Staff* opinion appropriately in the fuel adjustment proceedings involved in this appeal by returning to the original formula approved in *Edmisten*.

The Attorney General, Kudzu and CUCA contend that our legislature invalidated the *Edmisten* fuel adjustment formula by its adoption of former N.C.G.S. § 62-134(e).[10] We conclude that the enactment of N.C.G.S. § 62-134(e) did not invalidate the *Edmisten* fuel adjustment formula.

Prior to the enactment of N.C.G.S. § 62-134(e), the Commission's fuel adjustment procedures had operated automatically. Utilities unilaterally adjusted their rates once a month under the Commission's formula without being required to obtain Commission approval. Former N.C.G.S. § 62-134(e) replaced this automatic procedure with one whereby each adjustment to rates was reviewed and approved by the Commission before being implemented. It is clear to us, however, that the statute merely was intended to create a change of procedure and not to terminate the use of the *Edmisten* formula.

CUCA points to a sentence in former N.C.G.S. § 62-134(e) providing that "monthly fuel adjustment rate increases based solely upon the increased cost of fuel . . . as presently approved by the commission shall fully terminate effective September 1, 1975 . . . ." CUCA argues that the sentence was meant to prohibit adjustments based upon actual increases in total expenses for fuel and to allow adjustments only for increased unit prices of fuel. We think it clear, however, that the sentence was intended only to provide that individual fuel adjustments that had been ap-

10. N.C.G.S. § 62-134(e) was repealed effective 17 June 1982. 1981 N.C. Sess. Laws ch. 1197, § 2. It was in effect at the time the fuel adjustment proceedings addressed in the Commission's order before us on appeal were initiated and originally decided, however, and CP&L and the intervenors agreed that it should be applied if recalculations were required relative to those proceedings. As can be seen throughout this opinion, they completely disagree as to the effects of its applicability and as to whether any recalculations were proper in those proceedings.

proved prior to 1 September 1975 would be terminated on that date, and that the new procedures established by the statute would apply prospectively to fuel adjustment proceedings.

Finally, Kudzu and CUCA make several arguments, based on perceived public policy or legislative intent, that the formula approved in *Edmisten* should be abandoned in favor of a formula allowing fuel adjustments based solely on the increased unit prices of fuel. It suffices to say that the substance of each of those arguments was considered by this Court when we approved the fuel adjustment formula of *Edmisten* originally and again when we rendered our opinion in *Public Staff*. We did not find the arguments persuasive on either of those occasions. We see no need to discuss them in detail now that N.C.G.S. § 62-134(e) has been replaced by N.C.G.S. § 62-133.2 providing an entirely new procedure for making fuel adjustments. The Commission did not err here by applying the fuel adjustment formula approved in *Edmisten*.

[5] Kudzu additionally contends that CP&L was estopped from seeking a rate surcharge when these cases were before the Commission in the proceeding on remand that resulted in its 10 September 1985 final order. Kudzu argues that CP&L defended the Commission's two-track system in the original appeals of the general rate cases and, now that the two-track rate making system has been held unlawful, may not argue that its rates should have been higher than the rates previously set under that system. We do not agree.

CP&L has argued at all times that, even if the Commission's two-track rate making system violated N.C.G.S. § 62-134(e), any of CP&L's fuel costs that were improperly considered in fuel adjustment proceedings were also improperly excluded from general rate cases, and that CP&L was entitled to recover them. The single argument that CP&L has made most unequivocally and consistently at all stages of these cases has been that it was entitled to recover its fuel costs in one type of proceeding or the other. CP&L was not estopped from arguing before the Commission or before this Court that it was entitled to recover its fuel related costs through a surcharge.

We have concluded that the 10 September 1985 final order of the Commission was free of error. For the reasons discussed herein, that order is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. JOSEPH EDWARD KENNEDY

No. 658A86

(Filed 7 July 1987)

1. **Rape and Allied Offenses § 3— sexual offenses—short-form indictment**

Indictments charging first degree sexual offenses in accordance with N.C.G.S. § 15-144.2 without specifying which sexual acts were committed were sufficient to charge crimes of first degree sexual offense and to put defendant on notice of the accusations.

2. **Criminal Law § 124— short-form indictments for sexual offenses—no denial of unanimous verdict**

Defendant was not deprived of his right to a unanimous verdict because each of the three short-form indictments charged in identical language a first degree sexual offense by defendant against the same victim on the same date where the trial judge submitted a specific instruction with respect to unanimity of verdict as to each indictment and also assigned correlating specific alleged acts of sexual offense to each indictment.

3. **Jury § 7.9— inability to render guilty verdict—challenge for cause—applicability of statute to all cases**

The statute allowing a challenge for cause against a prospective juror who "[a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina," N.C.G.S. § 15A-1212(8), was intended to apply not only to the death qualification of prospective jurors in capital cases but also generally to qualifying jurors in all cases.

4. **Jury § 6.3— questioning prospective jurors—whether punishment would permit guilty verdict**

In a prosecution in which defendant faced mandatory life imprisonment on each of five first degree sexual offense charges, it was proper for the prosecutor to ask prospective jurors whether the punishment would prevent them from returning a verdict of guilty. Failure of the prosecutor to include in his questions the "matter of conscience" or "regardless of the facts and circumstances" language of N.C.G.S. § 15A-1212(8) did not make them improper.

5. Jury § 7.8— excusal of juror for cause—inability to perform duties

The trial court did not err in excusing a juror for cause on the ground that he was "unable to perform his duties as a juror and render a fair and impartial verdict in these cases," N.C.G.S. § 15A-1212(9), where the record shows that the juror's *voir dire* answers were confused, confusing, unresponsive and ambiguous.

6. Jury § 3— challenged juror in jury room—jury not impaneled—mistrial not required

The trial court did not err in refusing to declare a mistrial because a potential juror who was ultimately disqualified from service was allowed to remain in the jury room with passed jurors prior to impanelment while arguments were heard on the State's challenge of the juror for cause where the trial court conducted a thorough examination of the selected jurors and determined that there had been no discussion of the case while they were in the jury room, and each juror affirmed that he or she would be able to fairly and impartially serve on the jury.

7. Criminal Law §§ 50.1, 89.1— psychological test—opinion that victim responded in "honest fashion"

A psychologist's testimony that a sexual offense victim responded to psychological test questions in an "honest fashion" was not an improper expert opinion as to the victim's character or credibility but went to the reliability of the test itself. N.C.G.S. § 8C-1, Rule 702.

8. Rape and Allied Offenses § 4— victim's fear of defendant—relevancy

A psychologist's opinion testimony that the victim was greatly afraid of her father and her testimony as to behavior of and statements by the victim which form the basis of this opinion was properly admitted in a prosecution of defendant for sexual offenses allegedly committed against his daughter.

9. Criminal Law § 50.1; Rape and Allied Offenses § 4— expert testimony—symptoms of sexually abused children—victim's symptoms

In a prosecution of defendant for sexual offenses allegedly committed against his daughter, it was proper for the trial court to allow a psychologist and a pediatrician to testify concerning the symptoms and characteristics of sexually abused children and to state their opinions that the symptoms exhibited by the victim were consistent with sexual or physical abuse. N.C.G.S. § 8C-1, Rules 702, 703 and 704.

10. Criminal Law § 50.1; Rape § 4— expert testimony—scratch marks not self-inflicted

In a prosecution of defendant for sexual offenses allegedly committed against his daughter, the trial court properly allowed the Chief Medical Examiner for North Carolina to state his opinion that scratch marks on the victim's back were not consistent with self-mutilation and properly allowed a pediatrician to state her opinion that the injuries were neither accidental nor self-inflicted.

11. Criminal Law § 42.2— victim's damaged picture and dolls—absence of foundation for admission

In a prosecution of defendant for sexual offenses allegedly committed against his daughter, a torn school picture of the victim and three of the victim's dolls found with the hair cut off two of the dolls and the third doll decapitated were not admissible to show that the victim was preoccupied with child abuse and that cuts and burns on the victim were self-inflicted where there was no showing as to when and by whom the exhibits were damaged.

12. Criminal Law § 99.2— references to "the victim"—absence of prejudice

The trial court's reference to "the victim" on one occasion while listing for the prospective jurors the five offenses with which defendant was charged was a mere lapsus linguae and not a prejudicial expression of opinion. Furthermore, any error in the prosecutor's reference to "the victim" was cured when the trial court instructed the jury to disregard such terminology. N.C.G.S. § 15A-1222.

13. Criminal Law § 89.2— corroborative testimony—"new" information

Testimony was corroborative although it contained "new" or additional information when it tended to strengthen and add credibility to the testimony which it corroborated.

14. Rape and Allied Offenses § 6.1— first degree sexual offenses—submission of lesser offense not required

The trial court in a prosecution for first degree sexual offenses was not required to submit to the jury the lesser included offense of assault on a female where the evidence was clear and positive with respect to each element of the sexual offenses with which defendant was charged, and there was no evidence pointing to the commission of a lesser included offense.

15. Criminal Law § 117.1— instructions on witness credibility

The trial court's instructions on the credibility of lay and expert witnesses, including instructions that the jury "should consider the opinion of an expert witness, but you are not bound by it" and that the court had no opinion as to whether any part of the evidence should be believed or disbelieved, were sufficient, and the court did not err in failing to give defendant's requested instruction that the jury was permitted to completely disregard or reject the testimony of expert witnesses.

APPEAL by defendant from judgments sentencing defendant to two consecutive terms of life imprisonment for convictions on four charges of sexual offense in the first degree, imposed by *John, J.*, at the 2 June 1986 session of Superior Court, GUILFORD County. Heard in the Supreme Court 11 May 1987.

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

Cahoon & Swisher, by Robert S. Cahoon and Daniel E. Smith, for defendant.

MARTIN, Justice.

After considering defendant's assignments of error, we conclude that defendant received a fair trial, free of prejudicial error.

In summary, the state's evidence showed that on several occasions in 1985 defendant committed various sexual offenses against his daughter. As a result, the victim spent ten months in a psychiatric hospital and was also treated by medical doctors, psychologists, and social workers.

Defendant testified and produced evidence that he did not assault his daughter and that he was of good character and reputation.

Additional evidence necessary to determine the issues will be hereafter set forth.

[1] Defendant first assigns as error the trial court's denial of his motion to dismiss the indictments against him. Defendant was charged in five separate bills of indictment with sexual offense in the first degree. The indictments were drafted pursuant to N.C.G.S. § 15-144.2, which authorizes a short-form indictment for the crime of sexual offense. Each indictment charges that "on or about the date of the offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did engage in a sex offense with [the victim], a female person, by force and against her will." Defendant subsequently filed a motion for a bill of particulars, requesting the "[e]xact time, place and date of each offense charged," and the "[e]xact description of each particular criminal act by defendant." The state's response provided information on the specific sexual act alleged for each offense along with the date, time of day, and place of each offense. The state also filed three supplemental bills of particulars providing more specific information on the nature of the sexual offenses alleged in three of the cases. Defendant now argues that the indictments fail to charge offenses in a manner adequately apprising him of the conduct which is the subject of

the accusation as required by N.C.G.S. § 15A-924(a)(5), *State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189 (1980); that the bills do not specify the sexual offenses alleged to have been committed by the defendant and are thus so general that he could later be charged for the same offense and not be able to raise the earlier prosecution as a bar; and that because each of the bills in three of the cases charges in identical language a first degree sexual offense by defendant against the same victim on the same date, 7 June 1985, it cannot be ascertained whether the jury was unanimous in finding that defendant committed the acts charged. Defendant further contends that a bill of particulars cannot cure a defective indictment. Defendant argues he was deprived of his right to a unanimous jury verdict as guaranteed by article I, section 24 of the North Carolina Constitution, his right to due process, his right to be free from double jeopardy, and his right to proper indictment by a grand jury.

[2] We hold that the indictments were sufficient to charge the crime of first degree sexual offense and to put the defendant on notice of the charges. Nothing more is required. Defendant's contentions on this issue were answered in *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983); *State v. Edwards*, 305 N.C. 378, 289 S.E. 2d 360 (1982); and *State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978). In *Lowe*, the Court approved the abbreviated form of indictment. Then, in *Edwards*, the Court held that an indictment which charges first degree sexual offense in accordance with N.C.G.S. § 15-144.2 without specifying which sexual act was committed is sufficient to charge the crime of first degree sexual offense and to put the defendant on notice of the accusation. The Court in *Edwards* also pointed out that a defendant requiring additional information regarding the nature of the specific sexual act with which he stands charged may move for a bill of particulars to obtain information not contained in the indictment. Defendant availed himself of this procedure here. *Edwards* also settled defendant's double jeopardy claim. These holdings were reiterated in *Effler*, in which the short-form indictment in conjunction with the information provided in the bill of particulars was held to have met the requirements for an indictment as set forth in article I, section 23 of the North Carolina Constitution. In that case, Justice Meyer wrote:

> [T]he purpose of Article I, § 23 of the North Carolina Constitution, which states that every person charged with a crime has the right to be informed of the accusation, is threefold: to enable the defendant to have a fair and reasonable opportunity to prepare his defense; to avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense; and to enable the court to proceed to judgment according to the law in the case of a conviction.

309 N.C. at 747, 309 S.E. 2d at 206. The indictments in the present case were sufficiently particular to apprise defendant of the charges against him with sufficient certainty to satisfy these constitutional guarantees. As to defendant's claim that he was deprived of his right to a unanimous jury verdict, we note that the trial judge submitted a specific instruction with respect to unanimity of verdict as to each indictment and also assigned correlating specific alleged acts of sexual offense to each indictment. This argument has no merit.

In sum, we hold that the indictments charging defendant with the crimes of sexual offense in the first degree were proper in both form and substance. The sexual act alleged need not be specified, *State v. Hunter*, 299 N.C. 29, 41-42, 261 S.E. 2d 189, 197 (1980), and there can be more than one bill of indictment for several crimes which occurred on the same date. The indictments in the present case did not deprive defendant of any of his rights under either the Constitution of the United States or the North Carolina Constitution. This assignment of error is overruled.

[3] Next, defendant alleges that the trial court committed several errors during the jury selection process. First, defendant contends that the prosecutor improperly questioned the jurors. Specifically, he argues that the prosecutor should not have been permitted to ask the prospective jurors whether, if they were satisfied beyond a reasonable doubt of the defendant's guilt, the mandatory life sentences which would be imposed would prevent them from returning a verdict of guilty. He says that unlike capital cases in which it is the function of the jury to recommend a sentence, voir dire inquiries regarding punishment are improper in a case in which the determination as to punishment is for the trial judge. Defendant further argues that even if such questions

are permissible, the form of the inquiries asked by the prosecutor in the present case was improper because it was not consistent with N.C.G.S. § 15A-1212(8) which relates to a jury recommendation of the imposition of the death penalty and allows a challenge for cause against a prospective juror who, "[a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina."

Our reading of the official commentary to N.C.G.S. § 15A-1212(8) indicates that this section, a codification of the rule in *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776 (1968) (challenge for cause where a juror states his unequivocal opposition to capital punishment), was intended to apply not only to the death qualification of prospective jurors in capital cases but also generally to qualifying jurors in all cases. This is because, as the commentary makes clear, "[it was] determined that in other situations certain jurors might, regardless of the circumstances, refuse to vote for conviction." In the case sub judice, defendant faced mandatory life imprisonment on each of five charges. The reasoning in *Witherspoon* may logically be extended to a situation such as this, where it is entirely reasonable to believe that jurors might balk at convicting defendant on some or all charges because of the severity of the punishment. *See Buchanan v. Kentucky*, 483 U.S. ---, 97 L.Ed. 2d 336 (1987) ("death qualification" of jury not error where defendant being tried on noncapital murder charge jointly with codefendant being tried on capital murder charge). It is within the discretion of the trial judge, who has the opportunity to see and hear the juror on voir dire and to make findings based on the juror's credibility and demeanor, to ultimately determine whether the juror could be fair and impartial. *See Wainwright v. Witt*, 469 U.S. 412, 83 L.Ed. 2d 841 (1985); *O'Bryan v. Estelle*, 714 F. 2d 365 (5th Cir. 1983), *cert. denied*, 465 U.S. 1013, 79 L.Ed. 2d 245 (1984); *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1879).

[4] The primary goal of juror voir dire is to ensure that only those persons are selected to serve on the jury who could render a fair and impartial verdict. An examination of the transcript reveals that the prosecutor asked the prospective jurors the same question in essentially the same way: "If you are satisfied at the conclusion of the evidence in this case that the defendant is guilty

beyond a reasonable doubt, would the punishment imposed, a mandatory life sentence, prevent you from returning the verdict of guilty?" This question is acceptable both in form and in substance. Merely because the question fails to incorporate either the "matter of conscience" or "regardless of the facts and circumstances" language of section 15A-1212(8) does not make it improper. We find no error in the trial court's permitting these questions.

[5] Second, defendant maintains that a challenge for cause was improperly allowed against prospective juror Bill Seagraves. During the voir dire of Mr. Seagraves, the following transpired:

> THE COURT: Do you know of any reason why you couldn't be fair and impartial to both sides in this case during the course of this trial?
>
> MR. SEAGRAVES: Well, no, not really.
>
> . . . .
>
> THE COURT: Mr. Seagraves, did I detect a little hesitation on your part just now?
>
> MR. SEAGRAVES: Well, I'll tell you what. I was in the marines myself. I was in during the Korean War. I seen things that, you know—I've seen a lot—I'd just rather not talk about it. I was in during the Korean War.
>
> . . . .
>
> MR. CARROLL: Would that affect your ability to sit on this case in any way?
>
> MR. SEAGRAVES: I don't know. Because I don't believe in capital punishment.
>
> THE COURT: Let me just reiterate. There's no question of capital punishment in this case. . . .
>
> . . . .
>
> MR. CARROLL: You feel that that experience [in Korea] could somehow affect your ability to be fair and impartial?
>
> MR. SEAGRAVES: It could. Now, I ain't saying it would. Of course, if you start in and it gets, you know, day after day a

little more involved, you know, it could be—I ain't saying it would. I ain't saying that, you know.

Following this response, the state challenged the juror for cause and defense counsel objected. After a bench conference, the voir dire examination of Mr. Seagraves continued. After making further inquiries of the juror in an attempt to clarify his answers, court was recessed. When court reconvened the next morning, the trial judge, in the absence of the jurors, heard argument from counsel on the challenge for cause to Mr. Seagraves. The trial court thereafter made the following findings of fact:

(2) [T]hat the Court had the opportunity to see and observe the juror, or potential juror, during his examination by the district attorney and by the Court and observe the demeanor and manner of the juror, to assess and determine what weight and credibility should be given to the responses of the juror, potential juror, and, independently, to assess the potential juror's ability to perform his duties as a juror;

(3) That in the course of the questioning in the voir dire examination the potential juror volunteered in a manner unrelated to the question directed to him that his military service in the Korean conflict might in some way affect his ability to be fair and impartial as a juror in this matter;

(4) That upon extensive questioning, both by the Court and the district attorney, he was unable to indicate how it might affect his ability and, indeed, did not respond directly to those questions both by the Court and the district attorney;

(5) That the potential juror's responses to numerous questions put to him by the Court and the district attorney were frequently unresponsive and inappropriate . . . .

The court then concluded that Mr. Seagraves was "unable to perform his duties as a juror and render a fair and impartial verdict in these cases," pursuant to N.C.G.S. § 15A-1212(9), and allowed the state's challenge for cause.

Challenges for cause in jury selection are matters in the discretion of the court and are not reviewable on appeal except for abuse of discretion. *State v. Watson*, 281 N.C. 221, 188 S.E. 2d

289, *cert. denied*, 409 U.S. 1043, 34 L.Ed. 2d 493 (1972). A thorough reading of the voir dire examination of Mr. Seagraves confirms that his answers were indeed confused, confusing, unresponsive, and ambiguous. We find no abuse of discretion in the trial court's ruling.

[6] Third, defendant argues that while arguments were being heard on the state's challenge for cause, Mr. Seagraves and eleven other jurors were sent to the jury room for approximately one hour. Defendant moved for a mistrial, asserting a presumption of prejudice when a person not a member of the jury is allowed to be closeted with the jury for any period of time. The trial court heard arguments of counsel on this motion and then reconvened the jury panel. The court thereupon asked of each individual juror questions to the following effect:

> (a) [Juror's name], during the time that the 12 jurors were back in the jury room this morning, did anyone who was present there in any way attempt to or was there any discussion, whatsoever, in any way regarding these cases and charges against the defendant?
>
> (b) Was anything at all said or done, [juror's name], by anyone there that you feel would in any way affect your ability to proceed as a fair and impartial juror both for the state and the defendant in these cases?

Each juror responded in the negative to both questions. The court then denied the defendant's motion for mistrial and alternative motion to quash the jury, concluding that Mr. Seagraves' confinement with the eleven passed jurors "would in no way destroy the impartiality of the 11 members of the jury that had previously been passed, either individually or collectively" and "would not improperly influence [their] action," and that they "could and can render a fair and impartial verdict."

Upon a motion for mistrial, it is within the discretion of the trial court to determine whether substantial and irreparable prejudice to the defendant's case has occurred. *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982). Defendant argues that Mr. Seagraves' mere presence in the jury room created a presumption of prejudice, automatically requiring a new trial. In support of this proposition, defendant cites the case of *State v. Bindyke*, 288 N.C.

608, 220 S.E. 2d 521 (1975). However, that case is inapposite. In *Bindyke*, a mistrial was granted because an alternate juror was present in the jury room during jury deliberations. At the heart of the Court's holding in *Bindyke* was the appearance of impropriety during the *deliberations* of the jury. This was not the situation here, where the incident occurred prior to trial. In the present case, a potential juror who was ultimately disqualified from service was allowed to remain in the jury room with passed jurors prior to empanelment. The trial court conducted a thorough examination of the selected jurors in order to determine whether there had been any discussion of the case while they were in the jury room. There was no evidence that they discussed the case amongst themselves at any time during the period that Mr. Seagraves was in the jury room, and each juror affirmed that he or she would be able to fairly and impartially serve on the jury. Without more, it cannot be said that Mr. Seagraves' mere presence in the jury room tainted the jury in any way. The trial court did not abuse its discretion by these rulings.

By his next assignments of error, defendant challenges the propriety or the admissibility of various segments of the testimony of three expert witnesses: psychologist Michie Harriss Dew, pediatrician Martha Sharpless, and Chief Medical Examiner Dr. Page Hudson.

[7] Defendant first complains that Dr. Dew's testimony relating to the personality and IQ tests administered to the victim were inadmissible. In the course of the direct examination, when she was asked about the victim's performance on these tests, Dr. Dew said that the victim responded to the test questions in an "honest fashion . . . admitting that she was in a fair amount of emotional distress." Defendant contends that the testimony was not relevant to any fact in issue; that the state did not lay a proper foundation for its admission; and that it violated the rule prohibiting an expert witness from stating an opinion as to the guilt or innocence of the defendant or the credibility of a witness. N.C.R. Evid. 608 and 405; *State v. Aguallo*, 318 N.C. 590, 350 S.E. 2d 76 (1986); *State v. Heath*, 316 N.C. 337, 341 S.E. 2d 565 (1986); *State v. Keen*, 309 N.C. 158, 305 S.E. 2d 535 (1983). We disagree with defendant's contentions. Dr. Dew explained the purpose of the psychological tests and the way in which they are administered in addition to discussing the victim's performance on them. The

mental and emotional state of the victim before, during, and after the offenses as well as her intelligence, although not elements of the crime, are relevant factors to be considered by the jury in arriving at its verdicts. Any expert testimony serving to enlighten the jury as to these factors is admissible under Rule 702 of the North Carolina Rules of Evidence. We do not consider the testimony of this witness that the victim answered the test questions in an "honest fashion" to be an expert opinion as to her character or credibility. It was merely a statement of opinion by a trained professional based upon personal knowledge and professional expertise that the test results were reliable because the victim seemed to respond to the questions in an honest fashion: her patient did not attempt to give false responses on a psychological test, thereby skewing the test results and rendering the results unreliable. By this answer Dr. Dew was not saying that she believed the victim to be truthful, but rather that she gave truthful answers to the test questions. The psychologist's testimony went not to the credibility of the victim but to the reliability of the test itself. *Cf. State v. Kim*, 318 N.C. 614, 350 S.E. 2d 347 (1986); *State v. Aguallo*, 318 N.C. 590, 350 S.E. 2d 76; *State v. Heath*, 316 N.C. 337, 341 S.E. 2d 565.

[8] Defendant also argues that Dr. Dew's testimony that the victim was greatly afraid of her father and her testimony as to behavior of and statements by the victim which formed the basis of this opinion was incompetent. Defendant charges that the testimony was irrelevant to any fact in issue; that parts of it were not corroborative of any of the victim's prior testimony; that it served as an improper attempt to bolster the credibility of the victim and comment on defendant's guilt; and that it usurped the function of the jury to observe the victim's demeanor and to draw its own inferences therefrom. We are not persuaded by defendant's arguments, as we believe the child's fear of her father was relevant to the case and was a proper subject for expert testimony. Moreover, several witnesses testified without objection as to the victim's intense fear of her father. Defendant has therefore lost the benefit of the objection. *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983).

[9] Next, defendant says that it was improper to allow both Dr. Dew and the pediatrician, Dr. Sharpless, to testify concerning the

symptoms and characteristics of sexually abused children and to state their opinions that the symptoms exhibited by the victim were consistent with sexual or physical abuse. We find no error in the admission of this testimony, which was a proper topic for expert opinion. Where scientific, technical, or other specialized knowledge will assist the fact finder in determining a fact in issue or in understanding the evidence, an expert witness may testify in the form of an opinion, N.C.R. Evid. 702, and the expert may testify as to the facts or data forming the basis of her opinion, N.C.R. Evid. 703. The testimony of both of these witnesses, if believed, could help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victim. Furthermore, expert opinion on an ultimate issue is admissible. N.C.R. Evid. 704.

Other states have addressed this issue and held that testimony by qualified experts about characteristics typically observed in sexually abused children, such as secrecy, helplessness, delayed reporting, initial denial, depression, extreme fear, nightmares with assaultive content, poor relationships and school performance, is properly admissible under similar evidence statutes. *People v. Koon*, 724 P. 2d 1367 (Colo. App. 1986); *Allison v. State*, 179 Ga. App. 303, 346 S.E. 2d 380 (1986); *State v. Kim*, 64 Haw. 598, 645 P. 2d 1330 (1982); *State v. Myers*, 359 N.W. 2d 604 (Minn. 1984); *State v. Carlson*, 360 N.W. 2d 442 (Minn. App. 1985); *In the Matter of Michael G.*, 129 Misc. 2d 186, 492 N.Y.S. 2d 993 (1985); *State v. Middleton*, 294 Or. 427, 657 P. 2d 1215 (1983).

The fact that this evidence may support the credibility of the victim does not alone render it inadmissible. Most testimony, expert or otherwise, tends to support the credibility of some witness. Furthermore, although Dr. Sharpless was permitted to testify as to her diagnosis of physical and sexual abuse of the victim, this testimony was later struck and the jury instructed to disregard it. Thus, any error with respect to that testimony was harmless.

[10] Finally, defendant argues that the trial judge erred in permitting the state's rebuttal witness, Dr. Page Hudson, Chief Medical Examiner for the state of North Carolina, to testify that in his opinion the scratch marks on the victim's back were not consistent with self-mutilation, and in allowing Dr. Sharpless to offer her

opinion that the injuries were neither accidental nor self-inflicted. Basically, defendant contends that this testimony is not a proper matter for expert testimony under N.C.R. Evid. 702 and that these remarks effectively conveyed to the jury the witnesses' belief that the victim was not lying, in violation of N.C.R. Evid. 608(a). Again, we believe that this testimony was relevant and that it was helpful to the jury in determining the issues at trial. Ordinarily jurors are not skilled at determining whether wounds are self-inflicted. Dr. Hudson is an acknowledged expert in questions of this type. He has testified in hundreds of cases on the issue of causation of wounds. Such testimony, and that of Dr. Sharpless, would assist the jury in arriving at a just verdict and is admissible under N.C.R. Evid. 702. Trial judges are accorded wide discretion in determining the admissibility of expert testimony. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). These assignments of error are overruled.

[11] Defendant's next assignment of error relates to the trial court's refusal to allow into evidence certain defense exhibits. Specifically, the trial court sustained the state's objections to the admission of state's exhibit 60, a torn school picture of the victim which was found in the drawer of her bedside table, and state's exhibits 113, 114, and 115, which are three of the victim's dolls which were kept in her room in a box. The dolls had been intact, but sometime after 7 June 1985 when the victim left home, the dolls were found with the hair of two of the dolls cut off and the third doll decapitated. The defendant sought to introduce the picture and the dolls to show that the victim was preoccupied, if not obsessed, with child abuse. At trial defendant introduced into evidence articles relating to child abuse and incest which the victim's mother said she had found her reading. Defendant asserts that there was a reasonable inference that the victim mutilated the exhibits at issue while acting out her preoccupation with child abuse and also maintains that they were relevant to the issue of whether the victim's cuts and burns were self-inflicted. Defendant reasons that if the jury could reasonably infer that the victim mutilated the exhibits, it also could reasonably infer that she mutilated herself. There is no evidence that the victim damaged the exhibits. The record does not disclose when they were found, or what their condition had been at any specified time. It is entirely speculative as to when and by whom the ex-

hibits were damaged. More than a year passed between the time of the crimes and the trial. Without a proper foundation the exhibits were not admissible as evidence. *See State v. Campbell*, 311 N.C. 386, 317 S.E. 2d 391 (1984).

[12] Next defendant assigns error to the trial court's reference to "the victim," alleging that this amounted to an improper expression of opinion in contravention of N.C.G.S. § 15A-1222. Our review of the transcript reveals that prior to the voir dire of the jury, while the trial judge was listing for the prospective jurors the five offenses with which defendant was charged, he referred to the "alleged victim" during his listing of the first, second, fourth, and fifth offenses, but used "the victim" during his reading of the third offense. We first note that the defendant did not object to the wording of the court. We find this remark to have been a mere lapsus linguae and not prejudicial to defendant. *State v. Craig and State v. Anthony*, 308 N.C. 446, 302 S.E. 2d 740 (1983). In the same vein, we also hold that a subsequent reference by the district attorney to "the victim" did not prejudice the defendant. When the prosecutor used the phrase "the victim," defendant objected and the trial court ordered the jury to disregard the terminology. Thus, any supposed error was cured by the trial court's instruction. *State v. Pruitt*, 301 N.C. 683, 273 S.E. 2d 264 (1981).

[13] By his next assignment of error defendant challenges the admission into evidence of certain testimony of Gary Goodrich, a family worker at the Crossnore School where the victim was living at the time of trial. Goodrich testified that the victim informed him that her father had burned her with an iron and then insisted that she say that she had burned herself with a curling iron. Goodrich also testified that she told him that whenever the family went to the mental health center, her father "would tell the family what to say and that if she did not say what he told them to, he would kill her." Defendant's contention is that this testimony contained "new" evidence and thus was not corroborative and that the trial judge erred when defendant's motion to strike on that basis was denied. We disagree. The victim had previously testified as follows:

> Q. And prior to the time of June of 1985 when you were seeing Dr. Sharpless, did you tell her what your dad had done to you?

A. No.

Q. Why didn't you?

A. Because I was scared.

Q. What were you scared of?

A. My dad.

Q. And when you told Dr. Sharpless that you accidentally dropped a curling iron on your arm, why did you tell her that?

A. Because he told me to tell her that.

Q. Who told you to tell her that?

A. My dad.

Goodrich's testimony, then, was in fact corroborative of this prior testimony. Corroborative testimony may contain "new" or additional information when it tends to strengthen and add credibility to the testimony which it corroborates. *State v. Ramey*, 318 N.C. 457, 349 S.E. 2d 566 (1986). There was no error in the trial court's admitting this testimony into evidence.

[14] Defendant next brings forth several assignments of error which involve the instructions of the trial court. First, he alleges that the trial court should have submitted to the jury the lesser included offense of assault on a female and relies primarily on the case of *State v. Drumgold*, 297 N.C. 267, 254 S.E. 2d 531 (1979), for support. In *Drumgold*, it was necessary for the state to prove that the defendant overcame the will of the victim by the use of a deadly weapon in order to support a conviction for rape in the first degree. The evidence of the defendant and that of the victim conflicted on the issue of whether the defendant actually had a deadly weapon in his possession on the day of the alleged offense. The Court held that an instruction on rape in the second degree was warranted because the jury could believe that no deadly weapon was used and that the victim submitted to intercourse out of fear or duress. Defendant argues that *Drumgold* applies here because in both cases the defendant denied committing the offense, the testimony of the victim and of the defendant was contradictory, and there was testimony other than that of the defendant that the defendant did not commit the crime. *Drumgold* is

not applicable. We find no basis in the evidence for an instruction on the lesser included offense. It is the duty of the trial judge to instruct only upon matters arising upon the evidence at trial. *State v. Austin*, 320 N.C. 276, 357 S.E. 2d 641 (1987). We find that the evidence is clear and positive with respect to each element of the sexual offenses with which the defendant was charged, and there is no evidence pointing to the commission of a lesser included offense which would require an instruction from the trial court. *State v. Wright*, 304 N.C. 349, 283 S.E. 2d 502 (1981). Furthermore, as the Court stated in *State v. Lampkins*, 286 N.C. 497, 504, 212 S.E. 2d 106, 110 (1975):

> The mere possibility that the jury might believe part but not all of the testimony of the prosecuting witness is not sufficient to require the Court to submit to the jury the issue of the defendant's guilt or innocence of a lesser offense than that which the prosecuting witness testified was committed.

Thus there was no error by the trial court in this regard. *State v. Hardy*, 299 N.C. 445, 263 S.E. 2d 711 (1980).

[15] Second, defendant complains that the trial judge erred in failing to instruct, pursuant to defendant's written request, (1) that it is the function of the jury to assess the credibility of a witness, (2) that the fact that the court qualified a witness as an expert does not indicate whether the jury should believe or disbelieve that witness, and (3) that the court harbors no opinion as to whether any witness, lay or expert, is either credible or incredible. The trial court instructed the jurors that they "should consider the opinion of an expert witness, but you are not bound by it." As we understand defendant's argument, then, the trial court erred in failing to instruct the jury that it was permitted to completely disregard or reject the testimony of expert witnesses. The trial court did not err in its failure to give the instructions tendered by defendant. The trial court charged the jury in substance on the matters contained in defendant's requested instructions. *State v. Bailey*, 254 N.C. 380, 119 S.E. 2d 165 (1961). The trial judge emphasized to the jury that it was to be the sole judge of the credibility of each and every witness. He then went on to instruct:

> You've heard evidence from witnesses who have testified as expert witnesses. An expert witness is permitted to testi-

fy in the form of an opinion in a field where he or she purports to have specialized skill or knowledge.

As I've instructed you, you are the sole judges of the credibility of each witness and the weight to be given to the testimony of each witness. In making this determination as to the testimony of an expert witness, you should consider any of the other tests of weight and credibility about which I've instructed you, the evidence with respect to the witness's training, qualifications and experience or the lack thereof, the reasons, if any, given for the opinion, whether or not the opinion is supported by facts that you find from the evidence, whether or not the opinion is reasonable, and whether or not it is consistent with the other believable evidence in the case.

As I've already told you, members of the jury, you are the finders of facts in these cases. You should, therefore, consider the opinion of an expert witness, but you are not bound by it. In other words, you are not required to accept an expert witness's opinion to the exclusion of the facts and circumstances disclosed by other testimony.

These instructions on the credibility of lay and expert witnesses are sufficient. Also, the trial judge specifically told the jury that he had no opinion as to whether any part of the evidence should be believed or disbelieved. We overrule these assignments of error. Third, defendant argues that the court erred in assigning a specific alleged act of sexual offense to each charge from the bills of indictment. This argument is feckless.

Finally, defendant argues that the trial court erred in overruling defendant's motions for judgment of nonsuit and for dismissal of the charges and indictments against him, made at the conclusion of the defendant's evidence and at the close of all the evidence, and that the trial court further erred in signing and entering the judgment of imprisonment in each case. Suffice it to say that there was substantial evidence to support the allegations of the state. The issue was for the twelve and was resolved against the defendant.

No error.

RONALD D. GUPTON, EMPLOYEE, PLAINTIFF v. BUILDERS TRANSPORT, EMPLOYER, AND SELF-INSURED, CARRIER, DEFENDANT

No. 671PA86

(Filed 7 July 1987)

Master and Servant § 69— workers' compensation—eye injury—reduced wages—choice of scheduled benefits or partial disability

Where plaintiff truck driver received a compensable eye injury that resulted in a partial loss of his field of vision and prevented him from meeting I.C.C. standards for truck drivers, and plaintiff has been unable to find work at wages comparable to those he had been earning as a truck driver before the accident, plaintiff is entitled to either scheduled benefits under N.C.G.S. § 97-31 or permanent partial disability benefits under N.C.G.S. § 97-30 and may select the remedy offering the more generous benefits.

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

Justice MEYER dissenting.

Justice WEBB dissenting.

ON plaintiff's petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a decision by the Court of Appeals, 83 N.C. App. 1, 348 S.E. 2d 601 (1987), affirming the opinion and award of the Industrial Commission. Heard in the Supreme Court 12 May 1987.

Lore & McClearen, by R. James Lore, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Richard T. Rice and Nancy R. Hatch, for defendant-appellee.

WHICHARD, Justice.

Plaintiff was employed by defendant-employer as a long-distance truck driver. He was accidentally injured on 11 September 1984 when an elastic strap broke and struck him in the eye. The accident did not affect plaintiff's visual acuity, but it resulted in a blind spot covering seven percent of the visual field of that eye. This defect prevented plaintiff from meeting minimum standards set by the Interstate Commerce Commission, and, because there were no alternative positions available with his employer, he was discharged. Subsequently plaintiff has been unable to find

work at wages comparable to those he had been earning as a truck driver before the accident.

From the date of the accident until 11 January 1985, when plaintiff reached maximum medical improvement from the injury, he was paid all temporary total disability benefits to which he was entitled. Thereafter, the employer voluntarily sent a check for 8.4 weeks of compensation for the weeks from 12 January 1985 through 12 March 1985. On 14 February 1985 the employer notified plaintiff that it would pay no further compensation.

At the hearing on his claim plaintiff testified as to the wage differential between his current job and that he had had with defendant. Plaintiff introduced into evidence a memorandum from his employer's "Workers' Compensation Claims Manager" attaching copies of N.C.G.S. §§ 97-29 and -30. The memorandum pointed out that the maximum compensation rate for plaintiff's injury was $262.00 and that under section 97-30 he would be entitled to 66⅔ percent of the difference between his average weekly wage with Builders Transport and the average weekly wage on his new job. The memorandum concluded that the maximum benefit period is 300 weeks, less the number of weeks of temporary total disability and permanent partial disability already paid, and stressed that plaintiff *could* receive benefits up to 276.6 weeks. On the basis of the memorandum and a telephone conversation with the claims manager, plaintiff argued before the Deputy Commissioner that the doctrine of estoppel precluded his employer from refusing to pay benefits to which he was entitled under N.C.G.S. § 97-30.

The Deputy Commissioner concluded that plaintiff's injury was compensable as a scheduled injury under N.C.G.S. § 97-31(16), entitling him to an award of his average weekly wage for seven percent of 120 weeks, or 8.4 weeks. Plaintiff had already received this amount, and his claim for additional benefits was denied. In a comment to his findings the Deputy Commissioner specifically remarked that "it seems apparent in this case that compensation under [N.C.]G.S. 97-31(16) would operate to prohibit recovery under [N.C.]G.S. 97-30."

The full Commission adopted the opinion and award of the Deputy Commissioner. One Commissioner dissented, opining that the majority had erred in awarding the plaintiff compensation

under N.C.G.S. § 97-31; instead, it should have awarded compensation under N.C.G.S. § 97-30 "because the evidence clearly and indisputably proves his partial incapacity to earn wages as a result of his injury."

The Court of Appeals affirmed the Commission's award, declining to exclude from the definition of "loss of vision," for which N.C.G.S. § 97-31(19) provides compensation, partial loss of "field of vision." The opinion relied upon case law from that court in noting that "where all of the employee's injuries are compensable under G.S. 97-31, compensation is limited to an award under that section regardless of the employee's inability or diminished ability to earn wages." *Gupton v. Builders Transport*, 83 N.C. App. 1, 4, 348 S.E. 2d 601, 602 (1986).

In holding that plaintiff was limited to the benefits to which he was entitled under N.C.G.S. § 97-31, the Court of Appeals overlooked case law from this Court indicating that an award under N.C.G.S. § 97-31 does not necessarily foreclose the award of additional benefits to which a claimant might be entitled.

In *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857 (1965), the plaintiff was initially awarded benefits for disfigurement under N.C.G.S. § 97-31(21). At the time of his hearing the plaintiff, who had reached maximum medical improvement, had not yet attempted to return to work since the accident, so he presented no evidence of total or partial incapacity to work under N.C.G.S. §§ 97-29 and -30. His claim for benefits under those provisions was consequently denied. A year later, however, the plaintiff moved to reopen his case on the basis of changed condition, offering into evidence the fact that he was earning $30 less per week than he had earned before the accident. The Commission denied the motion, essentially because the evidence had been erroneously termed "changed condition" rather than "newly discovered evidence." In remanding to the Commission for reconsideration of the evidence that the plaintiff had suffered a diminution in earning capacity, this Court noted that "[h]ad plaintiff presented this proof at the [first] hearing . . . , the Commission would doubtlessly have found him entitled to an award under [N.C.]G.S. Sec. 97-30. The award which plaintiff received [as a result of that hearing] was for external facial or head disfigurement under [N.C.]G.S. Sec. 97-31(21)." *Id.* at 575, 139 S.E. 2d at 861.

The critical feature of *Hall*, for purposes of this analysis, is that despite the fact that the plaintiff had already received an award under N.C.G.S. § 97-31, this Court recognized that he might also be entitled to benefits under N.C.G.S. § 97-30.

In *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E. 2d 336 (1986), this Court reached an analogous conclusion regarding N.C.G.S. § 97-29, which governs compensation for total and permanent disability. The plaintiff in *Whitley* suffered injuries to his arm and hand. Because the injuries were sufficiently severe to preclude his returning to his old job and because he was illiterate and sixty years old, his "job potential [was] zero." *Id.* at 91, 348 S.E. 2d at 337. Although the plaintiff's injuries were included in the schedule set out in N.C.G.S. § 97-31, this Court concluded that

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

Id. at 96, 348 S.E. 2d at 340.

This Court reasoned that the 1943 amendment adding that section 31 "shall be in lieu of all other compensation" was adopted in response to the portion of the opinion in *Stanley v. Hyman-Michaels Co.*, 222 N.C. 257, 22 S.E. 2d 570 (1942), holding that nothing in the Workers' Compensation Act prohibited recovery for both the loss of a member and the disfigurement caused thereby. The opinion in *Stanley* provoked the amendment by noting that "[i]f the legislature intended to restrict compensation for disfigurement to those parts, members or organs of the body for which no compensation is provided in the schedules, we think it failed to express such intention in the statute." *Id.* at 262, 22 S.E. 2d at 574. The Court concluded that an "in lieu of" clause was deliberately absent from section 31. *Id.* at 263, 22 S.E. 2d at 574. The legislature responded by adding the restricting clause, but the Court in *Whitley* concluded that this amendment had no effect upon the possibility that an injury could be compensated by the provisions of more than one section of the Workers' Compensation Act. *Whitley*, 318 N.C. at 96-97, 348 S.E. 2d at 340. When a

single injury is covered by more than one section of the Act, the Commission may select a remedy. *See, e.g., Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 578, 336 S.E. 2d 47, 54 (1985); *Fleming v. K-Mart Corp.*, 312 N.C. 538, 547, 324 S.E. 2d 214, 219 (1985). So may the plaintiff when his injury is included in the schedule and he is also entitled to compensation under N.C.G.S. § 97-29. *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. at 96, 348 S.E. 2d at 340.

The Court's analysis of N.C.G.S. § 97-31 in *Whitley* honors the "fundamental rule that the Work[ers'] Compensation Act 'should be liberally construed to the end that the benefits thereof derived should not be denied upon [a] technical, narrow and strict interpretation.' " *Hall v. Chevrolet Co.*, 263 N.C. at 576, 139 S.E. 2d at 862, quoting *Johnson v. Hosiery Co.*, 199 N.C. 38, 40, 153 S.E. 2d 591, 593 (1930). Acknowledgment of this rule, of the precedent of *Hall*, and of this Court's interpretation of the "in lieu of all other compensation" language of N.C.G.S. § 97-31 in *Whitley*, compels our conclusion that plaintiff here is entitled to either scheduled benefits under N.C.G.S. § 97-31 or permanent partial disability benefits under N.C.G.S. § 97-30.

Moreover, we note the symmetry of N.C.G.S. § 97-29 and N.C.G.S. § 97-30, which both provide compensation for loss of wages due to a "disability." "Disability" is defined in N.C.G.S. § 97-2(9) as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." When an employee suffers a "diminution of the power or capacity to earn," *Branham v. Panel Co.*, 223 N.C. 233, 237, 25 S.E. 2d 865, 868 (1943), he or she is entitled to benefits under N.C.G.S. § 97-30. When the power or capacity to earn is totally obliterated, he or she is entitled to benefits under N.C.G.S. § 97-29. *See, e.g., Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E. 2d 336; *Fleming v. K-Mart Corp.*, 312 N.C. 538, 324 S.E. 2d 214. This symmetry logically leads us to hold that a claimant who is entitled to benefits under either N.C.G.S. § 97-31 or N.C.G.S. § 97-30 may select the more munificent remedy. "The pervasive canon of statutory construction [is] that where two remedies are created side by side in a statute the claimant should have the benefit of the more favorable." 2 A. Larson, *The Law of Workmen's Compensation* Sec. 58.25 (1987). Accordingly, "[w]here an employee can show that the physical injury

from which he is suffering causes appreciable employment disability, the employee is allowed to recover under which provisions affords [*sic*] him greater compensation." *Patin v. Continental Cas. Co.*, 424 So. 2d 1161, 1165 (La. App. 1982). *See also Dayal v. Provident Life & Accid. Ins. Co.*, 71 N.C. App. 131, 132, 321 S.E. 2d 452, 453 (1984) ("[T]he provisions of the Act are to be construed liberally and *in favor of* the employee." (Emphasis added.)).

Because stacking of benefits covering the same injury for the same time period is prohibited, *Whitley v. Columbia Mfg. Co.*, 318 N.C. at 95-96, 348 S.E. 2d at 340, *American v. Efird Mills*, 51 N.C. App. 480, 490, 277 S.E. 2d 83, 89-90, *cert. denied*, 304 N.C. 197, 285 S.E. 2d 101 (1981), *modified on other grounds and aff'd*, 305 N.C. 507, 290 S.E. 2d 634 (1982), and because the prevention of double recovery, not exclusivity of remedy, is patently the intent of the "in lieu of all other compensation" clause in N.C.G.S. § 97-31, a plaintiff entitled to select a remedy under either N.C.G.S. § 97-31 or N.C.G.S. § 97-30 may receive benefits under the provisions offering the more generous benefits, *less* the amount he or she has already received.

In order to secure an award under N.C.G.S. § 97-30, the plaintiff has the burden of showing "not only permanent partial disability, but also its degree." *Hall v. Chevrolet Co.*, 263 N.C. at 575, 139 S.E. 2d at 861. "The compensation is to be computed upon the basis of the difference in the average weekly earnings before the injury and the average weekly wages *he is able to earn* thereafter." *Branham v. Panel Co.*, 223 N.C. at 236, 25 S.E. 2d at 867. Although the Commission entered no findings regarding plaintiff's current earning capacity as a ceramic tile layer, testimony and exhibits in the record of proceedings before the Deputy Commissioner are sufficient evidence upon which the Commission could have based a finding of partial incapacity and an award of benefits under N.C.G.S. § 97-30.

A proceeding determined under a misapprehension of the applicable principles of law must be remanded to the Commission for consideration and adjudication of all the employee's compensable injuries and disabilities. *Hall v. Chevrolet Co.*, 263 N.C. at 578, 139 S.E. 2d at 863. Such "principles of law" include prior statutory construction by this Court, for "[t]he interpretation of a statute by the highest courts of a state by which the statute was enacted

is generally regarded as an integral part of the statute . . . ." 73 Am. Jur. 2d *Statutes* 143 (1974). The majority in the Commission was apparently unaware that a plaintiff might be entitled to benefits under more than one section of the Workers' Compensation Act, an entitlement recognized by this Court in both *Hall* and *Whitley*. Accordingly, we reverse the decision of the Court of Appeals and remand to that court for further remand to the Industrial Commission for consideration of plaintiff's entitlement to benefits under N.C.G.S. § 97-30.

Reversed and remanded.

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

Justice MEYER dissenting.

For the reasons stated in my dissenting opinions in *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E. 2d 336 (1986), and *Fleming v. K-Mart Corp.*, 312 N.C. 538, 324 S.E. 2d 214 (1985), I dissent. I also wish to add the following:

THE QUESTION OF WHETHER TO EXTEND THE RULING IN *WHITLEY* TO N.C.G.S. § 97-30 IS NOT PROPERLY BEFORE THIS COURT.

Building on the erroneous decision in *Whitley*, the majority, once again by judicial legislation, extends the ruling in *Whitley* as to N.C.G.S. § 97-31 to N.C.G.S. § 97-30, a result never intended by our legislature. It has chosen to do so in a case in which the question is not properly presented. At the hearing before Deputy Commissioner Burgwyn, plaintiff based his claim for benefits under N.C.G.S. § 97-30 on two theories. First, plaintiff contended that his loss of visual field is not compensable as a scheduled injury since he suffered no loss of "visual acuity." Second, plaintiff argued that the defendant "promised" payments under N.C.G.S. § 97-30 and that the Industrial Commission should enforce this promise. *Plaintiff did not argue that his alleged loss of wage-earning capacity, in and of itself, entitled him to benefits under N.C.G.S. § 97-30.*

Deputy Commissioner Burgwyn found that plaintiff had sustained a seven percent permanent partial disability of his right eye and concluded that he is entitled to an award under N.C.G.S. § 97-31(16). On appeal, the full Commission affirmed.

Plaintiff appealed to the Court of Appeals and again based his argument for compensation under N.C.G.S. § 97-30 on facts other than his alleged loss of earning capacity. In an opinion filed 7 October 1986, the Court of Appeals affirmed the opinion and award of the Industrial Commission. Plaintiff filed a petition for rehearing on 24 October 1986, based on this Court's decision in *Whitley*. The Court of Appeals denied plaintiff's petition on 28 October 1986. *Plaintiff then filed a petition for discretionary review with this Court, arguing, for the first time, that he is entitled to compensation under N.C.G.S. § 97-30 solely on the basis of lost wages.* Prior to the filing of this petition, the plaintiff's claim for benefits under N.C.G.S. § 97-30 hinged, not on lost wages, but on allegations that his eye injury was not a scheduled injury. *This Court granted plaintiff's petition, despite the fact that the question upon which plaintiff based his petition was not properly presented for review to the Court of Appeals.* The question upon which plaintiff now bases his claim was not properly presented for review to the Court of Appeals and cannot properly be brought before this Court under Rule 16 of the North Carolina Rules of Appellate Procedure. *See, e.g., State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 313 N.C. 614, 649, 332 S.E. 2d 397, 418-19 (1985) ("[T]his Court's scope of review is limited to questions properly presented to the Court of Appeals[;] . . . a party may not present for the first time in its brief to this Court, a question raising issues of law not set out in the assignments of error contained in the record on appeal."); *Sales Co. v. Board of Transportation*, 292 N.C. 437, 443, 233 S.E. 2d 569, 573 (1977) ("The potential scope of our review is limited by the questions properly presented for first review in the Court of appeals. . . . 'The attempt to smuggle in new questions is not approved.' *State v. Colson*, 274 N.C. 295, 309, 163 S.E. 2d 376, 386 (1968).").

THE RULING IN *WHITLEY* SHOULD NOT GOVERN THIS CASE.

In his brief before this Court, plaintiff essentially argues that the Court of Appeals erred in failing to extend this Court's decision in *Whitley* to the facts of his case. This argument is not persuasive. First, *Whitley* applies only to cases involving permanent total disability. In this action, the claimant is not permanently totally disabled. Second, this Court's decision in *Whitley* is a departure from the law in effect at the time of Mr. Gupton's injury. Accordingly, it should not apply to his claim for benefits.

The Court of Appeals did not err in failing to apply *Whitley* to the facts of this case. The holding in *Whitley* is limited to claims of permanent total disability and is clearly distinguishable from the present case, in which it is undisputed that the claimant is presently employed. Moreover, this Court should not extend the decision in *Whitley* to claims of permanent partial disability. While the majority cites *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857 (1965), as authority for its position, it is quite clear that the intent is to extend *Whitley.*

In *Hall* the claimant was not, at the time of his initial hearing, in a position to pray for permanent partial disability. Because he had not attempted to go back to work, he was in no position to show the impairment of his wage earning capacity. *Hall* was based not on the theory of election, rather on the theory of newly discovered evidence, i.e., that he discovered his reduced earning capacity only upon his return to work. This Court so recognized in its opinion in *Hall.*

In *Whitley*, this Court judicially expanded the statutory liability of employers based, in part, on the legislature's action in amending N.C.G.S. § 97-29 to allow for recovery of lifetime benefits:

> As originally enacted, section 29 limited compensation for total permanent disability to a maximum of 400 weeks. The legislature removed the time limitation in 1973. . . . The legislature's expansion of section 29 in 1973 reflects an obvious intent to address the plight of a worker who suffers an injury permanently abrogating his earning ability.

318 N.C. at 98, 348 S.E. 2d at 341 (citations omitted). This Court relied on the legislative expansion of benefits under N.C.G.S. § 97-29 in reaching its decision in *Whitley.* Given that the legislature did not amend N.C.G.S. § 97-30 in a similar manner (N.C.G.S. § 97-30 still states: "and in no case shall the period covered by such compensation be greater than 300 weeks from the date of injury"), this Court should not extend the expanded liability imposed by *Whitley* to cases of permanent partial disability.

EVEN IF *WHITLEY* IS APPOSITE, IT SHOULD NOT BE APPLIED TO THE CLAIM NOW BEFORE THIS COURT.

Even if this Court does extend the holding in *Whitley* to workers who are not permanently totally disabled, this expanded statutory liability should not be applied to Mr. Gupton's claim for benefits. A claimant's right to compensation under the North Carolina Workers' Compensation Act in cases of accidental injury is governed by the law in effect at the time of the injury. *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979). The law in effect at the time of the injury includes any *prior* statutory construction by this Court. Interpretation of a statute, such as N.C.G.S. § 97-31, by the highest court of the state is generally regarded as an integral part of the statute. 73 Am. Jur. 2d *Statutes* § 143 (1974). *See also Stynchombe v. Walden*, 226 Ga. 63, 172 S.E. 2d 402 (1970) (authoritative interpretation of a statute by the highest state court puts words into the statute as definitely as if it had been so amended by the legislature); *Nobin v. Randolph Corp.*, 180 Va. 345, 23 S.E. 2d 209 (1942) (construction part of a statute by the court of last resort becomes a component part of the statute).

The decision in *Whitley* was not the law "in effect at the time of the injury" and should not be applied to this action. While, as a general rule, a decision of a court of supreme jurisdiction that overrules a former decision is retrospective in its operation (*see, e.g., Cox v. Haworth*, 304 N.C. 571, 284 S.E. 2d 322 (1981)), this rule does not apply to decisions such as *Whitley* in which there are compelling reasons against retroactive application. *See, e.g., Rabon v. Hospital*, 269 N.C. 1, 152 S.E. 2d 485 (1967) (decision abolishing charitable immunity applied prospectively because of justified reliance on prior case law); *Wilkinson v. Wallace*, 192 N.C. 156, 134 S.E. 401 (1926) (when contracts have been made and rights acquired in reliance on a prior decision, the contracts will not be invalidated nor vested rights impaired by a subsequent decision).

There are several compelling reasons to limit the application of *Whitley* solely to injuries occurring after 29 August 1986, the date the opinion was filed. First, if the North Carolina legislature had amended the act in a similar fashion, the amendments would not have applied to injuries occurring before the effective date of

the amendments. *See, e.g., Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692. This Court's "judicial amendment" should not be applied more broadly than would a legislative amendment. Second, there exists a need for stability in law, particularly in the construction of statutes. *Powers v. Powers*, 239 S.C. 423, 427, 123 S.E. 2d 646, 647 (1962) (it is manifestly in the public interest that the law remain permanently settled, especially in the construction of statutes, "for if any change in the statutory law is desired, the General Assembly may readily accomplish it"). Prior to this Court's decision in *Whitley*, numerous court decisions emphasized that when all of a claimant's injuries are included in the schedule found in N.C.G.S. § 97-31, recovery is exclusively under that section. Employers, insurers, and self-insurers, as well as their attorneys, have relied on this statutory construction in setting premiums, in establishing reserve funds for claims, and in advising clients regarding liability and settlement options. This reliance was justified based on holdings of this Court concerning the application of the doctrine of *stare decisis* to decisions of statutory construction. *See, e.g., Lowery v. Haithcock*, 239 N.C. 67, 79 S.E. 2d 204 (1953) (even though former decisions of the Court may have liberalized the mechanic's lien statute beyond its original intent, the Supreme Court must apply the statute as previously construed by the Supreme Court). *See also Rabon v. Hospital*, 269 N.C. 1, 20, 152 S.E. 2d 485, 498 ("This Court has never overruled its decisions lightly. No Court has been more faithful to *stare decisis*."). Given the reliance placed on prior decisions of this Court, employers, insurers, and self-insurers should be provided with an opportunity to protect themselves against the expanded liability imposed by *Whitley*. Accordingly, this Court should hold that *Whitley* will not be applied to injuries occurring before the opinion was filed. *See, e.g., Rabon v. Hospital*, 269 N.C. 1, 21, 152 S.E. 2d 485, 499 ("Recognizing, however, that hospitals have relied upon the old rule of immunity and that they may not have adequately protected themselves with liability insurance . . . [t]he rule of liability herein announced applies only to this case and to those cases arising after January 20, 1967, the filing date of this opinion.").

This dissent should not be interpreted as reflecting a belief on my part that a claimant should not be entitled to select a remedy as between the schedule in N.C.G.S. § 97-31 and the

coverage provided in N.C.G.S. § 97-30. I believe that a claimant should have that election. That decision, however, rests with the legislature and not with this Court. As I read the law as enacted by our legislature, this claimant's injuries are all included in the schedule set out in N.C.G.S. § 97-31. Consequently, under the law in effect at the time of the injury, his entitlement to compensation is exclusively under that section. The Industrial Commission has no authority to award benefits which are not otherwise recoverable under the Act, and the Court of Appeals could not uphold such an award, if made.

As stated by the Court of Appeals in *Little v. Penn Ventilator Co.*, 75 N.C. App. 92, 330 S.E. 2d 276 (1985), *aff'd in part*, 317 N.C. 206, 345 S.E. 2d 204 (1986):

> We agree that this result is harsh on plaintiff; he has undoubtedly suffered a serious injury which, while not presently disabling, could manifest itself later in the form of partial or total blindness. . . . However, we note again that plaintiff's right to recovery of any medical expenses is entirely statutory and that any change in the law is a legislative responsibility. While we are empowered to declare and enforce plaintiff's rights under the law, we may not enlarge them, no matter how compelling the facts may be.

Little v. Penn Ventilator Co., 75 N.C. App. at 98, 330 S.E. 2d at 280. It is unfortunate that the plaintiff sustained an eye injury which prevents him from continuing his job as a truck driver. However, the employer is only liable for those benefits recoverable under the Workers' Compensation Act at the time of the injury, and the benefits cannot be enlarged by this Court no matter how compelling the facts may be. The Court of Appeals decision properly affirmed the opinion and award of the Industrial Commission. Accordingly, I vote to affirm the Court of Appeals.

Justice WEBB dissenting.

I dissent. It is hard to imagine a case in which the plain words of a statute are more easily interpreted than in this case. N.C.G.S. § 97-31 says in part:

> In cases included by the following schedule the compensation in each shall be paid for disability during the healing

period and in addition the disability shall be deemed to continue for the period specified, and shall be in lieu of all other compensation, including disfigurement. . . .

. . . .

(16) For the loss of an eye, sixty six and two-thirds percent (66-2/3%) of the average weekly wages during 120 weeks.

. . . .

(19) . . . The compensation . . . for partial loss of vision of an eye . . . shall be such proportion of the periods of payment above provided for total loss as such partial loss bears to total loss. . . .

In reading a statute if the plain meaning is clear and unambiguous, we should not look to any other source for interpretation. 73 Am. Jur. 2d *Statutes* § 194 (1974). I do not see how the meaning of the above statute could be any plainer. It says compensation for loss of vision shall be under N.C.G.S. § 97-31 and this "shall be in lieu of all other compensation." It is difficult to expound on these words in an effort to make them more clear. They speak for themselves. If any definition of "in lieu of" is needed, Webster's 3d New International Dictionary defines it as "in place of," or "instead of." I can only conclude that the compensation provided by N.C.G.S. § 97-31 was intended by the General Assembly to be the exclusive compensation for the injuries covered by the section. For us to contort the definition of these words so that they do not have their plain meaning is to usurp the function of the General Assembly.

I believe the majority has also violated another canon of construction. If a legislature acquiesces in the construction of a statute by a court we should be able to assume that the court has properly interpreted the intention of the legislature because the legislature could otherwise overrule the court's interpretation. 73 Am. Jur. 2d *Statutes* § 169 (1974). In *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978), this Court held that recovery under N.C.G.S. § 97-31 precluded recovery under any other section. The General Assembly has not amended N.C.G.S. § 97-31 since that time. This should settle the issue.

The majority has relied on *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E. 2d 336 (1986) and *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857 (1965). I agree that *Whitley* is authority for the majority's position. I would not be wrong in this case, however, because we were wrong in *Whitley*. *Whitley* is as good an example of legislation by the judiciary as is this case. I would overrule *Whitley*. *Hall* is not authority for the majority's position. In that case there was evidence of injury in addition to the injury covered by N.C.G.S. § 97-31. This has always been compensable under the Act. *See Perry*, 296 N.C. 88, 249 S.E. 2d 397.

I vote to affirm the Court of Appeals.

STATE OF NORTH CAROLINA v. SHEILA MARIE BURNS PERDUE

No. 447A86

(Filed 7 July 1987)

1. Homicide § 21.5— murder of child by mother—evidence of corpus delicti—sufficient

In a prosecution of defendant for the murder of her one-month-old child, there was sufficient evidence that the child's death resulted from the criminal agency of another where the emergency room physician who examined the infant at the hospital testified that she had sustained profound head injury indicating fracture of the skull bones; that it is hard to fracture a child's bones, including the skull; that "simple injuries such as falling from a stand or being dropped accidentally is very uncommon to bruises and fractures"; and the medical examiner testified that it would take a rather considerable amount of torsion or force to cause the fractures he observed during the autopsy of the victim. *State v. Byrd*, 309 N.C. 132, is distinguishable because here there was observable external trauma to the victim, there was evidence that defendant had exclusive care of the child on the day the infant died, and there was evidence that the fractures were likely sustained very close to the time of death and that the victim probably lived for only a short time after receiving the head injury.

2. Homicide § 21.5— murder of child by mother—evidence sufficient

The State presented sufficient evidence of premeditation and deliberation, as well as malice, in the prosecution of a mother for the murder of her child where the victim, a helpless thirty-day-old child, had no opportunity to legally provoke the defendant; the defendant displayed erratic conduct after the death of her daughter; several witnesses testified that defendant had an odor of alcohol on her breath; an emergency room doctor and paramedics testified that

the victim had a bruised and battered look, including swelling over the back of the skull; and evidence of blood spattered on defendant's shirt and in the child's bedroom also supported the conclusion that the victim met a violent and brutal death.

3. **Criminal Law § 75.15— confession—obtained while defendant tranquilized—admissible**

The trial court did not err in the prosecution of defendant for the murder of her infant daughter by admitting an incriminating statement made by defendant after an injection of Haldol, a tranquilizer, where defendant was coherent and was not dream-like or trance-like, did not become drowsy until after the statement had been signed, and presented no medical evidence on the motion to suppress.

4. **Criminal Law § 102.9— murder of infant—prosecutor's argument concerning good parent—no error**

The trial court did not err in a prosecution for the murder of defendant's infant daughter by allowing the prosecutor to comment in his closing argument as to what a good parent would do when confronted by an officer investigating her infant's death. The argument was in response to defense counsel's statement that defendant was a good mother and was supported by evidence that defendant kicked at paramedics when told that she needed to go to the hospital and used profanity and voiced threats to officers and ambulance drivers at her home.

5. **Criminal Law § 102.7— murder—prosecutor's argument on credibility of serologist—no error**

The trial court did not err in a murder prosecution by admitting the prosecutor's argument regarding the credibility of the serologist where defense counsel had attacked the credibility of the serologist.

6. **Criminal Law § 102.6— murder—prosecutor's closing argument—explanation of why witness not called—no error**

It was not improper for the prosecutor to state during closing arguments in a murder prosecution that he wouldn't have called defendant's husband for the world where the statement was made in response to the defense counsel's remark that it was significant that defendant's husband had not been called.

7. **Homicide § 14.3— murder of infant—instruction on malice—no error**

The trial court did not err by instructing the jury that malice could be inferred from an attack by hand without other weapons when the attack was made by a mature man or woman against an infant where there was firm evidence that the victim died from a "blunt impact" received shortly before death and that her death was not likely the result of accident or self-inflicted wounds; defendant had nearly exclusive care of the child on the day the death occurred; and the fatal blows received by the victim likely occurred a very short time, perhaps a minute, before death.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment entered on 10 April 1986, by *Ross, J.*, imposing a life

sentence upon defendant's conviction of first-degree murder, returned at the 7 April 1986 Criminal Session of Superior Court, DAVIDSON County. Heard in the Supreme Court 11 May 1987.

On 8 July 1985, defendant was indicted for the first-degree murder of her infant daughter. On 12 December 1985, Judge Joseph R. John ordered that there was insufficient evidence of aggravating factors to warrant submission of the death penalty. The case was tried before a jury, and defendant was found guilty of first-degree murder.

Lacy H. Thornburg, Attorney General, by William P. Hart, Assistant Attorney General, for the State.

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

MEYER, Justice.

In this appeal from her conviction of first-degree murder of her infant daughter, defendant argues: (1) that the evidence was insufficient to support a conviction of first-degree murder, (2) that the court erred in admitting her inculpatory statement into evidence, (3) that the court erred in overruling defendant's objections to the district attorney's closing argument, and (4) that the court erroneously instructed the jury on the element of malice. We find no error.

In March 1985, defendant, Sheila Perdue, lived in a mobile home with her husband, Homer Perdue, and their thirty-day-old infant daughter, Tammy Maranda Perdue. According to the testimony of Homer Perdue, on 11 March 1985 at approximately 2:10 p.m., he was working at Lott Steel and received a call from the defendant, who reported that there was something wrong with their daughter. He drove to their mobile home and there he saw the defendant holding Tammy, who appeared white and lifeless. Perdue rushed to his father's mobile home, just next to his, and called an ambulance. He then went back to his mobile home and tried to perform cardiopulmonary resuscitation on the child.

In response to Perdue's call, paramedics and Davidson County sheriff's deputies came to the Perdue mobile home. Harvey Blackwelder, a paramedic, testified that when he arrived at the mobile home, he was met by Jerry Sink of the rescue squad. Sink,

who had Tammy in his arms, laid her on the ambulance cot. Blackwelder testified that when he observed the infant, she had no vital signs. Blackwelder also testified that the infant had blood on her face, lacerations on the bridge of her nose, and abrasions around her left eye. He testified that there was bruising on the chest, abdomen, and face of the infant.

Both defendant and Tammy were transported by ambulance to Lexington Memorial Hospital. While there, the defendant was observed by law enforcement personnel, as well as the emergency room physician, who testified that her behavior was erratic; she acted at times calm and at other times hysterical. Pursuant to a nontestimonial identification order, defendant's blood was drawn.[1] Before being taken to the Sheriff's Department for questioning, she was injected with five milligrams of Haldol, a tranquilizer.

While at the Sheriff's Department, defendant waived her *Miranda* rights and gave the following statement, which was offered into evidence by the State:

> About 6:30 a.m. my father-in-law (BOBBY EUGENE PERDUE) came to our trailer to awaken my husband so that he could go to work. I didn't get up at that time. Sometime later, my father-in-law came back to ask me if I was going to come over to his trailer, which is behind ours, and watch television. That was sometime around nine a[.]m. I'm not sure of the exact time because our clock broke the night before. Anyway, I went over to my father-in-law's and took Tammy with me. She was sleeping. Before I left I fed her two ounces of milk (my trailer). Tammy slept while I was at my father-in-law's. I watched TV with my father-in-law. I don't know what time I left there but we were watching an old movie and it wasn't over when I did leave. The baby was still asleep. When I got back to my trailer Tammy was awake so I fed her 1½ ounces of milk. After she took the milk she burped and blood came out of her mouth all over me. I laid her down and went back to my father-in-law's and used his phone to call my husband (HOMER RAY PERDUE) at his job at Lott Steel. I didn't have a phone and that's why I had to leave my

1. The lab report indicated that defendant's blood had an ethyl alcohol content of .17 percent. Neither the report itself nor the results thereof were offered as evidence.

baby and go to the other trailer to call my husband. I went back to my trailer and about three seconds after I got there my father-in-law came in. The baby was okay but still bleeding from the mouth. The baby has been constipated and I've taken it to the doctor for that. The only marks I noticed were where it looked like she grabbed for her mouth and scratched her face. She slept well last night; she awakened about 4 a.m. and I got up. I changed her diaper, fed her, and then she went right back to sleep. I didn't hurt Tammy and I don't know who did.

The State's medical evidence was based on the testimony of Dr. Mark Bordou, the emergency room physician who examined the infant when she arrived at the hospital, and Dr. Page Hudson, the State's Chief Medical Examiner.

Dr. Bordou testified that he examined Tammy on 11 March 1985, in his capacity as emergency room physician and medical examiner. He testified that the child had a bruised and battered appearance and that there was general swelling about her face. He further testified that the most profound injuries were on the infant's head and that there was a "tremendous amount of swelling over the back of the skull and discoloration which indicated blood about the surface of the scalp."

Dr. Page Hudson, a forensic pathologist and the State's Chief Medical Examiner, performed an autopsy on Tammy Maranda Perdue on 12 March 1985. He observed extensive bruising to the chest, hand, and head. He observed a fresh fracture on the left arm, a fresh fracture of the left leg, and extensive fracturing of the skull. He opined that it would take a rather considerable amount of torsion or force to cause the leg and arm fractures and that these fractures occurred rather close to the time of death. He also testified that the skull fracture was likely the result of "considerable blunt force injury." He offered his opinion that Tammy Perdue died as a result of a blunt force injury to the head and could have lived for only a short time after sustaining such an injury.

Paramedics and Davidson County sheriff's deputies testified that in defendant's mobile home they observed bloodstains on a baby carrier, baby carrier cover, disposable diaper box cover, and blanket in the crib. In the bathroom, they observed reddish stains

on the shower stall, under the sink, and on the carpet. They also observed reddish stains on a mattress on a bed in the end bedroom and on a pair of white shorts found on the floor in the kitchen. Paramedics who observed defendant outside her mobile home noticed that she wore a shirt and pants that appeared to have been bloodstained.

Jona Medlin, a chemist with the State Bureau of Investigation, testified that she examined the samples of blood of defendant and Tammy Perdue. After analysis of the baby carrier, defendant's shirt and pants, and the white shorts found on the floor of the kitchen, she offered her opinion that human blood was present on the items analyzed and that the blood was consistent with the blood of the infant.

Defendant offered the testimony of several witnesses who said they had observed her with her baby daughter prior to the death and that she had been a good parent. They testified that she had strict rules about not holding the baby too long or smoking around the baby.

I.

[1] By her first argument, defendant contends that the trial court erred in entering judgment because the evidence was insufficient to support a conviction of first-degree murder. Specifically, defendant argues that the State proved neither the *corpus delicti* of the crime nor the requisite criminal intent necessary to support a conviction of first-degree murder. We disagree.

The *corpus delicti* of murder includes proof of death and proof that the death resulted from the criminal agency of another. *State v. Johnson*, 193 N.C. 701, 138 S.E. 19 (1927). Evidence of "criminal agency of another," as that phrase has been used in defining *corpus delicti* in homicide cases, means evidence which tends to show that the deceased died not as a result of natural or accidental causes, but by the hand of another. *Jefferson v. State*, 128 So. 2d 132 (Fla. 1961). *See generally* R. Perkins, *The Corpus Delicti of Murder*, 48 Va. L. Rev. 173 (1962).

Defendant argues that because the expert medical testimony did not expressly exclude an accidental cause of death, the State failed to prove that the death resulted from the criminal agency of another. We disagree.

Dr. Bordou testified that the victim sustained profound head injury indicating fracture of the skull bones. He opined that it is hard to fracture a child's bones, including the skull, and that "simple injury such as falling from a stand or [being] dropped accidentally is very uncommon to bruises and fractures." Dr. Hudson testified that it would take "a rather considerable amount of torsion or force" to cause the fractures he observed during the autopsy of the victim. We hold that this evidence was sufficient to permit a jury to find that the victim's injuries were not the result of accident and that the *corpus delicti* was established.

Defendant's reliance on *State v. Byrd*, 309 N.C. 132, 305 S.E. 2d 724 (1983), is misplaced. There, defendants were convicted of second-degree murder of their infant son. The pathologist who performed the autopsy on the victim observed no external injury. After an order of exhumation, the victim's body was examined by a state medical examiner, who testified and offered an opinion that the child victim died as a result of a "blunt trauma" to the head. The medical examiner also offered his opinion that a twenty-five-day-old child could not sit up, crawl, or turn over. This Court held that while the testimony was some evidence that the child did not accidentally cause injuries to *himself*, it was not "tantamount to a statement that *another* person could not have, or was unlikely to have, accidentally inflicted the injuries." *Id.* at 138-39, 305 S.E. 2d at 729.

Byrd is readily distinguishable from the present case. Here, paramedics, the emergency room doctor, and the state medical examiner all observed external trauma to the victim; in *Byrd* there was no observable trauma. In the present case, there was evidence that the defendant had exclusive care of the child on the day the infant died; in *Byrd* there were three other adults, living in the Byrd household, who had the opportunity to inflict the injuries. In the present case, Dr. Hudson testified that the fractures he observed on the victim were likely sustained very close to the time of death and that the victim probably lived for only a short time, perhaps a minute, after receiving the head injury; in *Byrd* it was not clear when the child sustained injuries resulting in death.

[2] In addressing defendant's contention that there was insufficient evidence of premeditation and deliberation and of malice, we are guided by well-developed legal principles.

First-degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983). Premeditation means that defendant formed the specific intent to kill the victim for some period of time, however short, before the actual killing. *State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981). Deliberation is an intention to kill, executed by defendant in a cool state of blood, in furtherance of a fixed design to accomplish some unlawful purpose. *State v. Robbins*, 275 N.C. 537, 169 S.E. 2d 858 (1969). Malice is a condition of mind that prompts one to take the life of another intentionally, without just cause, excuse, or justification. *State v. Robbins*, 309 N.C. 771, 309 S.E. 2d 188 (1983).

This Court has repeatedly held that premeditation and deliberation are rarely susceptible to direct proof and must usually be shown by circumstantial evidence including (1) lack of provocation by the victim, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations by the defendant before and during the course of the occurrence giving rise to the death of the deceased, (4) dealing of lethal blows after the deceased has been felled and rendered helpless, and (5) evidence that the killing was done in a brutal manner. *State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (1984). Likewise, malice may be inferred from the use of a deadly weapon, *State v. Lang*, 309 N.C. 512, 308 S.E. 2d 317 (1983), or the willful blow by an adult on the head of an infant, *State v. West*, 51 N.C. (6 Jones) 505 (1859).

Applying the foregoing principles to the facts, we hold that the State presented sufficient evidence to prove premeditation and deliberation, as well as malice. The victim, a helpless thirty-day-old child, had no opportunity to legally provoke the defendant. The defendant displayed erratic conduct after the death of her daughter; several witnesses testified that she had an odor of alcohol on her breath. An emergency room doctor, as well as paramedics, testified that the victim had a bruised and battered appearance, including a swelling over the back of the skull. That the victim met a violent and brutal death was also supported by the evidence of blood spattered on defendant's shirt and in the child's bedroom. We hold that this evidence supports a finding of premeditation and deliberation, as well as malice.

II.

[3] Defendant next argues that the trial court erred in admitting into evidence defendant's statement to police. Specifically, defendant argues that she did not possess the requisite mental capacity to make an intelligent and voluntary waiver of her rights prior to giving an inculpatory statement.

In determining the voluntariness of the confession, we look to the totality of the circumstances. *State v. Massey*, 316 N.C. 558, 342 S.E. 2d 811 (1986). The trial court is to determine whether the State has borne its burden of showing, by a preponderance of the evidence, that defendant's confession was voluntary. *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984). The factual findings by the trial court are binding on appeal if supported by competent evidence; however, conclusions of law are fully reviewable. *Id.*

On voir dire, the court heard the testimony of Officer Bass, who observed the defendant at the time she waived her *Miranda* rights and gave a statement to police. Among its findings of fact, the court found that at approximately 5:20 p.m., the defendant was injected with five milligrams of Haldol, a tranquilizer. The court found that during the subsequent waiver of rights and statement to police, defendant was coherent and "was not dream-like or . . . transe-like [sic]; [she] did not become drowsy until after the statement had been taken, recorded and signed."

Based on these findings, the court concluded that defendant's statement to Officer Bass was freely made and that defendant knowingly and voluntarily waived her constitutional rights to remain silent and to the assistance of counsel.

Defendant argues that the evidence does not support the court's conclusion that the statement was voluntary. She argues that because her will was overborne by the effects of the Haldol injection, her incriminating statement was not truly voluntary.

It is well settled that the fourteenth amendment guarantee of due process protects against the admission of a defendant's confession which is not truly voluntary and the product of a free will and rational intellect. *Townsend v. Sain*, 372 U.S. 293, 9 L.Ed. 2d 770 (1963); *Blackburn v. Alabama*, 361 U.S. 199, 4 L.Ed. 2d 242 (1960). This Court has held that a defendant's intoxication at the time of confession does not preclude the conclusion that a defend-

ant's statements were freely and voluntarily made. *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981), *overruled on other grounds, State v. Freeman*, 314 N.C. 432, 333 S.E. 2d 743 (1985). In *Parton*, an officer who arrested defendant testified that although defendant was intoxicated, he was not staggering and appeared coherent. We held that based on this testimony, the trial court properly found a free and voluntary waiver of *Miranda* rights. *See* Annot. "Sufficiency of Showing that Voluntariness of Confession or Admission was Affected by Alcohol or Other Drugs," 25 A.L.R. 4th 419 (1983 and Supp. 1986).

Defendant argues that while there are no cases directly on point, the most closely analogous case from another jurisdiction is *In re Cameron*, 68 Cal. 2d 487, 439 P. 2d 633, 67 Cal. Rptr. 529 (1968), where defendant became hysterical during police questioning and was then taken to a hospital where he was given an injection of three hundred milligrams of Thorazine. There, the court held that defendant's confessions were inadmissible because the Thorazine destroyed anxiety and made him amenable to the wishes of others.

In the present case, although no medical evidence was presented on the motion to suppress, defendant requests that we examine the medical literature to find that the effects of Haldol in the present case approximate the effects of Thorazine in the *Cameron* case. We decline defendant's invitation to engage in a *de novo* medical analysis of the effects of Haldol on a particular defendant. However, we note parenthetically that our research discloses no case in which an appellate court has found that the effects of Haldol rendered a confession involuntary. *See People v. Kincaid*, 87 Ill. 2d 107, 429 N.E. 2d 508 (1981), *cert. denied*, 455 U.S. 1024, 72 L.Ed. 2d 144 (1982) (confession made two hours after receiving five-milligram dose of Haldol); *People v. Madden*, 148 Ill. App. 3d 988, 501 N.E. 2d 1297 (1986), *appeal denied*, 113 Ill. 2d 581, 505 N.E. 2d 358 (1987) (confession voluntary, notwithstanding injection of Haldol); *State v. Jones*, 386 So. 2d 1363 (La. 1980) (expert testified that Haldol does not lower inhibitions; defendant's statement, one day after drug administered, properly found to be voluntary). *But cf. State v. Porter*, 122 Ariz. 458, 595 P. 2d 1003 (Ariz. App. 1978) (defendant took Haldol two hours prior to arrest; trial court erred in failing to instruct jury on voluntariness of confession).

Based on the aforementioned, we find the trial court did not err in admitting defendant's incriminating statement.

III.

Defendant next argues that the trial court erred in overruling defendant's objections to the district attorney's closing argument. First, defendant contends that the district attorney made an improper remark as to what a "good parent" would do when confronted by an officer investigating her infant's death. Second, defendant argues that the district attorney improperly commented on the credibility of witnesses. Finally, defendant argues that it was improper for the district attorney to explain why he did not call defendant's husband as a witness.

[4] It is well settled that counsel is allowed wide latitude in arguing to the jury facts in evidence and all inferences to be drawn therefrom. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). It is within the trial judge's discretion to determine whether counsel has exceeded the freedom allowed in the argument of hotly contested cases, and this Court will not review the judge's exercise of discretion unless there exists such gross impropriety in the argument as would likely influence the jury's verdict. *State v. Hockett*, 309 N.C. 794, 309 S.E. 2d 249 (1983).

Defendant argues that the trial court erred in not sustaining her objection to the following argument:

> [W]ould you kick at the officers when they came out to help you with the case, to find out what was going on, would you curse at them? Not if you are a good parent and you know that. If you loved your child and you didn't hurt that child you would have wanted everybody around to do as much as they could as quick as they could to find out what did happen.

The argument was a response to defense counsel's statement that there was uncontradicted evidence that defendant was a good mother. This Court has often held that a prosecutor may respond to arguments offered by defense counsel. *See, e.g., State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 166 (1986) (defense counsel "opened the door" to argument that witness was not truthful).

Moreover, the facts belie defendant's argument that the district attorney's comments misstated the evidence. A paramedic who arrived at defendant's mobile home testified that when defendant's husband informed her that she needed to go to the hospital, the defendant indeed kicked at him and at the paramedic. Likewise, Franklin Godby, a Davidson County Deputy Sheriff, testified that defendant used profanity and voiced threats to officers and ambulance drivers at her home. Accordingly, we find that the court did not err in overruling defendant's objection to this portion of the district attorney's argument.

[5] Defendant also maintains that the court erred in overruling her objection to the district attorney's statement regarding the credibility of the serologist, who had testified that the bloodstains in the defendant's clothing were consistent with the victim's blood. The district attorney stated:

> I askedher [sic] in each category if she tested enough things to form an opinion whether the blood she found on those items was consistent with this child's blood and she said YES. If she didn't, she wouldn't have told you that, Members of the Jury.

Defendant argues that the district attorney traveled outside the record and argued his own beliefs and personal opinion to the jury. Of course counsel is not permitted to express his personal beliefs as to the credibility of witnesses. *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983). However, counsel is allowed to respond to arguments made by defense counsel and restore the credibility of a witness who has been attacked in defendant's closing argument. *State v. McCall*, 289 N.C. 512, 223 S.E. 2d 303, *vacated on other grounds*, 429 U.S. 912, 50 L.Ed. 2d 278 (1976).

We have examined the record and find that during closing argument, defendant's counsel attacked the credibility of the serologist and urged the jury to apply to her testimony the "Latin phrase: *Falsius in unum; falsius in totem* [sic]—(false in one part, false in totality)." The district attorney's argument was a legitimate response to that attack.

[6] Finally, we find no merit in defendant's argument that it was improper for the district attorney to state, with respect to defendant's husband: "I wouldn't have called him as a witness for

the world!" We find that the district attorney's statement was made in response to defense counsel's remark, during closing argument, that it was "significant that the State did not call him [Homer Perdue] as a witness." We have previously held that the district attorney may respond to such statements that call into question the failure of the State to call a witness. *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983) (proper for State to explain, in response to defense counsel questioning why certain witness was not called to testify, that proposed witness had a sordid past).

IV.

[7] In her final argument to this Court, defendant argues that the trial court erred in instructing the jury on the element of malice. In pertinent part, the court charged the jury:

> Malice may be implied from evidence that the victim's death resulted from attack by hand alone without the use of other weapons when the attack was made by a mature man or woman upon a defenseless infant.

Defendant argues that because there was no evidence as to how the injuries were sustained, the jury should not have been permitted to infer malice.

Where an adult has exclusive custody of a child for a period of time and during such time the child suffers injuries which are neither self-inflicted nor accidental, the evidence is sufficient to create an inference that the adult inflicted an injury. *State v. Riggsbee*, 72 N.C. App. 167, 323 S.E. 2d 502 (1984) (child abuse case; held that where defendant had sole custody of child at time of injury, coupled with evidence that injury was not accidental, evidence supported inference that defendant intentionally caused fracture to child's arm); *State v. Loss*, 295 Minn. 271, 204 N.W. 2d 404 (1973) (manslaughter; jury could infer that adult with custody inflicted fatal blows); *Commonwealth v. Paquette*, 451 Pa. 250, 301 A. 2d 837 (1973) (no eyewitness to alleged beating; fact finder justified in rejecting theory of accidental injury where bruising occurred while child was in exclusive care of defendant); *State v. Durand*, 465 A. 2d 762 (R.I. 1983) (manslaughter; jury could infer that custodial adult inflicted injuries where wounds were neither self-inflicted nor accidental).

In the present case, there was firm evidence that the victim died from a "blunt impact" received shortly before death and that her death was not likely the result of accident or self-inflicted wounds. This was sufficient to permit an inference that the infant's death resulted from an attack by human hands. In view of the fact that defendant had nearly exclusive care of the child on 11 March 1985, and testimony that fatal blows received by the victim likely occurred very shortly, perhaps a minute, before death, it was proper to instruct the jury that malice could be inferred from the attack of human hands alone. *State v. West*, 51 N.C. (6 Jones) 505; *State v. Sallie*, 13 N.C. App. 499, 186 S.E. 2d 667, *cert. denied*, 281 N.C. 316, 188 S.E. 2d 900 (1972).

Having found no merit in any of defendant's contentions before this Court, we find that she had a fair trial, free from error.

No error.

STATE OF NORTH CAROLINA v. JAMES LARRY GAPPINS

No. 384A86

(Filed 7 July 1987)

1. **Criminal Law §§ 39, 87.4— murder—redirect examination—witness's opinion of defendant's intent—proper**

In a murder prosecution arising from an incident outside a bar, the trial court did not err by allowing a witness to testify that, in his opinion, the defendant wanted to whip or shoot a black soldier where the testimony was elicited by the prosecutor on redirect examination after defense counsel had asked during cross-examination whether the witness recalled saying that he felt like defendant wasn't going to hurt anyone, that he just wanted to scare them.

2. **Criminal Law § 169.5— murder—testimony about decedent's hobbies and talents—not prejudicial**

There was no prejudicial error in a murder prosecution in allowing the decedent's father to testify as to decedent's hobbies and talents, although the evidence was irrelevant, where eyewitness testimony identified defendant as having shot and killed the unarmed deceased without provocation.

3. **Criminal Law § 85— character evidence—cross-examination about specific acts—no error**

The trial court did not err in a murder prosecution by allowing the prosecutor to cross-examine defendant's character witnesses about specific instances

of conduct by defendant where defendant put his character in issue by having witnesses testify concerning his reputation for peacefulness, a "pertinent trait of his character." N.C.G.S. § 8C-1, Rules 404(a)(1) and 405(a).

4. **Homicide § 28.1— murder—failure to instruct on self-defense or manslaughter —no error**

The trial court did not err by failing to instruct the jury on self-defense or on voluntary manslaughter based on imperfect self-defense where the evidence, viewed in the light most favorable to defendant, indicates that defendant was the aggressor during the entire incident, that the killing was an accident, and that defendant had not formed either a belief that it was necessary to kill the victim or an intent to kill him in order to protect himself from death or great bodily harm.

5. **Criminal Law § 181— newly discovered evidence—motion for new trial denied —no error**

The trial court did not err in a murder prosecution by denying defendant's motion for a new trial under N.C.G.S. § 15A-1415(b)(6) based on newly discovered evidence that psychotherapists at a clinic which had evaluated defendant felt that defendant was suffering from Post Traumatic Stress Disorder resulting from his experiences in Vietnam where the opinions of the two psychotherapists were related to the evaluating psychiatrist, who did not adopt them or incorporate them into his report, but who did note defendant's tour in Vietnam and assessed it as "relatively stressful."

APPEAL by the defendant from judgments entered by *Brewer, J.*, at the 23 January 1986 Session of Superior Court, CUMBERLAND County.

The defendant was charged in a two count indictment with first degree murder and misdemeanor assault by pointing a gun. The jury found him guilty as to both counts, and he received sentences of life imprisonment and six months imprisonment, to be served consecutively. The defendant appealed the murder conviction and resulting sentence of life imprisonment to the Supreme Court as a matter of right. His motion to bypass the Court of Appeals with regard to his appeal of the assault conviction was allowed on 7 July 1986. Heard in the Supreme Court on 13 April 1987.

Lacy H. Thornburg, Attorney General, by Joan H. Byers, Special Deputy Attorney General, and William P. Hart, Assistant Attorney General, for the State.

Nance, Collier, Herndon, Wheless, Guthrie & Jenkins, by James R. Nance, Jr. and Constance McLean Ludwig, for the defendant appellant.

MITCHELL, Justice.

The State presented evidence which tended to show that in the early morning hours of 8 June 1985, approximately ten soldiers from Fort Bragg drove into Fayetteville to the Silver Dollar Lounge. A fellow soldier had returned to the army base to summon them after he and another soldier got into an argument with some civilians at the Silver Dollar Lounge. He had left his friend at the bar and returned to the base to get help, because he thought his friend might encounter difficulty leaving the bar.

When the soldiers arrived, they parked across the street from the lounge. Two of them went in to see if their friend was still there. The others dispersed around the area. Carl Crawford and Damon Monjure stood by a tree beside a parked truck. Not finding their friend inside the bar, someone went to call the base to see if he had gone there. While the soldiers were waiting, the defendant came out of the bar and began walking toward his truck. Seeing the defendant, and assuming it was his truck, Crawford and Monjure crossed the street to return to their vehicles.

The defendant began yelling at the two soldiers, demanding to know what they were doing to his truck. The defendant then went to his truck, withdrew a Winchester .30-.30 rifle and followed Crawford and Monjure across the street to the place where the other soldiers were standing. Pointing the rifle at Crawford, the defendant said, "I know it was you and I know it was you." The defendant cocked his rifle and told Crawford to move into the street, saying that one, if not all, of the soldiers was going to get his bullet.

Two acquaintances of the defendant who had also come out of the bar attempted to calm him, telling him that the soldiers had done nothing to his truck and to leave. The defendant demanded to know what the soldiers were doing there, to which Sergeant Gregory Buchanon responded that they were just taking a break. The defendant, walking over to Buchanon, said, "Oh, you felt like taking a break." The defendant's acquaintances continued to coax him to leave, but the defendant told them to leave him alone saying: "No, this would be self defense." He told Buchanon to take his hands out of his pocket. As Buchanon was moving his hands

into the air, the defendant shot him in the neck, causing his death.

Other evidence introduced at trial is reviewed and discussed where pertinent throughout this opinion.

[1] By his first assignment of error, the defendant contends that the trial court erred in allowing the State's witness Gilbert McLaurin to testify over objection to his opinion, at the time immediately before the shooting, of what the defendant intended to do. The witness who had been drinking in the bar with the defendant the night of the murder, testified that, in his opinion, the defendant wanted to whip or shoot the black soldier, Crawford. We agree with the defendant that ordinarily a witness may not give his opinion of another person's intention on a particular occasion. *State v. Sanders*, 295 N.C. 361, 369-70, 245 S.E. 2d 674, 681 (1978); *State v. Brower*, 289 N.C. 644, 661, 224 S.E. 2d 551, 563 (1976). However, we find no merit in this assignment of error.

The testimony about which the defendant complains was elicited by the prosecutor on redirect examination of the witness only after defense counsel had asked the witness during cross examination: "Do you recall telling Mr. Wadkins that you felt like Larry [the defendant] wasn't going to hurt anybody, he just wanted to scare them?" The only questions asked by the prosecutor concerning the witness's opinion as to the defendant's intentions were for the purpose of clarifying the witness's answer to defense counsel's prior question on the matter. Questions seeking an explanation on redirect examination of matters brought out by the defendant on cross examination are proper. The answers are admissible even though they might have been inadmissible if the State had opened the line of inquiry in the first instance. *State v. Williams*, 315 N.C. 310, 320, 338 S.E. 2d 75, 82 (1986). A defendant may not deliberately elicit testimony and then later complain of its admission. *State v. Hunt*, 297 N.C. 447, 450, 255 S.E. 2d 182, 184 (1979). It was therefore not error to permit the witness to testify as to his opinion of the defendant's intentions, the defendant having "opened the door." *State v. Avery*, 315 N.C. 1, 27-28, 337 S.E. 2d 786, 801 (1985).

[2] The defendant also contends that the trial court committed prejudicial error in allowing the decedent's father to testify as to the decedent's hobbies and talents. This contention is without

merit. The prosecutor elicited testimony during direct examination of the witness that the decedent liked to "write," "draw," and "mess with old cars and motorcycles." The defendant argues that the admitted testimony was irrelevant in that it was not probative of any fact in issue, and that it was designed to capture the sympathy of the jury.

The test of relevancy of evidence is whether it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1986). "Evidence which is not relevant is not admissible." N.C.G.S. § 8C-1, Rule 402 (1986). The burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission. *State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684, *cert. denied*, 439 U.S. 830, 58 L.Ed. 2d 124 (1978). The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded. *State v. Billups*, 301 N.C. 607, 272 S.E. 2d 842 (1981); *State v. Cross*, 293 N.C. 296, 302, 237 S.E. 2d 734, 739 (1977); N.C.G.S. § 15A-1443(a) (1983).

Although we conclude that the testimony in question was irrelevant to the issues in the case and should not have been admitted into evidence, the defendant has not carried his burden of showing such prejudice as would require a new trial. Plenary eyewitness testimony identified the defendant as having shot and killed the unarmed deceased without provocation. We therefore hold that the admission of the testimony into evidence was harmless error, as it is not likely that it affected the result of the trial. This assignment of error is overruled.

[3] By his next assignment of error, the defendant contends that the trial court erred in six instances by allowing the prosecutor to cross examine character witnesses for the defendant concerning specific acts of misconduct by the defendant. We initially point out that the defendant failed to object to four of the questions asked by the prosecutor about which he now complains. Therefore, review on appeal of those questions is limited to consideration of whether the questions constituted plain error. *See State v. Ramey*, 318 N.C. 457, 349 S.E. 2d 566 (1986); *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983).

After the character witnesses testified concerning the defendant's reputation for peacefulness, the prosecutor asked the witnesses on cross examination whether they had heard or knew about certain instances including acts of domestic cruelty and rowdy and abusive conduct by the defendant when he was drinking. These questions were permissible under our Rules of Evidence.

It has long been established that a defendant in a criminal case is entitled to introduce evidence of his own good character as substantive evidence in his favor. 1 Brandis on North Carolina Evidence § 104 (1982 and Cum. Supp. 1986); *State v. Peek*, 313 N.C. 266, 273, 328 S.E. 2d 249, 254 (1985); *State v. Denny*, 294 N.C. 294, 297, 240 S.E. 2d 437, 439 (1978). However "[i]f the accused thus 'puts his character in issue,' the State in rebuttal may introduce evidence of his bad character . . . ." 1 Brandis on North Carolina Evidence § 104 (1982 and Cum. Supp. 1986); N.C.G.S. § 15A-1226(a) (1983).

With the enactment of the North Carolina Rules of Evidence, effective 1 July 1984, this practice remained intact as codified in Rule 404, except that subdivision (a)(1) limits the admission of evidence of the character of the accused to that relating to "a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same . . . ." Specifically, Rule 404 provides in pertinent part that:

> Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.
>
> (a) *Character evidence generally.*—Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) *Character of accused.*—Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same . . . .

N.C.G.S. § 8C-1, Rule 404 (1986).

Further, Rule 405 prescribes allowable methods of proving character as follows:

> Rule 405. Methods of proving character.

> (a) *Reputation or opinion.*—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. *On cross-examination, inquiry is allowable into relevant specific instances of conduct.* Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.
>
> (b) *Specific instances of conduct.*—In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

N.C.G.S. § 8C-1, Rule 405 (1986) (emphasis added). We note that the second sentence of subsection (a) of Rule 405 represents a departure from prior case law, in that it allows a witness who has given character evidence for the defendant to be cross examined by the State about relevant specific instances of the defendant's conduct. By enacting this sentence of the rule, the legislature adopted the practice applied in "most jurisdictions." 1 Brandis on North Carolina Evidence § 115, n. 4 (1982) (citing *Wigmore on Evidence* (Chadbourn rev. § 988)). Prior case law applying the former rule that prohibited the use of specific instances of misconduct to test a character witness's knowledge of the character and reputation of the person about whom he was testifying is no longer authoritative or binding in that regard. *See generally,* 1 Brandis on North Carolina Evidence §§ 111 and 115 (1982 and Cum. Supp. 1986) (discussing former rule).

In the present case, the defendant put his character in issue by having witnesses testify concerning his reputation for peacefulness, a "pertinent trait of his character." Only then did the prosecutor, in accordance with Rules 401(a)(1) and 405(a), cross examine the witnesses about specific instances of conduct by the defendant, in an effort to rebut their prior testimony as to the defendant's character for peacefulness. In this particular context, the answers to the prosecutor's questions were properly admitted. This assignment of error is overruled.

[4] The defendant also assigns as error the trial court's failure to instruct the jury on self-defense and voluntary manslaughter based on imperfect self-defense. A defendant is entitled to an instruction on perfect self-defense as an excuse for a killing when

evidence is presented tending to show that, at the time of the killing:

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

State v. Wallace, 309 N.C. 141, 147, 305 S.E. 2d 548, 552-53 (1983) (quoting *State v. Bush*, 307 N.C. 152, 158, 297 S.E. 2d 563, 568 (1982)). A defendant is entitled to an instruction on imperfect self-defense only if the first two elements of perfect self-defense are shown to exist. *State v. Bush*, 307 N.C. 152, 159, 297 S.E. 2d 563, 568 (1982). In determining whether there was any evidence of self-defense presented, the evidence must be interpreted in the light most favorable to the defendant. *State v. McCray*, 312 N.C. 519, 324 S.E. 2d 606 (1985); *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 (1973).

The defendant's evidence at trial in the present case tended to show that when he came out of the bar at closing time on the night in question, he saw two men standing beside his truck. The defendant testified that it looked as if one of the men was either urinating on his truck or reaching down to take something out of it. As the defendant approached, yelling at the two men, they moved across the street. The defendant testified that "the one they called Monjure, said something about, 'If you'll come on over here, we'll whip your old ass.'" Then they began to run away. The defendant further testified that not knowing what the men were going to do, he got his rifle from his truck and followed them across the street. The defendant was "cussing and raising

hell at Crawford" when Monjure walked around the vehicle beside which he stood.

The defendant testified as follows:

> I told him to stop where he was and—ah—he told me something about—said, Well, we didn't steal nothing, and Crawford said that they would—he was just taking a leak beside the tree, and I told him—I said, you weren't looking at the tree. I said, You mean to tell me that you were pissing on my truck? And he said, No, no, no, sir. He said, I was just going to the bathroom beside the truck. And—ah—Monjure said something about, "If you think we have got anything, go ahead and call the law. We didn't get nothing out of it," and—ah—two people had followed me, had got there after I did, and that was Calvin and McLaurin, and they were trying to calm me down and talk to me and tell me it weren't worth it, that they were just running their mouth and didn't mean nothing by what they said, and they didn't think that they had gotten nothing out of the truck, and that if they went to the bathroom on it, it would wash off. And at that point, I said, Well, just might do that, and as far as I was concerned, it was over, and I turned to leave.

The defendant further testified that as he turned to leave, he saw the other soldiers, of whose presence he was not previously aware, and

> I was saying, "What in the hell are all of y'all doing here," somebody said something about they had something for me, and when I turned and looked, the first person I saw was Buchannon [sic], he was the closest one to me, and he had his hands up behind his back in a parade rest type stance, and when I turned and looked at him, he spread his legs apart a little bit and he was just standing there, and I said, "What did you say?" And he said, taking a break. And so, I told him, I said, Well, I have got to see what is behind your back. I said, Let me see your hands. . . .
>
> And at that time he moved—his arms were up . . . behind his back, his elbows were bent and he didn't have them dropped down straight behind him, they were up . . . and at that time, when he made—when he made a little sud-

> den move, he just didn't ease his hands out . . . and start to move his hands out, his body moved with his arms, and at that time, I saw a long white-looking stick. I figured it was a pick handle or a—ah—ah—axe handle. I just saw the white part of a stick coming out from behind him. I don't know whether I saw it between his legs the way his legs were before it got out from beside his leg or whether it was outside of his leg that I saw it, and when he did that, I kind of jumped like that and picked the gun up with one hand and it went off.

The defendant specifically testified that he thought that Buchanon was going to hit him and that it scared him, but that *he did not intend to shoot Buchanon.*

The evidence, when viewed in the light most favorable to the defendant, indicates that he was the aggressor during the entire incident. The defendant himself testified that the men ran away from his truck. Thereafter, the defendant went to the truck, got his rifle and followed them across the street. Further, there was no evidence of necessity—real or apparent—for the defendant to kill in order to protect himself from death or great bodily harm at the time in question. Although the defendant testified that he saw a "long white-looking stick" behind the decedent's back, there was no evidence tending to indicate that an attack by the decedent was imminent. To the contrary, the evidence was that the soldiers made great efforts to convince the defendant that they had meant no harm to his truck and that he should call the police if he doubted them. Further, there is evidence that the defendant told his acquaintances when they tried to persuade him to leave before the shooting: "No, this would be self defense."

More importantly, no evidence tended to show that the defendant *in fact* formed a belief that it was necessary to kill the victim to protect himself from death or great bodily harm. Even taking the defendant's own testimony in the light most favorable to him, the defendant's evidence tended unequivocally to show that the killing was an accident, and that he had not formed either a belief that it was necessary to kill the victim or an intent to kill him in order to protect himself from death or great bodily harm. Where, as here, there is no evidence to support a reasonable jury finding that the defendant *in fact* believed it

necessary to kill his adversary to protect himself from death or great bodily harm, the defendant is not entitled to an instruction on either perfect or imperfect self-defense. *State v. Bush*, 307 N.C. 152, 160, 297 S.E. 2d 563, 569 (1982). Counsel for the defendant seems to have recognized this at trial in stating to the trial court: "[w]e have never relied upon self-defense in this case. We have relied on accident from the beginning . . . ."

We conclude as a matter of law that there was no evidence of either perfect or imperfect self-defense presented in the present case. Therefore, the trial court did not err in failing to instruct the jury on self-defense.

Similarly, there was no evidence to support an instruction on voluntary manslaughter. Generally, "voluntary manslaughter is an intentional killing without premeditation, deliberation or malice but done in the heat of passion suddenly aroused by adequate provocation or in the exercise of imperfect self-defense where excessive force under the circumstances was used or where the defendant is the aggressor." *State v. Wallace*, 309 N.C. 141, 149, 305 S.E. 2d 548, 553 (1983). The defendant does not argue that he killed the deceased in the heat of passion suddenly aroused by adequate provocation. Instead, he argues that he was entitled to an instruction on voluntary manslaughter because the jury reasonably could have found his actions to be the result of imperfect self-defense. In order for an instruction on voluntary manslaughter based on imperfect self-defense to be required, the first two elements of perfect self-defense must be shown to exist. *See generally, State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982). As we have pointed out, the evidence did not tend to indicate that the defendant did *in fact* form a belief that it was necessary to kill the deceased, and there was no evidence tending to show that such a belief would have been reasonable under the circumstances. Therefore, there was no evidence of imperfect self-defense and no basis upon which the jury reasonably could have found the defendant guilty of voluntary manslaughter. He was not entitled to a jury instruction on voluntary manslaughter. We find no error in the jury instructions.

[5] As his last assignment of error, the defendant contends that the trial court erred in denying his motion under N.C.G.S. § 15A-1415(b)(6) for a new trial based on newly discovered evidence. The

statute provides that a defendant by motion may seek appropriate relief when:

> [e]vidence is available which was unknown or unavailable to the defendant at the time of the trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant.

N.C.G.S. § 15A-1415(b)(6) (1983).

In order for a new trial to be granted on the ground of such newly discovered evidence under the statute, the following must be shown: (1) the witness or witnesses will give newly discovered evidence; (2) such newly discovered evidence is probably true; (3) the new evidence is competent, material and relevant; (4) due diligence was used and proper means were employed to procure the testimony at the trial; (5) the newly discovered evidence is not merely cumulative; (6) it does not tend only to contradict a former witness or to impeach or discredit him; (7) it is of such a nature as to show that a different result would probably be reached at a new trial. *See State v. Cronin*, 299 N.C. 229, 262 S.E. 2d 277 (1980); *State v. Parson*, 298 N.C. 765, 259 S.E. 2d 867 (1979). Such a motion is addressed to the sound discretion of the trial judge and in the absence of abuse of discretion is not reviewable on appeal. *Id.*; *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974).

Through an affidavit of the defendant's attorney and testimony at the hearing on the motion, evidence was introduced tending to show that in December, 1985, the defendant's attorney sent him to the Cliffdale Clinic to be examined by Dr. Robert G. Crummie, a psychiatrist and the Medical Director of the clinic. As a result of his evaluation of the defendant, Dr. Crummie prepared a report in which he stated that he felt that the defendant is generally a gentle person, except when he is drinking, at which times he is probably very dangerous. He stated that the defendant drinks excessively, but otherwise did not mention in his report any emotional disturbance that might have existed at the time of the murder. Dr. Crummie did, however, state in his report that the defendant spent one year in Vietnam which was "relatively stressful" for him.

After the verdict, the defendant's attorney contacted the Cliffdale Clinic in an effort to get Dr. Crummie to testify, for pur-

poses of sentencing, concerning the defendant's possible rehabilitation. Because Dr. Crummie was unable to appear, he suggested that the defendant's attorney contact Rick Ryckman or Ron Friar, psychotherapists at the clinic who had talked with the defendant in conjunction with Dr. Crummie's evaluation. Upon discussion with Mr. Ryckman, the defendant's attorney learned for the first time that Mr. Ryckman and Dr. Friar had discussed the possibility that the defendant suffered from Post Traumatic Stress Disorder.

Mr. Ryckman testified that in his position at the clinic, he is required to be supervised by a licensed practicing psychologist or psychiatrist, and that Dr. Crummie is his supervisor. He further testified that he administered two psychological tests to the defendant and then interviewed him for approximately fifteen minutes. Mr. Ryckman prepared a report which he submitted to Dr. Crummie. In this report, he stated that "there appears to be some possible mitigating factors with regard to [the defendant's] . . . recent behavior. These could be associated with Vietnam War Syndrome (Post Traumatic Stress Disorder, Chronic, delayed)." He discussed this with Dr. Crummie. Mr. Ryckman testified, explaining that he is of the opinion that:

> [T]here was significant impairment in Larry Gappins at the time of the commission of the alleged offense. . . . The post-traumatic stress disorder is a contributing factor and is exacerbated by the use of alcohol. Specifically, when Mr. Gappins drinks, his judgment becomes extremely poor and he becomes violent, often incurring flashbacks to the Vietnam War experiences.

Dr. Friar testified that while interviewing the defendant, Mr. Ryckman called him in to listen to the defendant recount some of his Vietnam experiences. Based upon one such experience related by the defendant, Dr. Friar concluded that the defendant "may well have post-traumatic stress disorder." However, he suggested that further testing would be required and that his conclusion could prove to be wrong in later diagnosis.

The defendant argues that the trial court abused its discretion in failing to find that this evidence is probably true, that it is not merely cumulative, and that it is of such a nature that a different result would probably be reached in the guilt determina-

tion phase at a new trial. We do not agree. The opinions of the two witnesses were related to their supervisor Dr. Crummie after their interview with the defendant. Dr. Crummie apparently ruled them out in making his evaluation of the defendant's mental health, because he did not adopt them or incorporate them in his report in which he specifically noted the defendant's tour in Vietnam and assessed it as "relatively stressful." We therefore conclude that the trial court did not err. This assignment of error is overruled.

For reasons stated herein, we hold that the defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. SAMUEL HUGH HAGER

No. 513A85

(Filed 7 July 1987)

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

There was sufficient evidence to submit premeditated and deliberated murder to the jury and to support the jury's verdict of guilty where there was ample evidence of ill will between defendant and the decedent; defendant stated that decedent owed him approximately $2,000 on a drug debt; defendant acknowledged that violence might be necessary to collect the debt; decedent had apparently collected $2,000 from defendant's girlfriend for the purchase of a car, but never delivered the car and refused to return the money; the killing occurred in a brutal manner; defendant delivered at least two blows with a rifle butt with such force as to cause an intercranial hemorrhage; defendant rebuffed his companion's efforts to stop the beating; and defendant bragged to a friend after the killing that he had "just done one in."

2. Criminal Law § 102.6— prosecutor's argument on death sentence in guilt phase—no prejudice

There was no prejudice in a first degree murder prosecution from the prosecutor's argument that a verdict of guilty of first degree murder was the only way that the law could take care of defendant where the trial judge sustained defendant's objection and gave limiting instructions.

3. Criminal Law § 102.6— murder—prosecutor's argument for first degree murder rather than felony murder—no error

The trial judge was not required to act *ex mero motu* in a first degree murder prosecution where the prosecution argued that the jury should find defendant guilty of first degree murder on the basis of premeditation and deliberation rather than felony murder.

4. Criminal Law § 102.6— first degree murder—argument during guilt phase on bifurcated trial—no error

The trial judge was not required to act *ex mero motu* in a first degree murder prosecution where the prosecutor's argument in the guilt phase of the trial merely explained how and when the bifurcated trial process operates.

5. Criminal Law § 102.6— murder—prosecutor's argument on defendant's failure to present evidence of victim's character—no error

In a first degree murder prosecution in which defendant argued that he acted in self-defense, the trial court did not err by failing to sustain defendant's objection to the prosecutor's argument on defendant's failure to present evidence of the victim's character which might show that the victim had been the aggressor.

6. Criminal Law § 73.1— felonious assault—hearsay evidence of earlier assault—no prejudice

There was no prejudicial error in a felonious assault prosecution from the admission of hearsay testimony that the assault victim had taken out an assault warrant on defendant and feared repercussions from him where there was ample evidence that the assault victim feared defendant and defense counsel stated in his opening argument that there was no contention that defendant had not assaulted the victim.

7. Criminal Law § 138.16— felonious assault and robbery—aggravating factor—position of leadership—no error

The trial court did not err by finding as an aggravating factor for convictions of felonious assault and robbery that defendant occupied a position of leadership or dominance where the evidence showed that defendant and two companions, Sherrill and Burt, started to a store; defendant directed the driver to go to the home of the victims, Ball and Baldwin; defendant wished to collect money owed him and indicated that violence might be necessary to collect the money; Sherrill was allowed into the house after defendant was told he could not enter; a fight ensued after defendant forced his way into the house; when Baldwin tried to call the police, Sherrill assaulted her with her fists and the telephone receiver; after defendant's attack on Ball, Sherrill kicked Ball as he lay helpless on the ground; Burt, who had witnessed the assault on Ball, then aided defendant in his attempt to take Ball's car by smashing out its window; Sherrill meanwhile turned defendant's car around to ready it for his escape; and Burt attempted to get rid of the rifle used by defendant to beat Ball by dropping it in a lake. N.C.G.S. § 15A-1340.4(a)(1)(a).

8. **Criminal Law § 138.21— felonious assault—especially heinous, atrocious or cruel—no error**

The trial court did not err by finding as an aggravating circumstance to a felonious assault that the offense was especially heinous, atrocious or cruel where, as the victim lay stunned on the floor as a result of blows from one of defendant's companions, defendant held a stereo over his head and slammed it down on her face, later bragging that his victim's body had risen four feet off the floor and that she had broken bones in her body, comments which suggested that defendant enjoyed committing the offense. N.C.G.S. § 15A-1340.4 (a)(1)f.

BEFORE *Freeman, J.*, at the 13 May 1985 Special Criminal Session of Superior Court, IREDELL County, the following judgments were entered against defendant: life imprisonment for first degree murder, twenty years for robbery with a dangerous weapon, and ten years for assault with a deadly weapon inflicting serious injury, all sentences to be served consecutively. Defendant appeals from the imposition of the life sentence as a matter of right pursuant to N.C.G.S. § 7A-27(a). Defendant's motion to bypass the Court of Appeals on the other convictions was allowed. Heard in the Supreme Court on 12 March 1987.

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

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

FRYE, Justice.

Defendant contends that it was error for the trial court to submit to the jury the charge of murder in the first degree on the theory of premeditation and deliberation. He also contends that he is entitled to a new trial because of improper closing arguments by the prosecutor and because of the admission of irrelevant and non-corroborative hearsay evidence. Finally, he seeks a new sentencing hearing on grounds that the trial court erred in finding certain aggravating factors as a basis for enhancing his sentences in the non-capital cases. We find no merit in any of defendant's contentions.

The State's evidence tended to show the following sequence of events. On the evening of 20 April 1984, defendant, accompanied by his girlfriend, Kim Sherrill, and Bradley Burt, left the

Kale residence where defendant had been staying, heading for the store. En route defendant informed the others that he needed to go see a man to collect some money that was owed to defendant, apparently as a result of a drug transaction. Defendant added that he might have to "tap him in the knees to get the money."

Defendant, Sherrill, and Burt arrived at the home shared by the decedent, Ronald Ball, and his girlfriend, Trudy Baldwin. Baldwin had been expecting defendant, since he had called earlier to tell her he was coming. A dispute had been brewing between defendant and Baldwin concerning defendant's belief that Baldwin had stolen cash from his house some three or four weeks earlier. Indeed, that morning defendant had unsuccessfully sought to have a warrant issued against Baldwin for this alleged larceny and in apparent frustration had quipped to the magistrate, "Well, it looks like I'm going to have to kill that bitch." Another financial dispute between Ronald Ball and defendant's girlfriend Kim Sherrill also had been brewing. Ball had apparently kept some $2000 given him by Sherrill to purchase an automobile which Ball never delivered.

Defendant had two pocketknives and a pair of brass knuckles in his car when he arrived at the victim's residence. Baldwin answered the door and allowed Kim Sherrill to enter but because of her fear of defendant, told him to stay outside. Defendant, however, forced his way into the house. Ball then emerged from a back room carrying a rifle and ordered Sherrill and defendant to leave. Defendant managed to grab the barrel of the rifle and push Ball out of the house to where Burt was standing. When the two men began to struggle outside of the house, Baldwin picked up the telephone and told Sherrill that she was going to call the police, whereupon Sherrill hit Baldwin with the telephone and the two began fighting.

Outside the house, the defendant, swinging the rifle like a baseball bat, struck Ball in the head with the rifle, sending him to the ground. Defendant struck Ball in the head a second time and at least a third time. Burt, after the second blow, attempted to stop the beating by grabbing defendant but was "slung off" and told, "Get the hell out of the way; this is my party."

Defendant, after completing his attack on Ball, went back into the house where he found Baldwin lying on the floor dazed

by blows from Sherrill. Defendant then picked up a stereo set, lifted it over his head and thrust it down upon Baldwin's face with such force that he later boasted that Baldwin's body "came about four feet off the floor."

Defendant then took a ring of car keys from Ball's pocket and attempted to remove Ball's car but could not determine which key opened the car doors. Burt, attempting to assist defendant, grabbed the rifle and smashed one of the windows in the victim's car. Defendant, however, failing to locate the key to the ignition, abandoned the effort to take victim's car. Before departing the scene in his own car along with Sherrill and Burt, defendant reached into Ball's pocket again and removed a wallet. Burt took the rifle with him and later threw it into Lake Norman. Defendant that night bragged to a friend that he "had just done one in" and "took his billfold and $200.00." Ball died from an intercranial hemorrhage resulting from blunt trauma to the left side of the head.

Defendant introduced no evidence. The jury returned verdicts of guilty of assault with a deadly weapon inflicting serious injury, robbery with a dangerous weapon and murder in the first degree. On the murder conviction, the jury found one aggravating circumstance[1] and at least three mitigating circumstances.[2] The jury failed to find that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and accordingly recommended a sentence of life imprisonment. Judgment was entered accordingly.

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1. That the murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons. *See* N.C.G.S. § 15A-2000(e)(11).

2. (1) That defendant committed the offense under compulsion which was insufficient to constitute a defense but significantly reduced his culpability. *See* N.C.G.S. § 15A-2000(f)(5).

(2) That the defendant was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense. *See* N.C.G.S. § 15A-1000(c)(2).

(3) Any other circumstance or circumstances arising from the evidence which the jury deemed to have mitigating value. *See* N.C.G.S. § 15A-2000(f)(9).

[1] Defendant first contends that the evidence of premeditation and deliberation is insufficient to convict him of first degree murder.

This Court, in determining the sufficiency of the evidence of premeditation and deliberation, has said:

> 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 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, 319 N.C. 73, 80, 352 S.E. 2d 428, 433 (1987) (quoting *State v. Brown*, 315 N.C. 40, 58-59, 337 S.E. 2d 808, 822-23 (1985)). Further, the nature and number of the victim's wounds is also a circumstance from which premeditation and deliberation can be inferred. *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673 (1986). No factor is necessarily determinative. Rather, the totality of the circumstances must be assessed. *See State v. Corn*, 303 N.C. 293, 278 S.E. 2d 221 (1981).

In the present case, there is ample evidence of ill-will between the defendant and the decedent. Defendant stated that Ball

owed him approximately $2000 on a drug debt. In discussing his intention to collect the money owed to him by Ball, defendant acknowledged that violence might be necessary to collect on this debt, indicating that he "might have to tap him in the knees." Further, Ball had apparently accepted $2000 from defendant's girlfriend for the purchase of a car, but Ball never delivered the car and refused to return the money. The uncontradicted evidence also reveals that the killing here occurred in a brutal manner. Ball died as a result of the defendant's vicious beating of him about the head with the butt of a rifle with such force as to cause an intercranial hemorrhage. Defendant delivered at least two blows after Ball had been felled and rendered helpless. Also, during the course of the attack defendant rebuffed his companion's efforts to stop the beating, warning him to "Get the hell out of the way" and proclaiming that "This is my party." After the killing, the defendant bragged to a friend that he had "just done one in." We conclude that the foregoing evidence was sufficient to support the submission of premeditated and deliberated murder to the jury and to support the jury's verdict of guilty.

[2] Defendant further complains that certain arguments made by the prosecution in closing deprived him of a fair trial. First, defendant contends that in several instances the prosecutor made improper use of the prospect of a death sentencing proceeding by arguing to the jury at the close of the guilt phase that:

> [the] only way you can be sure this man is never going to do this again is to find him guilty of first degree murder. Not second degree murder, and not voluntary manslaughter, and certainly not guilty [sic]. First degree murder is the only way that you can make sure that the law can take care of Samuel Hugh Hager.

Defendant's objection to this argument was sustained and the trial judge gave limiting instructions to the jury to disregard the argument that a guilty verdict of first degree murder was the only way the law can take care of defendant. Assuming, *arguendo*, that the prosecutor's statements were in error, we hold that any impropriety arising from the statements was cured when the trial judge sustained defendant's objection and gave limiting instructions.

[3] The prosecutor argued further that

> the State says and contends to you that if you find [Hager] guilty of first degree murder, find him guilty of first degree murder on the basis of malice, premeditation and deliberation, not under the felony murder rule.

Defendant did not object to this argument. Therefore review must be limited to the question of whether the argument was so grossly improper as to require the trial judge to intervene *ex mero motu*. *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673.

It is well settled in North Carolina that counsel is allowed wide latitude in arguments to the jury in contested cases. Counsel for each side may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his or her side. *State v. Payne*, 312 N.C. 647, 325 S.E. 2d 205 (1985); *State v. Huffstetler*, 312 N.C. 92, 322 S.E. 2d 110 (1984). Further, it is permissible for a prosecutor to ask the jury to return the highest degree of conviction and the most severe punishment available for the offense charged. *See State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (1984). *See also State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979); *State v. Christopher*, 258 N.C. 249, 128 S.E. 2d 667 (1962).

As indicated above, there was substantial evidence in support of the prosecutor's argument that the jury could find defendant guilty of premeditated and deliberated murder. Further, there was evidence on which the jury could have found that the armed robbery occurred as an afterthought to the killing. The fact that the prosecutor as a strategic matter chose to focus the jury's attention on first degree murder based on premeditation and deliberation and not on the felony murder rule resulted in no impropriety and therefore the trial judge was not required to act *ex mero motu*.

[4] Finally, the prosecutor stated during his closing argument that:

> What you find him guilty of is solely your business. If you find him guilty of first degree murder, then we can go to the second phase or the punishment phase of this trial, about what to do with him. If you find him guilty of second degree murder or voluntary manslaughter, the trial's over. The Court can pass sentence on him.

> You've got to decide what to do with the defendant. You've got to decide whether or not he's guilty or innocent. You do that based on the evidence and the law.

Defendant also failed to object to these statements. Upon review of the above portions of the prosecutor's argument, we conclude that these comments merely explained when and how the bifurcated process of a trial operates. Such statements are not prejudicial to the defendant, *see State v. Miller*, 315 N.C. 773, 340 S.E. 2d 290 (1986), citing *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977), and in this case were merely cumulative to the trial court's final instructions concerning the bifurcated process and the jury's responsibilities. We hold therefore that this portion of defendant's argument also did not require an action by the trial court *ex mero motu*.

[5] Defendant contends that the trial court also erred in failing to sustain his objection to the prosecutor's reference in his closing argument to evidence which the defendant failed to offer. The prosecutor argued as follows:

> Don't you think for one minute that if it had been anything bad about Ronald Ball's life that Lawyer Pressly over there would have brought it out to you about his reputation?
>
> MR. PRESSLY: OBJECTION and MOVE TO STRIKE.
>
> THE COURT: OVERRULED.
>
> MR. ZIMMERMAN: Thank you, Your Honor.
>
> He'd let you know about that. All indications from all the evidence, he was a good man. He's dead.

This Court has held that the State may bring to the jury's attention the defendant's failure to present exculpatory evidence, since such evidence need not come from the defendant's testimony. *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986). Defense counsel's argument to the jury regarding the murder charge was that defendant acted in defense of himself, albeit by using more force than necessary. Rule 404(a)(2) of the North Carolina Rules of Evidence permits evidence of the character of the victim tending to show that the victim was the first aggressor. *See* Commentary to Rule 404. The prosecutor's argument here constituted nothing more than a comment on defendant's failure

to present evidence of the victim's character which might show that the victim was the aggressor and was therefore permissible. Defendant's assignment of error is thus meritless.

[6] Defendant's next assignment of error relates specifically to his felonious assault conviction. He contends that during the direct testimony of Franklin D. Weathers the trial court erroneously admitted irrelevant and non-corroborative hearsay evidence that defendant had assaulted Ms. Baldwin on an earlier occasion. The following transpired during Weathers' testimony:

> Q. All right, did she tell you anything about taking out a warrant for Sammy or anything?
>
> A. Yes, sir, said she had took out an assault warrant—
>
> MR. PRESSLY: OBJECTION.
>
> THE COURT: OVERRULED. Go ahead.
>
> A. She had took out an assault warrant for him either on Thursday or Friday morning. I don't remember exactly which one.
>
> Q. All right, was that why she was scared or what?
>
> A. Yes, sir.

According to defendant, Weathers' testimony that Baldwin told Weathers she had taken out an assault warrant on the defendant was hearsay since it was offered to prove that she had in fact filed an assault charge against defendant and thus feared repercussions from him for having done so. Defendant also contends that Weathers' testimony that Baldwin's fear resulted from her having taken out the warrant was irrelevant because such testimony was based on Weathers' own opinion as to the source of Baldwin's fear. Finally, defendant argues that Weathers' testimony was not corroborative since Baldwin did not mention any assault charge in her testimony.

The admission of incompetent evidence not amounting to a constitutional violation will not warrant awarding a new trial unless "there is a reasonable possibility that, had the error in question not been committed a different result would have been reached at the trial . . . ." N.C.G.S. § 15A-1443(a) (1983). Defendant in this case failed to show how he was prejudiced by Weath-

ers' testimony. There was ample evidence that Baldwin feared defendant. She asked Weathers to bring her a gun for protection because of the trouble she was having with defendant and Sherrill. When the couple arrived at the scene of the incident, Baldwin refused to let the defendant in the house. Furthermore, defendant's counsel stated in his opening argument to the jury that "[t]here is no contention by the defendant that this man did not assault Trudy Baldwin." This admission of guilt coupled with the evidence of Baldwin's fear rendered harmless any possible error in Weathers' testimony. *Id.*

[7] Next, defendant contends that the trial court erred in finding as a statutory aggravating factor in the felonious assault and robbery cases that the defendant occupied a position of leadership or dominance of other participants in the commission of the offenses. N.C.G.S. § 15A-1340.4(a)(1)(a). According to defendant, no one participated with him in the commission of these offenses and therefore this finding was not supported by substantial evidence. This Court addressed a similar argument by the defendant in *State v. Lattimore*, 310 N.C. 295, 311 S.E. 2d 876 (1984). The defendant in *Lattimore* was convicted of attempted armed robbery. His codefendant, McNeair, pled guilty only to accessory after the fact of the robbery. The defendant in *Lattimore* had spent the evening prior to the attempted robbery with McNeair playing basketball. On the way home defendant told McNeair that "he needed some money" and that he "needed to hit something which means to rob something, break into something." Defendant indicated that a particular Pantry store "ought to be an easy one to rob." At defendant's request, McNeair drove past the Pantry, turned his car around, and let defendant out in front of the store. Upon hearing that defendant had attempted to rob the Pantry and had shot the clerk, McNeair aided the defendant in his escape. In *Lattimore* we held that this "evidence fully supports the trial court's finding that defendant occupied a position of leadership which resulted in McNeair's *involvement* in the crimes." (Emphasis added.) *Id.* at 299, 311 S.E. 2d at 879. The Court reasoned that the focus of N.C.G.S. § 15A-1340.4(a)(1)(a) is not on the role of the "participants" in the crime, but on the role of the defendant in inducing others to participate or in assuming a position of leadership. *Id.*

The evidence in the instant case shows that the defendant, Sherrill and Burt left the Kale residence in defendant's car headed for the store. En route, defendant directed the driver, Sherrill, to go to the home of the victims. Defendant stated that he wanted to go to Ball's home in order to collect money from Ball and further suggested that he might have to "tap him in the knees to get the money." Earlier, defendant, in the presence of Sherrill, said, "Well, it looks like I'm going to have to kill that bitch [Ms. Baldwin]." Sherrill was allowed inside the victim's house after defendant was told he could not enter. After forcing his way into the house, a fight ensued between the defendant and Ball. When Baldwin attempted to call the police, Sherrill assaulted her with her fists and the telephone receiver. After defendant's attack on Ball, Sherrill kicked Ball as he lay helpless on the ground. Burt, who had witnessed defendant's attack on Ball, then aided defendant in his efforts to take Ball's car, by smashing out its window. Meanwhile, Sherrill turned defendant's car around to ready it for defendant's escape. Finally, Burt attempted to get rid of the rifle used by defendant to beat Ball by dropping it in a lake. This evidence is clearly sufficient to show that the defendant occupied a position of leadership which resulted in Sherrill's and Burt's involvement in the crimes. Defendant's assignment of error here is therefore meritless.

[8] Defendant lastly contends that the trial court erred in finding as an aggravating factor that the felonious assault was especially heinous, atrocious or cruel. N.C.G.S. § 15A-1340.4(a)(1)f. In determining whether an offense is especially heinous, atrocious or cruel, "the focus should be on whether the facts of the case disclose *excessive* brutality or physical pain, psychological suffering or dehumanizing aspects *not normally present in that offense.* *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (1983). (Emphasis in original.) *See State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). The entire set of circumstances surrounding the offense must be considered in making this decision. In *Oliver*, the defendant, after murdering the victim, boasted that he had killed someone who was begging for his life and "kind of liked it." This Court, considering the analogous aggravating factor in the capital murder, found this fact to be significant in determining that the aggravating factor of especially heinous, atrocious or cruel was properly submitted to the jury.

In the instant case defendant's felonious assault on Baldwin was excessively brutal and dehumanizing. As Baldwin lay on the floor of her home, already stunned from blows by Sherrill, defendant held a stereo over his head and slammed it down on her face. In addition, defendant later boasted that the assault caused Baldwin's body to rise about four feet off the floor and "[Baldwin] had had a broken nose before . . . now she has body bones broken." These comments, not unlike those made by the defendant in *Oliver*, suggest that defendant enjoyed committing the offense. On these facts, we hold that the trial court properly found the aggravating factor of especially heinous, atrocious or cruel.

For the foregoing reasons, we hold that defendant received a fair trial, free of prejudicial error.

No error.

TOWN OF HAZELWOOD v. TOWN OF WAYNESVILLE

No. 43PA87

(Filed 7 July 1987)

Municipal Corporations § 2— annexation—prior jurisdiction rule—first mandatory public procedural step—resolution of intent

The adoption of a resolution of intent, not a resolution of consideration, is the critical date for determining whether a municipality utilizing involuntary annexation procedures has prior jurisdiction over the same territory being considered for voluntary annexation by a different municipality. N.C.G.S. §§ 160A-31 and -37.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 83 N.C. App. 670, 351 S.E. 2d 558 (1987), reversing an order granting defendant's motion for summary judgment entered by *Pachnowski, J.*, at the 21 February 1986 Civil Session of Superior Court, HAYWOOD County. Heard in the Supreme Court 8 June 1987.

Haire & Bridgers, P.A., by R. Phillip Haire and James M. Spiro, and Timothy Finger, for plaintiff-appellee.

Smith, Bonfoey & Queen, by Michael Bonfoey and Frank G. Queen, for defendant-appellant.

WHICHARD, Justice.

This appeal involves an interpretation of the North Carolina statutes governing annexation of unincorporated areas by municipalities. Specifically, the question is which of two municipalities simultaneously attempting to annex the same territory—one by voluntary means under N.C.G.S. § 160A-31, the other by involuntary means under N.C.G.S. § 160A-37—has the statutory right to complete annexation. The answer lies in a scrutiny of the statutory procedures governing these two modes of annexation as well as in the circumspect application of prior case law.

Annexation by petition, the voluntary procedure, requires each owner of real property in an area contiguous to the boundaries of the municipality to sign a petition requesting annexation. N.C.G.S. § 160A-31(a) (1982). Once the petition has been received by the governing body of the annexing municipality, the clerk is directed to investigate and certify the sufficiency of the petition. N.C.G.S. § 160A-31(c) (1982). Thereafter the governing body must fix a date for a public hearing on the question of annexation, causing notice to be published at least ten days prior to the hearing. *Id.* After the hearing, the governing board may pass an annexation ordinance effective immediately or on any specified date within six months of the date of its passage. N.C.G.S. § 160A-31(d) (1982).

The process of involuntary annexation by municipalities having a population of less than 5,000 is considerably more protracted and deliberate than annexation by petition. N.C.G.S. § 160A-37(a) mandates that the "resolution stating the intent of the municipality to consider annexation" fix a date for a public hearing on the question of annexation. A report including maps and detailing services to be provided the territory proposed for annexation, and the methods of financing those services, must be available at the office of the municipal clerk at least thirty days prior to the public hearing, which must be held not less than forty-five nor more than ninety days after the passing of the resolution. N.C.G.S. § 160A-35 (1982 & Cum. Supp. 1985); N.C.G.S. § 160A-37(a), (b)(1), (3) (Cum. Supp. 1985).

In addition, for all annexations for which resolutions of intent are adopted on or after 1 July 1984, the municipal governing body must either provide in the resolution of intent that the effective

date of the annexation ordinance be at least one year from the date the ordinance is passed, or identify the area under consideration for annexation (with a resolution of consideration) at least one year prior to adopting a resolution of intent. N.C.G.S. § 160A-37(i) (Cum. Supp. 1985); N.C.G.S. § 160A-37(j) (Cum. Supp. 1985). A resolution of consideration may have a metes and bounds description or a map, and the area therein described must include but may be greater than the territory that is ultimately the subject of the resolution of intent and the report mandated by N.C.G.S. § 160A-35. N.C.G.S. § 160A-37(i) (Cum. Supp. 1985).

In *City of Burlington v. Town of Elon College*, 310 N.C. 723, 729, 314 S.E. 2d 534, 538 (1984), this Court held that voluntary annexation proceedings under N.C.G.S. § 160A-31 and involuntary proceedings under N.C.G.S. § 160A-37 are "equivalent proceedings" for purposes of the "prior jurisdiction rule." This rule posits that, among equivalent proceedings, the "one which is prior in time is prior in jurisdiction to the exclusion of those subsequently instituted." *Id.* at 727, 314 S.E. 2d at 537, quoting 2 E. McQuillin, *The Law of Municipal Corporations* Sec. 7.22a (3d ed. 1966). The Court emphasized that the preferences of the property owners and residents of the targeted territory are inconsequential: "it appears to be the very essence of the *involuntary* annexation procedures that the affected landowners have no choice, as long as the annexing body complies with the applicable statutes." *Id.* at 729, 314 S.E. 2d at 538 (citations omitted). The Court in *Burlington* concluded that plaintiff-city had prior jurisdiction because its resolution of intent was the first mandatory public procedural step in the statutory process of involuntary annexation and because this step had preceded the submission of the property owners' petition.[1] *Id.* at 730, 314 S.E. 2d at 538-39.

"The time of commencement of proceedings, for purposes of the [prior jurisdiction] rule, is the 'taking of the first mandatory public procedural step in the statutory process for . . . annexation of territory.' " *Id.* at 728, 314 S.E. 2d at 537. The critical question presented in this appeal is whether a resolution of intent or a

1. The effective date of the 1983 amendment to sections (i) and (j) of N.C.G.S. § 160A-37 and -49 postdated the litigation culminating in *Burlington*. Therefore the question whether the resolution of consideration might be the first mandatory procedural step did not arise in that case.

resolution of consideration is the first mandatory public procedural step in the involuntary annexation process. The question arises from these facts:

On 5 November 1985 plaintiff Town of Hazelwood adopted a resolution of consideration identifying areas under consideration for annexation pursuant to N.C.G.S. § 160A-37. The area described included the Plott Creek subdivision, whose eleven property owners presented two annexation petitions to defendant Town of Waynesville on 18 and 25 November 1985. Receipt of the petition initiated the voluntary annexation procedure authorized by N.C.G.S. § 160A-31. Annexation pursuant to these provisions was completed by the adoption of an ordinance annexing the Plott Creek subdivision to defendant Town of Waynesville on 28 January 1986.

Shortly before the Waynesville annexation ordinance was passed, plaintiff Town of Hazelwood filed a complaint averring that its prior resolution of consideration, describing an area that included the Plott Creek subdivision, had constituted the "first mandatory public procedural step" of the two annexation procedures. Plaintiff averred that, on the authority of *City of Burlington v. Town of Elon College*, 310 N.C. 723, 314 S.E. 2d 534, it had prior jurisdiction over the Plott Creek area, thus foreclosing annexation of that territory by defendant Town of Waynesville. The trial court found no genuine issue of material fact and granted summary judgment to defendant Town of Waynesville.

The Court of Appeals reversed, holding that the resolution of consideration adopted by the Town of Hazelwood established its prior jurisdiction over the area in contention and that the annexation ordinance passed by the Town of Waynesville thus was without effect. The court noted the near identity of the facts in this case with those in *Burlington*, the only significant difference being that the first mandatory public procedural step in *Burlington* had been a resolution of intent. The court also noted that subsections 160A-37(i) and (j) provide "two different procedural methods for beginning the involuntary annexation process under [N.C.]G.S. 160A-33 *et seq.*" *Town of Hazelwood v. Town of Waynesville*, 83 N.C. App. at 672, 351 S.E. 2d at 559. It reasoned that "[w]hile a resolution of consideration is not absolutely essential to accomplishing involuntary annexation pursuant to [N.C.]G.S. 160A-

33 *et seq.*, it is essential if the municipality does not wish, for whatever reason, to postpone the date of annexation for a year after the annexation ordinance is passed." *Id.* The court consequently held that "the adoption of a resolution of consideration was the first mandatory public procedural step in the statutory process [plaintiff] chose to utilize." *Id.* at 672-73, 351 S.E. 2d at 559.

We acknowledge that the first mandatory public procedural step for a municipality *choosing to proceed with involuntary annexation under N.C.G.S. § 160A-37(i)* is a resolution of consideration. However, the procedure stated in subsection (i) is itself an *option.* The first *mandatory* public procedural step common to both means of initiating involuntary annexation is the passing of a resolution of intent. We therefore hold that the date of adoption of a resolution of intent is the critical date for determining whether a municipality utilizing involuntary annexation procedures has prior jurisdiction over the same territory being considered for voluntary annexation by a different municipality.

Our holding is compelled by the logic of the procedure for involuntary annexation. The statute mandates a waiting period of at least one year before involuntary annexation may be completed, whether a municipality chooses to pass a resolution of consideration one year prior to its resolution of intent or whether it chooses simply to delay the effective date of the annexation ordinance at least one year after the passage of the resolution of intent. The statute does not require that involuntary annexation be initiated with a resolution of consideration; it does require a lengthy *period* of consideration preceding either the mandatory resolution of intent or the effective date of the annexation ordinance.

In either case, the resolution of intent—not the resolution of consideration—must be accompanied by a detailed report that is the product of deliberate planning. This annexation scheme manifests the legislature's intent to require towns and cities to consider carefully the consequences of involuntary annexation of a particular territory, and it indicates the legislature's desire to enable residents of the area under consideration to anticipate and adjust to the proposed annexation. If jurisdiction is asserted by a possibly precipitous resolution of consideration that, by doing lit-

tle more than laying claim to general areas for possible annexation, precludes annexation of territory within these areas by other municipalities, these aims may be frustrated.

Not only the logic, but also the plain language of the provisions governing procedure for involuntary annexation compels the conclusion that the resolution of intent is the "first mandatory public procedural step" for purposes of the prior jurisdiction rule. These provisions begin: "Any municipal governing board desiring to annex territory under the provisions of this Part shall *first* pass a resolution stating the intent of the municipality to consider annexation." N.C.G.S. § 160A-37(a) (1985) (emphasis added). This language was neither changed nor affected by the 1983 amendment mandating a waiting period before involuntary annexation could be initiated under section 160A-37(i) or completed under section 160A-37(j).

Finally, we note the Court of Appeals' concern that if it were to have held as we do now, it

> would be arbitrarily preferring voluntary annexation over involuntary annexation since, once a resolution of consideration is passed, property owners in the area under consideration could, under similar circumstances, do what was done here, i.e., choose another municipality and petition for voluntary annexation by them.

Town of Hazelwood v. Town of Waynesville, 83 N.C. App. at 673, 351 S.E. 2d at 560. The Court of Appeals may have read the holding in *Burlington* that voluntary and involuntary annexation procedures were equivalent for purposes of the prior jurisdiction rule to mean that they were equivalent proceedings in every respect. We note again that, despite this Court's indication in *Burlington* that for purposes of determining jurisdiction the two means of annexation are equivalent, the statute itself has a built-in preference. The statute requires at least a year for completion of the process of involuntary annexation. Voluntary annexation, however, may be completed in less than two weeks. Thus, a deliberate preference for voluntary annexation is incorporated into the law. This statutory preference also informs our interpretation of the provisions before us.

In reversing the decision of the Court of Appeals, we also take judicial notice of recently ratified legislation that amends

N.C.G.S. §§ 160A-37(i) and -49(i) (governing involuntary annexation for cities of more than 5,000), so that they now provide that "adoption of [a] resolution of consideration shall not confer prior jurisdiction over the area as to any other city." 1987 N.C. Sess. Laws ch. 44. The Act is effective from and after 29 June 1983, but does not affect litigation pending on the date of ratification. Its provisions thus do not resolve the question now before us.

It is presumed, however, that an amendment to a statute is generally designed either to change the law or to clarify it. *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E. 2d 481, 483 (1968). When the legislature amends an ambiguous statute, the presumption is not that its intent was to change the original act, but "merely to '. . . clarify that which was previously doubtful.' " *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 240, 328 S.E. 2d 274, 280 (1985), quoting *Childers v. Parker's, Inc.*, 274 N.C. at 260, 162 S.E. 2d at 484. The recent legislation amending sections 160A-37(i) and -49(i) was clearly enacted in response to the Court of Appeals' decision in this case, and it bolsters our interpretation of the policies and reasoning behind the annexation statutes generally.

Plaintiff contends, as an alternative basis for its challenge to defendant's annexation of the Plott Creek subdivision, that the absence of the signatures of a life tenant and of certain tenants by the entirety on the petitions certified as sufficient by the Waynesville Town Clerk indicates imperfect compliance with the requisites of N.C.G.S. § 160A-31 and therefore vitiates the validity of the ordinance. These contentions appear neither as allegations in plaintiff's complaint nor as objections or exceptions in the record of proceedings before the trial court nor as an assignment of error argued in plaintiff's brief before the Court of Appeals. "This Court will not decide questions which have not been presented in the courts below . . . ." *White v. Pate*, 308 N.C. 759, 765, 304 S.E. 2d 199, 203 (1983); *see also Sales Co. v. Board of Transportation*, 292 N.C. 437, 443, 233 S.E. 2d 569, 573 (1977). We thus do not reach "this question which the [plaintiff] attempt[s] to raise for the first time here." *White*, 308 N.C. at 765, 304 S.E. 2d at 203.

The materials before the trial court presented "no genuine issue of material fact," N.C.G.S. § 1A-1, Rule 56, but purely a

question of law as to the validity of defendant Town of Waynesville's voluntary annexation of the Plott Creek subdivision. For the reasons set forth above, that annexation was valid, and it preempted any effort by plaintiff Town of Hazelwood to involuntarily annex the same territory. The trial court thus properly entered summary judgment for defendant Town of Waynesville, and the Court of Appeals erred in reversing that ruling. Accordingly, the decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. AARON ELWOOD PIGOTT

No. 10A86

(Filed 7 July 1987)

1. **Criminal Law § 66.9— suggestive photographic identification procedure—no substantial likelihood of mistaken identification**

Although the group of photographs used in a pretrial identification procedure was unnecessarily suggestive, there was no substantial likelihood of misidentification so that the admission of a rape victim's photographic and in-court identifications of defendant did not violate defendant's due process rights where the store in which the rape occurred was well lighted; the victim, a store employee, saw defendant face-to-face three times before he attacked her and also during the attack itself; the victim had reason to pay close attention to defendant on his third trip to the cash register; the victim's description of her assailant to the police fit defendant; the victim displayed no uncertainty about her choice; and the photographic identification was made within hours of the crime.

2. **Criminal Law § 66.9— suggestive photographic identification procedure—no substantial likelihood of misidentification**

Although the group of photographs used in a photographic identification procedure was unnecessarily suggestive, there was no substantial likelihood of misidentification of defendant by two deliverymen who had seen defendant at the store where a rape occurred so that the admission of their photographic and in-court identifications of defendant in the rape trial did not violate defendant's due process rights where each man had known defendant for some years; each saw defendant twice in the store under good lighting conditions and each recognized him at that time; one of the men paid particular attention to defendant because of his dress; the other man paid sufficient attention to come back into the store and tell the victim to "watch" defendant; the "description" each man gave the police consisted of defendant's name and other information about him and a brief description of his dress; both men

were positive in their identifications of defendant both in the store and at the pretrial photographic procedures; and the photographic identifications of defendant occurred within hours of the crime.

3. Bills of Discovery § 6— State's failure to make discovery—refusal of mistrial as sanction

Although the State violated the discovery statutes in a rape case by failing to provide defense counsel with photographs of defendant showing scratches on his body pursuant to counsel's request for the discovery of documents, the trial court did not abuse its discretion in denying defendant's motion for a mistrial as a sanction for the State's failure to make discovery where the district attorney first became personally aware of the photographs during the trial; defendant was allowed ample time to examine the photographs before their introduction into evidence; although defendant had reason to believe there were no photographs at the time he made an opening statement and cross-examined the victim about scratches on her assailant, he had no reason to believe that the State would not produce witnesses to testify to scratches on defendant; and the State did in fact present such witnesses. N.C.G.S. §§ 15A-902(b), 15A-903(d), and 15A-910.

Justice MEYER concurring.

Justices MITCHELL and MARTIN join in this concurring opinion.

APPEAL from a sentence of life imprisonment imposed by *Ellis, J.*, following defendant's conviction of first degree rape at the 9 September 1985 Criminal Session of Superior Court, BRUNSWICK County. Heard in the Supreme Court 9 March 1987.

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

William F. Fairley, for defendant-appellant.

FRYE, Justice.

Defendant contends first that his identification by three of the State's witnesses was so tainted by impermissibly suggestive pretrial identification procedures that his identification by these witnesses at trial violated his right to due process. Second, he contends that the trial judge improperly allowed into evidence certain photographs produced in mid-trial by the police to the surprise of all and to the prejudice of the defendant. We disagree with both contentions and hold that defendant received a trial free of reversible error.

Defendant was indicted on 22 July 1985 for first degree rape and tried at the 9 September 1985 Criminal Session of Superior

Court, Brunswick County, with Ellis, J., presiding. The jury found him guilty as charged, and Judge Ellis entered the mandatory sentence of life imprisonment. Defendant appealed to this Court.

The State's evidence at trial tended to show that the victim[1] was working as the third shift cashier at a convenience mart in Shallotte, North Carolina, on the morning of 5 May 1985, when at about 5:30 a.m. an individual later identified by her as defendant entered the store and asked her for change. He took the change and went to play a video game located in the store. As was her practice, she "kept an eye on him." After playing about ten minutes, he returned to the cash register and bought a drink and some crackers and went towards the back of the store (where the restrooms were located). At about that time, three deliverymen from Merita bread arrived. Two of the men knew defendant, although one of them did not know his name. Both men twice saw defendant face-to-face while they were in the store. As they were leaving, the senior man came back into the store and told the victim that she should "watch" defendant. The victim called the police, and the deliverymen left. Defendant came up to the counter, asked about the price of a sandwich, and returned it to the cooler. The victim turned her back to him; he grabbed her by the neck and dragged her to the storage area where he produced a knife and raped her at knife point. The victim suffered permanent damage to her back.

Defendant denied being in the store at all and offered alibi evidence.

I.

The victim testified and the trial judge found that after defendant left the convenience store, the victim called the police and was taken to the hospital for an examination. Later that afternoon, she was taken back to the police department. There, one of the officers presented the victim with a stack of ten photographs and said that she had some pictures she wanted the victim to look at. The officer made no other statement about the photographs. The victim looked through the entire stack and then selected a photograph of defendant, which she identified as a picture of her assailant.

1. To spare the victim further embarrassment, we will not refer to her by name in this opinion.

[1] Defendant contends that the admission of both this out-of-court identification and the victim's subsequent in-court identification of him was reversible error. The test to be applied is clear. "Identification evidence must be excluded as violating a defendant's right to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Harris*, 308 N.C. 159, 162, 301 S.E. 2d 91, 94 (1983).

Defendant contends that the group of photographs used in the identification procedure in question was unnecessarily suggestive. The trial court effectively found, and indeed we can see for ourselves, that six of the ten photographs used were so poor as to be virtually unidentifiable. Of the remaining four, one was of a man obviously older and heavier than the man described by the victim, and one was of a man in the uniform of the Brunswick County Sheriff's Office, leaving an effective group of two real choices. Defendant's was the only photograph in the entire group of a person dressed in a manner similar to that described by the victim. The State offered no explanation, either before this Court or the trial court, for the photograph selection. We assume, therefore, for the purposes of this opinion, that the use of this photographic group was unnecessarily suggestive.

However, our inquiry does not end there. *Manson v. Brathwaite*, 432 U.S. 98, 53 L.Ed. 2d 140 (1977). An identification at an unnecessarily suggestive pretrial identification procedure is not inadmissible unless the procedure employed was so suggestive that there is a substantial likelihood of irreparable misidentification. *State v. Flowers*, 318 N.C. 208, 220, 347 S.E. 2d 773, 781 (1986). Whether there is a substantial likelihood of misidentification depends upon the totality of the circumstances. *Id.* In making this determination, a court must consider the following factors:

1) The opportunity of the witness to view the criminal at the time of the crime;

2) the witness' degree of attention;

3) the accuracy of the witness' prior description;

4) the level of certainty demonstrated at the confrontation; and

5) the time between the crime and the confrontation.

Manson v. Brathwaite, 432 U.S. 98, 114, 53 L.Ed. 2d 140, 154. Against these factors must be weighed the corrupting effect of the suggestive procedure itself. *Id.*

Applying this test to the victim's out-of-court identification, we hold that the trial court correctly concluded that this identification procedure did not violate defendant's due process rights. The victim had an excellent opportunity to view her assailant. The store was well-lit; the victim saw the defendant face-to-face three times before he attacked her and also during the attack itself. She had reason to pay close attention to him on his third trip to the cash register. She described her assailant to the police as a black man in his mid-twenties, about five feet nine inches or five feet ten inches tall, weighing about 190 pounds, of medium build with orange spots in his hair and no visible scars, and wearing cut-offs without shoes or shirt. Except for the specific pair of cut-offs, this description appears to fit defendant. The victim displayed no uncertainty about her choice. Finally, the identification was made within hours of the crime. When these factors are weighed against the suggestiveness in the identification procedure, there appears little likelihood that any misidentification occurred. The trial court accordingly did not err in allowing into evidence the victim's out-of-court and in-court identifications of defendant.

[2] This same group of photographs was also shown to the two deliverymen who knew defendant. The trial court found that in each case the officer handed the witness the photographs and asked him to see if he recognized the person seen earlier in the store. Each witness selected defendant's photograph. Neither witness examined the photographs in the other's presence.

Again assuming for the purposes of this opinion that the use of this group of photographs was unnecessarily suggestive, we hold that the trial court nevertheless did not err in concluding that defendant's due process rights were not violated by admission of the out-of-court and in-court identifications of these two witnesses. As this Court has said before, the primary evil to be avoided is the likelihood of misidentification. *Flowers*, 318 N.C. 208, 347 S.E. 2d 773. In this case, there is no likelihood that either witness' identification was unduly influenced by the identification

procedure employed by the police. The trial judge found that each man had known defendant for some years. Each saw him twice in the convenience store, under good lighting conditions, and each recognized him at that time. One of the men paid particular attention to defendant because of his dress: although the morning was chilly, defendant wore only a pair of cut-offs. The other paid sufficient attention to come back into the store and speak to the victim about defendant. The "description" each man gave the police consisted of his name and other information about him and a brief description of his dress. Both witnesses were positive in their identification both in the convenience store and at their respective pretrial identification procedures. Their selection of defendant's photograph occurred within hours of the crime. When these factors are weighed against the suggestiveness in the photographs, there appears to be no likelihood that the use of the photographs influenced the witnesses' identification in any way.

II.

[3] According to the record, on 12 July 1985, defendant submitted a written request for voluntary discovery pursuant to N.C.G.S. § 15A-902 (1983). In response, the State agreed to make available to defendant for his attorney's inspection "documents that are deemed subject to discovery under G.S. 15A-903(d)." Defendant's attorney was directed to contact the officer in charge of the investigation for an appointment to view. The "documents" so presented were the photographs from the lineup and photographs of the victim.

In the middle of the trial, however, the district attorney became aware of the existence of some photographs of the defendant showing scratches on his hands, arms and body. These photographs had been taken at the direction of the officer in charge of the investigation a couple of days after defendant's arrest. The district attorney showed the photographs to the defendant's attorney during the lunch recess and sought to have them admitted as illustrative evidence. Defendant's attorney moved for sanctions in the form of a mistrial. He contended that defendant would be irreparably harmed by the introduction of these photographs because, acting in reliance on the absence of such photographs among the materials produced in response to his request for preliminary discovery and a statement by one of the arresting

officers, he had told the jury in his opening speech that the State would offer no evidence of any scratches on defendant, and he had further cross-examined the victim to establish that her assailant should have had scratches. The trial judge denied defendant's motion, finding that defendant had had an opportunity to examine the photographs and that defendant would not be prejudiced by their admission.

Although there is no suggestion of bad faith on the part of the prosecutor, it is clear that the State nevertheless violated the discovery statutes in this instance. By responding without equivocation to defendant's request for voluntary discovery, the State assumed "the duty fully to disclose all of those items which could be obtained by court order." *State v. Anderson*, 303 N.C. 185, 192, 278 S.E. 2d 238, 242 (1981); *see also* N.C.G.S. § 15A-902(b) (1983). Photographs "within the possession, custody, or control of the State . . . which are material to the preparation of [defendant's] defense, [and] are intended for use by the State as evidence at the trial" are obtainable by court order. N.C.G.S. § 15A-903(d) (1983). We have previously said that " '[w]ithin the possession, custody, or control of the State' as used in these provisions means within the possession, custody or control of the prosecutor *or those working in conjunction with him and his office.*" *State v. Crews*, 296 N.C. 607, 616, 252 S.E. 2d 745, 752 (1979) (emphasis added). Thus, despite the prosecutor's personal ignorance of the photographs' existence, they were nevertheless in the State's "possession, custody or control" within the meaning of the statute at the time of defendant's discovery request. They were material to defendant's presentation of his case and were in fact introduced into evidence by the State. Accordingly, the photographs at issue were discoverable and should have been disclosed in the State's voluntary answer to defendant's request. The State's failure to do so rendered it subject to sanctions as set forth at N.C.G.S. § 15A-910 (1983).

However, the imposition of sanctions for failure to comply with discovery is entirely within the sound discretion of the trial court and will not be reversed absent a showing of abuse of that discretion. *State v. Alston*, 307 N.C. 321, 330, 298 S.E. 2d 631, 639 (1983). We find no such abuse in the instant case. Defendant was allowed ample time to examine the photographs before their introduction at trial. Although defendant had reason to believe that

there were no *photographs* at the time he made his opening statement and cross-examined the victim about scratches on her assailant, it appears from the record that he had no guarantee or reason to believe that the State was not going to produce *witnesses* to testify to scratches on defendant. There were in fact such witnesses. Accordingly, we do not believe that the trial judge abused his discretion in denying defendant's motion for mistrial.

For all of the reasons set forth in this opinion, we hold that defendant received a fair trial, free of prejudicial error.

No error.

Justice MEYER concurring.

I concur in all aspects of this Court's opinion, with the single exception of the holding that the district attorney, in response to pretrial discovery requests, erred in failing to disclose certain photographs showing scratches on defendant's body. The photographs in question were made shortly after the crime occurred at the direction of a Lieutenant Gause. They were not in the possession of the district attorney; he knew absolutely nothing of their existence; and as this Court's opinion makes clear, there has been no suggestion whatsoever of bad faith on his part.

Obviously, when a defendant files a request for voluntary discovery of photographs, the district attorney is duty bound to search his own files and to make reasonable inquiry of his assistants and the investigating officers as to the existence of the materials requested. It is, likewise, obvious that the district attorney may not refuse to make such examination and inquiry for the very purpose of avoiding discovery. Here, there has been no showing, or even any suggestion, that the district attorney did not make the proper examination of his files and inquiry of his assistants and the investigating officers as to the presence of the photographs in question.

This Court's opinion concedes that the district attorney did not become aware of the existence of the photographs in question until "the middle of the trial." The defendant's attorney candidly states in his brief to this Court:

> The record discloses that during lunch of the second day of trial, the District Attorney became aware of the existence of State's Exhibits 27 through 36 and delivered them to counsel for the defendant at that time. The defendant does not question the prosecutor's good faith in having only belatedly produced the documents . . . .

(Citation omitted.) The record clearly indicates that as soon as the district attorney discovered the photographs in question, he made defense counsel aware of them and actually showed the photographs to him. He thus complied with defendant's discovery request as soon as he became aware of the existence of the requested photographs. It is my position that under the circumstances of this case, the district attorney's failure to disclose the photographs in question was not only not prejudicial error, but it was not error at all.

Justices MITCHELL and MARTIN join in this concurring opinion.

STATE OF NORTH CAROLINA v. REGINALD BAKER

No. 764A85

(Filed 7 July 1987)

1. **Criminal Law § 73— rape and incest—statements by victim's grandmother—hearsay and double hearsay**

The trial judge did not err in a prosecution for first degree rape and incest by excluding testimony from the victim's mother that the victim's grandmother had said she suspected that the victim's grandfather had had sexual relations with her and testimony from another witness that the victim's mother had said that the grandmother had said that she suspected the grandfather of having sexual relations with the victim. N.C.G.S. § 8C-1, Rule 802.

2. **Criminal Law § 33— rape and incest—testimony of grandmother—speculative**

The trial court did not err in a prosecution for rape and incest by the victim's stepfather by refusing to admit testimony that the victim's grandmother suspected the grandfather of having had sexual relations with the victim because the grandmother did not testify at the *in camera* hearing which determined the admissibility of the evidence and her evidence if she had testified was too speculative to have been admissible.

3. Criminal Law § 51— child medical examiner—qualified as expert pediatrician

An assignment of error that the trial court erred in a rape and incest prosecution by qualifying a witness as a child medical examiner was overruled where the witness was tendered by the State and accepted by the court as an expert in the field of pediatrics. The witness referred to his experience as a child medical examiner as evidence of his qualification as an expert in pediatrics.

4. Criminal Law § 53— rape and incest—opinion of pediatrician—admissible

The trial court did not err in a prosecution for rape and incest by permitting a pediatrician to testify that his physical examination of the victim was consistent with the events described by the victim.

5. Witnesses § 1.2— rape and incest—voir dire to determine understanding of duty to tell truth—in presence of jury—no error

The trial court did not err in a prosecution for rape and incest by conducting a competency *voir dire* of the nine-year-old victim in front of the jury where the court examined the witness as to her understanding of the duty of a witness to tell the truth. N.C.G.S. § 8C-1, Rule 104(c) provides that such a hearing may be in front of a jury, and defendant has not demonstrated how he was prejudiced by the examination.

APPEAL by defendant from *Lewis (John B.), Judge.* Judgments entered 19 September 1985 in Superior Court, WAYNE County. Heard in the Supreme Court 12 February 1987.

The defendant was tried for first degree rape and incest committed against his nine-year-old stepdaughter. The State's evidence showed that on 20 or 21 June 1984 the victim's mother entered an alcoholic rehabilitation center, leaving the victim and her siblings in the defendant's care. On the night of her mother's departure the victim was asleep in the upper bunk bed in a room shared by her sister. The defendant entered the room, climbed into the victim's bed, removed her clothes and had sexual intercourse with her. She testified that this had not happened before but that it occurred again the following night and on several subsequent occasions. She reported the incidents to her grandmother, to a social worker, to a physician, and eventually, to her mother. The victim was examined by a physician, Dr. Reuben Maness, who testified that his observations revealed physical evidence consistent with the victim's having experienced vaginal penetration.

The defendant testified in his own behalf and denied committing these offenses. He also presented evidence of his good

character. He was convicted as charged and sentenced to concurrent terms of life and four years in prison. He appealed.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State.

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

WEBB, Justice.

[1] In his first assignment of error the defendant argues that the court erred in excluding evidence that the prosecuting witness' grandfather had engaged in sexual relations with her. During the cross-examination of Rebecca Rouse, a social worker who worked on the prosecuting witness' case, the defendant's attorney discovered that Ms. Rouse's notes showed that Jo Ann Baker, the prosecuting witness' mother, suspected that the prosecuting witness had had sexual relations with her grandfather.

The State objected to any testimony in regard to any sexual behavior of the prosecuting witness other than sexual behavior at issue in this case on the ground that such testimony is excluded under the Rape Victim Shield Act, N.C.G.S. § 8C-1, Rule 412. Pursuant to subsection (d) of the Act the court conducted an in camera hearing to determine the admissibility of the testimony. The grandmother was subpoenaed but did not come to the hearing.

Ms. Baker testified at the in camera hearing that she had said to Mary Edwards:

> I told her that my mother seemed to think that my father had messed with [the prosecuting witness]. Said that she had come home one day, she had left the kids there with my father and when she came back said she was sitting in a short chair or something and he stayed in the bathroom and he wouldn't come out in a long time, but she suspected something and I told her I didn't believe it. . . . [M]y mother said, she had bloody pants on during that night, sometime when she found [the prosecuting witness] changing getting ready to take a bath, but as far as them being together in

bed, no, my mother didn't tell me nothing like that and nobody else.

Mary Edwards testified at the in camera hearing that Mrs. Baker had told her:

> [T]hat her mother had just called her and her mother was upset with her, she had gone some place and came back and when she came back she couldn't get in the door and finally she said that the father did come and let her in and her mother was under the impression that he had been with [the prosecuting witness].

The court excluded testimony as to the conclusion of Mrs. Baker's mother that the prosecuting witness may have had sexual relations with her grandfather. The court said such evidence was inadmissible under the Rape Victim Shield Act, N.C.G.S. § 8C-1, Rule 412. The defendant argues this was reversible error. He cites *State v. Ollis*, 318 N.C. 370, 348 S.E. 2d 777 (1986), and *State v. Baron*, 58 N.C. App. 150, 292 S.E. 2d 741 (1982), and argues that this testimony is relevant under the Act. He contends that this evidence would account for the findings of Dr. Maness as to the prosecuting witness' condition which proves that someone other than the defendant had sexual relations with her. He said this tends to prove the defendant did not have sexual relations with the prosecuting witness.

It is not necessary to determine whether the Rape Victim Shield Act applies to this case. The testimony of Mrs. Baker as to what her mother told her was hearsay. *See* N.C.G.S. § 8C-1, Rule 801(c) for the definition of hearsay. The testimony of Ms. Edwards as to what Mrs. Baker told her Mrs. Baker's mother had said was double hearsay. The testimony of neither witness would have been admissible for consideration by the jury. N.C.G.S. § 8C-1, Rule 802. It was not error for the court to exclude this testimony.

[2] At trial the defendant contended that the testimony of each of the witnesses at the in camera hearing established that the grandmother could offer relevant testimony. Prior to the adoption of the new rules of evidence it was clear that the court could not find based on this evidence that the grandmother could testify. It has been the law in this state that at an in camera hearing to determine the admissibility of evidence a court cannot consider

hearsay testimony. *State v. Davis*, 290 N.C. 511, 227 S.E. 2d 97 (1976). N.C.G.S. § 8C-1, Rule 104(a) now provides in part:

> Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court, . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges.

We do not have to decide whether Rule 104(a) provides that in determining a question as to the admissibility of evidence a court may rely on hearsay evidence. We hold that the testimony of Mrs. Baker and Ms. Edwards as to what the prosecuting witness' grandmother would have said is too equivocal to say the court committed error in excluding it.

The testimony of each witness was to the effect that the grandmother was suspicious that the grandfather had sexual relations with the prosecuting witness. Mrs. Baker said the grandmother's suspicion was aroused because the grandfather stayed in "the bathroom a long time." Ms. Edwards said the grandmother was suspicious because the grandfather did not come immediately to let her in when she was locked out of the house. If the grandmother had testified to these facts her conclusion that the grandfather had engaged in sexual relations with the granddaughter would have been too speculative to be admissible. *See State v. Porth*, 269 N.C. 329, 153 S.E. 2d 10 (1967). She should not have been allowed to testify that the grandfather stayed in "the bathroom a long time" or that he was late in letting her in the house when the granddaughter was in the house. This testimony would not have been relevant. It did not tend to make any fact that is of consequence to the determination of the case more or less probable. *State v. Coen*, 78 N.C. App. 778, 338 S.E. 2d 784 (1986). *See* N.C.G.S. § 8C-1, Rule 401, for the definition of relevance.

We do not know what the testimony of the grandmother would have been. She did not testify at the in camera hearing. The court did not err by excluding her testimony from the jury based on the evidence presented at the hearing. The defendant's first assignment of error is overruled.

[3] The defendant next argues that the court erred in allowing the State to qualify Dr. Maness as an expert "child medical examiner" specializing in cases of child sexual abuse because the

area is not proper for expert testimony, the witness failed to demonstrate his qualifications in the field, and the questions and answers "artificially bolstered his testimony." It is apparent from an examination of the record that the witness was tendered by the State and accepted by the court as an expert in the field of pediatrics and that the witness referred to his experience as a child medical examiner as evidence of his qualification as an expert in pediatrics. This assignment of error is overruled.

[4] By his third assignment the defendant argues that the court erred in overruling the defendant's objection to the State's asking Dr. Maness whether his observations during examination of the victim were consistent with what she had told him about the incident in question. He contends that such questioning improperly invaded the province of the jury and artificially bolstered the victim's testimony.

After testifying that the victim had told him that her stepfather had engaged in sexual intercourse with her, the following occurred on direct examination of Dr. Maness:

Q: Based on your physical examination and your findings relating to the absence of a hymen in [the victim] was that consistent, your physical consistent with what [the victim] told you had happened[?]

A: Yes.

. . .

A: What the physical examination was consistent with what she had told me, yes.

Q: And based on your experience and training in these kinds of cases, your conversation with [the victim] and your examination of physical findings, do you have an opinion as to whether or not [the victim] had been penetrated vaginally?

Mr. Braswell: Objection. [Exception No. 7]

Court: Overruled. You may answer.

A: My opinion was that she had been.

This testimony was properly admitted under *State v. Galloway*, 304 N.C. 485, 284 S.E. 2d 509 (1981), in which this Court held that

> A physician who is properly qualified as an expert may offer an opinion as to whether the victim in a rape prosecution had been penetrated and whether internal injuries had been caused thereby. . . . Testimony that an examination revealed evidence of traumatic and forcible penetration *consistent with* an alleged rape is a proper expression for an expert witness to establish whether the victim had been penetrated by force.

Id. at 489, 284 S.E. 2d at 512 (citations omitted, emphasis in original). The witness in this case, like the witness in *Galloway*, did no more than express an opinion that his examination revealed evidence consistent with events described by the victim. *See also State v. Robinson*, 310 N.C. 530, 313 S.E. 2d 571 (1984) and *State v. Starnes*, 308 N.C. 720, 304 S.E. 2d 226 (1983). This assignment of error is overruled.

[5] Finally, the defendant argues that the court erred in conducting a competency voir dire of the victim in the presence of the jury. The record reveals that the following occurred during direct examination of the victim:

> MR. BRASWELL: Your Honor, we object and ask the Court [to] inquire as to whether or not this young lady understand [sic] the nature of an oath.
>
> COURT: Do you understand that you have your hand on the Bible promising to tell the truth, that's what she asked. Do you swear that you'll tell the truth and nothing but the truth?

A: Yes, sir.

Q: Would you tell us your name?

. . .

Q: And when you have gone to school before have any of your teachers told you about telling the truth?

A: Yes, ma'am.

Q: And do you know what that means?

A: Yes, ma'am.

Q: Can you tell us what that means?

A: Yes, ma'am.

Q: What does that mean? Do you understand what I'm asking you, [name]?

MR. BRASWELL: Objection.

COURT: You can answer. You do understand what she's saying?

A: Yes, sir.

Q: What does it mean to tell the truth?

A: It means to tell what happened.

Q: Okay.

MR. BRASWELL: Objection, move to strike.

COURT: Overruled. Denied.

Q: And if you don't tell the truth, what is that?

A: A lie.

Q: Okay. Is it good to tell the truth or to tell a lie?

MR. BRASWELL: Objection.

COURT: Overruled. [Exception No. 2]

Q: You can go ahead?

A: The truth.

Q: And when you told the Judge before you started talking this morning you said you were going to tell the truth; is that right?

A: Yes, ma'am.

Q: And is that what you're doing?

A: Yes, ma'am.

MR. BRASWELL: Objection.

COURT: Overruled.

Although the defendant did not request a voir dire hearing out of the presence of the jury to determine the competency of the witness he argues the court should have had such a hearing. He argues that the way in which the examination was conducted unfairly bolstered the witness' credibility with the jury because she was able to say several times that she was telling the truth. He also contends he was not able to cross-examine the witness as to her competency because the court asked its questions before the jury.

N.C.G.S. § 8C-1, Rule 104, provides in part:

> (a) . . . Preliminary questions concerning the qualification of a person to be a witness, . . . shall be determined by the court, . . .
>
> . . .
>
> (c) . . . Hearings on the admissibility of confessions or other motions to suppress evidence in criminal trials in Superior Court shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

Rule 104(c) requires that a hearing such as the one requested in this case be held out of the presence of the jury only when the ends of justice require it. We cannot hold it was error in this case for the court not to hold the hearing out of the presence of the jury, particularly when the defendant did not request it.

The defendant raised a question as to the understanding of the nature of an oath by the witness. Lack of understanding of the nature of an oath would have been grounds for disqualification of a person as a witness prior to the adoption of the Rules of Evidence. *See State v. Pope*, 24 N.C. App. 217, 210 S.E. 2d 267 (1974), *cert. denied*, 286 N.C. 419, 211 S.E. 2d 799 (1975). N.C.G.S. § 8C-1, Rule 601, does not mention the ability to understand the nature of an oath but provides a person may be disqualified as a witness when he is incapable of expressing himself concerning the matter or when he is incapable of understanding the duty of a

witness to tell the truth. The court in this case examined the witness as to her understanding the duty of a witness to tell the truth. Rule 104(c) provides that such an examination may be in front of a jury. The defendant has not demonstrated how he was prejudiced by this examination in any way which would not be the case in any such examination. He has not demonstrated error.

In the defendant's trial we find

No error.

BELVA S. FOSTER, EMPLOYEE PLAINTIFF APPELLEE v. WESTERN-ELECTRIC CO., EMPLOYER; SELF-INSURED, DEFENDANT APPELLANT

No. 624A86

(Filed 7 July 1987)

Master and Servant § 69— workers' compensation—deduction for temporary disability payments under private plan

An employer was entitled to credit for payments made to an injured employee under a private disability plan against the amount owed as workers' compensation where the employer had not accepted plaintiff's injuries as compensable under workers' compensation at the time the private payments were made, nor had there been a determination of compensability by the Industrial Commission. Payments made by defendant cannot be characterized as due and payable and thus remain under the purview of N.C.G.S. § 97-42.

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

Justice MEYER concurring.

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported in 82 N.C. App. 656, 347 S.E. 2d 471, which affirmed the opinion and award of the full Commission filed 6 September 1985. Heard in the Supreme Court 11 March 1987.

Frye and Kasper, by Warren E. Kasper, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by Richard T. Rice, for defendant-appellant.

MARTIN, Justice.

The sole issue raised on this appeal is whether defendant-employer is entitled to a credit of payments made to plaintiff-employee under a private disability plan against the amount owed plaintiff as workers' compensation. We hold that defendant is entitled to a credit under N.C.G.S. § 97-42 and accordingly reverse the decision of the Court of Appeals.

Plaintiff, an employee of defendant's, was injured on 17 March 1982 when an automobile exiting defendant's parking lot struck her as she crossed the road in front of defendant's premises. Plaintiff was unable to work from 18 March through 10 October 1982. Defendant denied that plaintiff had been injured by an accident arising out of and in the course of her employment as required under workers' compensation. On 23 March 1982 defendant began paying plaintiff benefits pursuant to the company's Sickness and Accident Disability Benefit Plan. The plan provided benefits to employees for all disabling injuries, even though not work-related. Plaintiff received a total of $7,598.16 in weekly installments under the plan during the time she was unable to work. This amount included "full pay" of $342.26 per week from 23 March through 29 June and "half pay" of $171.13 per week from 30 June through 10 October. All payments were made prior to any determination by the Industrial Commission.

On 30 August 1983, the Commission ruled that plaintiff had been temporarily totally disabled by an accident arising out of and in the course of her employment. The Commission entered an award in the amount of $6,741.96 which encompassed the same time period for which plan benefits had already been received. Defendant then moved pursuant to N.C.G.S. § 97-42 that the award be offset by credit for the amounts previously paid plaintiff under the plan. At a separate evidentiary hearing on this issue, the deputy commissioner denied defendant's motion. This ruling was affirmed in turn by the full Commission and the Court of Appeals.

In affirming the denial of credit under section 97-42, the Court of Appeals relied upon *Moretz v. Richards & Associates*, 316 N.C. 539, 342 S.E. 2d 844 (1986). We disagree with the Court of Appeals' interpretation of *Moretz* and find that the *Moretz*

analysis of section 97-42 does not support the result reached below.

N.C.G.S. § 97-42 provides that

> [a]ny payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article *were not due and payable when made*, may, subject to the approval of the Industrial Commission be deducted from the amount to be paid as compensation.

N.C.G.S. § 97-42 (1985) (emphasis added).

The denial of credit in *Moretz* turned on our interpretation of the phrase "due and payable." Ordinarily, to establish a compensable claim under the Workers' Compensation Act, the plaintiff must demonstrate that he sustained an injury by accident arising out of and in the course of his employment. *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 293 S.E. 2d 196 (1982); *O'Mary v. Clearing Corp.*, 261 N.C. 508, 135 S.E. 2d 193 (1964). However, in *Moretz*, it was stipulated that the employer's insurance carrier had accepted the employee's claim as compensable under the Act shortly after the injury occurred. Prior to the Industrial Commission hearing, the carrier made disability payments for 362 weeks. At the hearing, the Commission determined that the employee was only entitled to 180 weeks of disability payments, but denied the employer credit under section 97-42 for the benefits already paid. We affirmed the denial of credit, reasoning that "[b]ecause defendants accepted plaintiff's injury as compensable, then initiated the payment of benefits, those payments were *due and payable* and were not deductible under the provisions of section 97-42." 316 N.C. at 542, 342 S.E. 2d at 846 (emphasis added).

In the instant case, on the other hand, defendant had *not* accepted plaintiff's injury as compensable under workers' compensation at the time the payments were made, nor had there been a determination of compensability by the Industrial Commission. Defendant contended that plaintiff's injury was not one arising out of and in the course of her employment because it occurred on a public road rather than on defendant's own premises. Under the analysis of *Moretz*, then, payments made by defendant pursuant to the plan cannot be characterized as due and payable. Because

they were not due and payable when made, the payments remain within the purview of section 97-42. Therefore the Court of Appeals erred in holding that "North Carolina does not have a specific statutory authorization to allow an employer the credit sought here." 82 N.C. App. at 658, 347 S.E. 2d at 472. Section 97-42 cannot be read to exclude deduction of the payments made to plaintiff under the plan in question.

We note parenthetically that the Court of Appeals cited without discussion to *Ashe v. Barnes*, 255 N.C. 310, 121 S.E. 2d 549 (1961), the only other case in which this Court has affirmed the denial of credit under section 97-42. In *Ashe*, the employer's insurance carrier made disability payments to the employee after his accident but prior to the Industrial Commission hearing. The employer stipulated that the employee had sustained an injury by accident arising out of and in the course of his employment. We find that the pertinent stipulations in *Ashe* are essentially indistinguishable from those in *Moretz*, and the *Ashe* payments would be held due and payable under the more recent *Moretz* rationale.

Plaintiff argues that public policy dictates the result reached by the Court of Appeals. To the contrary, the legislative intent underlying section 97-42 and the Workers' Compensation Act as a whole clearly supports the awarding of a credit in the instant case. In ascertaining legislative intent, we are guided by the language of the statute, the spirit of the act, and what the statute seeks to accomplish. *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E. 2d 336 (1986).

The Workers' Compensation Act is designed to relieve against hardship. *Kellams v. Metal Products*, 248 N.C. 199, 102 S.E. 2d 841 (1958). To that end, one of its primary purposes is to provide a swift and certain remedy to injured workers without the necessity of protracted litigation. *Rorie v. Holly Farms*, 306 N.C. 706, 295 S.E. 2d 458 (1982); *see* N.C.G.S. § 97-18 (1985) (prompt payment required). In cases such as this one where compensability under the Act is disputed, it may be some time before the injured worker begins to receive workers' compensation benefits. Here plaintiff's claim was not adjudged to be compensable under the Act until one and one-half years after her injury. Payment by the employer under a private disability plan ac-

complishes sound policy objectives by providing immediate financial assistance to the disabled worker *while* she is disabled. Through its plan, defendant affords a much-needed continuity of income to injured employees fully consistent with the expressed policies of workers' compensation.

The Act is also designed to provide payments based upon the actual loss of wages. Compensation must be keyed to the loss of ability to earn. *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865 (1943). Here the plan in question functions as a wage replacement program tantamount to workers' compensation. The amount of the benefit payment correlates to the worker's wages.

Finally, the Act disfavors duplicative payments for the same disability. *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E. 2d 336 ("in lieu of" clause of section 97-31 prevents double recovery). We recognize also that allowing double recovery reduces the incentive to adopt private disability plans providing for immediate payment of benefits.

These policy considerations dictate that an employer such as defendant in this case, who has paid an employee wage-replacement benefits at the time of that employee's greatest need, should not be penalized by being denied full credit for the amount paid as against the amount which was subsequently determined to be due the employee under workers' compensation. To do so would inevitably cause employers to be less generous and the result would be that the employee would lose his full salary at the very moment he needs it most.[1] Plaintiff's proposed construction of section 97-42 is neither liberal nor one made with a view to the public welfare. *See Point v. Westinghouse Electric Corp.*, 382 S.W. 2d 436 (Mo. App. 1964).

Other jurisdictions which have interpreted private benefit plans identical to the plan in this case have uniformly determined that the amount paid under the plan may properly be credited against the amount of workers' compensation awarded. *See, e.g., Western Electric, Inc. v. Ferguson*, 371 So. 2d 864 (Miss. 1979);

1. We express no opinion as to whether payments made to a claimant under a plan to which the claimant contributed are within the purview of N.C.G.S. § 97-42. The record before us fails to disclose any contribution by plaintiff to the private disability plan.

Hull v. Southwestern Bell Telephone Co., 565 S.W. 2d 809 (Mo. App. 1978); *Cowan v. Southwestern Bell Telephone Co.*, 529 S.W. 2d 485 (Mo. App. 1975); *Strohmeyer v. Southwestern Bell Telephone Co.*, 396 S.W. 2d 1 (Mo. App. 1965); *Young v. Western Electric Co.*, 96 N.J. 220, 475 A. 2d 544 (1984). We hold that the awarding of a credit under section 97-42 is appropriate in this case.

We therefore reverse the decision of the Court of Appeals and remand to that court for further remand to the Industrial Commission for entry of an order not inconsistent with this opinion.

Reversed and remanded.

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

Justice MEYER concurring.

I concur in the result and in the principle that our court decisions should encourage the payment of benefits to injured employees while they are not receiving their regular wages, i.e., "at the very moment he needs it most."

I am unable to concur in that portion of the Court's opinion that discusses and interprets *Moretz* and *Ashe*. Neither of those cases has anything whatsoever to do with the issue presented in the case now before us—whether credits are due employers for payments made to employees under private disability benefit plans. The Court's opinion interprets *Moretz* to hold that if a compensation carrier accepts the claim as compensable and voluntarily pays the injured employee ("at the very moment he needs it most"), the acceptance of the claim as compensable makes the payments made thereunder "due and payable when made" and therefore the carrier is not entitled to any credit for those amounts upon a final award. The Court's opinion compounds the problem by holding for the first time in this case that the payments that were made in *Ashe* "would be held due and payable" under the *Moretz* rationale. It emphasizes under the circumstances presently before us that the employer had *not* accepted the plaintiff's injury as compensable, and therefore "[u]nder

the analysis of *Moretz*, then, payments made by defendant pursuant to the plan cannot be characterized as due and payable." The Court's opinion clearly implies that if a compensation carrier "stonewalls" a claim by denying coverage, it is entitled to a credit for the amount advanced because the carrier had thereby "accepted the plaintiff's injury as compensable" and therefore would not be entitled to a credit on the final award under N.C.G.S. § 97-42. I cannot think of any interpretation of *Moretz* and *Ashe* that would be more detrimental to injured employees.

I see no need to set the principle of *Moretz* in stone, assuming the Court's opinion interprets its holding correctly. If indeed *Moretz* and *Ashe* stand for the proposition that, when a carrier who contests coverage steps forward voluntarily and pays during the period the worker is disabled, the carrier is not entitled to a credit solely by reason of the fact that benefits were paid voluntarily, this Court needs to revisit those cases.

STATE OF NORTH CAROLINA v. LAWRENCE T. BRICE

No. 523A86

(Filed 7 July 1987)

1. Criminal Law § 87.1— question not leading

The prosecutor's question to a child sexual offense victim, "When you woke up that night after going to sleep, who was in your room?" was not an improper leading question because it was not susceptible to a "yes" or "no" answer and did not suggest that the child should identify defendant as the person in her bedroom.

2. Criminal Law § 93— question assuming facts not in evidence—order of proof

The prosecutor's question to a child sexual offense victim as to who was in her bedroom when she awoke on the night in question assumed facts not in evidence since at that point in the trial there was no evidence that anyone had entered the victim's room, but the trial court did not abuse its discretion in permitting the prosecutor to depart from the regular order of presentation of evidence given the age of the witness and the subject matter of her anticipated testimony. N.C.G.S. § 8C-1, Rule 611(a).

3. Criminal Law § 169.3— leading questions—evidence of similar import admitted without objection

Defendant was not prejudiced by two leading questions posed to a witness on redirect examination where the witness had already given testimony of

similar import without objection during defendant's cross-examination of her. N.C.G.S. § 8C-1, Rule 611(c).

4. **Rape and Allied Offenses § 5— first degree sexual offense—indecent liberties—sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of first degree sexual offense and taking indecent liberties with a minor where it tended to show that defendant touched the eight-year-old victim between her legs when her panties were off and hurt her "inside" with his finger.

5. **Criminal Law § 106— sufficiency of evidence—necessity for leading questions to child victim**

The evidence was not insufficient in a prosecution for a sexual offense and indecent liberties because the child victim was unable to testify without leading questions about the offenses where the victim did testify as to each element of the charged offenses. Even if the victim's testimony had been improperly admitted, that fact would not have entitled defendant to a dismissal of the charges.

6. **Criminal Law § 102.7— jury argument—willingness of witness to lie**

The prosecutor's statement that a defense witness "would have come in here and placed her hand on the Bible and told you she had been to the moon and it was made of cheese if she thought it could help [defendant]" did not inject the prosecutor's personal opinion and belief into the jury argument and was not incompetent and prejudicial where the prosecutor clearly identified her argument as a contention, and where the inference the prosecutor invited the jury to draw was permissible given the witness's inconsistent statements under oath.

APPEAL by the defendant from judgment entered by *Owens, J.*, at the 4 June 1986 Regular Criminal Session of Superior Court, BUNCOMBE County. The defendant was indicted for first degree sexual offense and indecent liberties with a minor. A jury found him guilty of both offenses as charged. He received a life sentence for the first degree sexual offense conviction and a concurrent term of six years for the indecent liberties conviction. The defendant appealed his life sentence to the Supreme Court as of right. His motion to bypass the Court of Appeals on his appeal of the indecent liberties conviction was allowed on 28 August 1986. Heard in the Supreme Court on 14 April 1987.

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

John Byrd, Assistant Public Defender, for the defendant appellant.

MITCHELL, Justice.

The defendant presents various assignments of error. These include several contentions that the prosecutor improperly asked leading questions of the victim and another witness. Another contention is that the prosecutor assumed facts not in evidence in one question to the victim. Also, the defendant asserts that the trial court should have granted his motion to dismiss all charges for insufficient evidence. Finally, the defendant argues that the trial court should have sustained his objection to a statement made in the prosecutor's closing argument because it was incompetent, prejudicial and an assertion of opinion. We find no merit in any of these assignments of error.

The State's evidence tended to show that the eight-year-old victim lived with her aunt and grandfather, whom she refers to as "Tune," until November 1985. Her mother occasionally stayed with them. The victim said that on Halloween—Thursday, 31 October 1985—she was alone with her grandfather, the defendant Lawrence T. Brice. He entered her bedroom and touched her between the legs when her panties were off. He hurt her "inside" with his finger and threatened to hit her with a shoe if she told anyone. She had blood in her underwear later.

A social worker gave corroborative testimony that the victim had reported the defendant had "messed" with her previously by sitting on one of her legs to hold her down and placing his index finger "in her private area." The defendant had hit the victim in the face with a "flip-flop" (rubber shoe) before, and her nose had bled.

On 4 November 1985, the victim showed signs of an object having entered her vagina. She had blood tinged mucus at her vaginal opening, redness around her hymen, pus at the lower end of her hymen, black and blue spots on her hymen, and a laceration of her vaginal lining.

The defendant did not testify, but presented witnesses who said he was extensively involved in raising his granddaughter. Others said that the child's mother and the defendant had argued and the victim had stated that her mother told her to say the defendant had sexually abused her.

The defendant's first assignment of error concerns the following exchange during the direct examination of the victim by the prosecutor:

> Q. And did anything happen to wake you up that evening?
>
> A. Yes.
>
> Q. Could you tell us what happened to you, . . .?
>
> A. (No response.) . . .
>
> Q. That night when you went to sleep and something woke you up, who was in your room? Who was in your bedroom?
>
> [Objection overruled.]
>
> Q. You may answer that, ... When you woke up that night after going to sleep, who was in your room?
>
> [Objection overruled.]
>
> A. Tune.

[1] The defendant contends this question was improper in that it was leading and assumed facts not in evidence. We hold that the trial court did not abuse its discretion by allowing this question. The question was not leading. It was not susceptible to a "yes" or "no" answer, nor did it suggest that the child should identify the defendant as the person in her bedroom. *State v. Thompson*, 306 N.C. 526, 529, 294 S.E. 2d 314, 316-17 (1982); *see also State v. Young*, 291 N.C. 562, 570, 231 S.E. 2d 577, 582 (1977) (examiner may direct attention to the matter at hand without suggesting answers). Furthermore, the prosecutor was questioning a child concerning a "delicate" topic. *See State v. Higgenbottom*, 312 N.C. 760, 767, 324 S.E. 2d 834, 840 (1985); *State v. Stanley*, 310 N.C. 353, 312 S.E. 2d 482 (1984).

[2] The question, however, did assume facts not in evidence, since at that point in the trial there was no evidence that anyone had entered the victim's bedroom. The victim was the State's first witness, and she had only testified as to her age, residence, and other matters unrelated to the challenged evidence. Nonetheless, the question did not exceed the bounds of permissible direct examination, given the age of the witness and the subject matter

of her anticipated testimony. The trial court properly may depart from the regular order of presentation of evidence so as to make that presentation more effective for the ascertainment of the truth, and will be reversed only for abuse of discretion. *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977); N.C.G.S. § 8C-1, Rule 611(a) (1986). Given the age of the witness and the nature of the inquiry in this case, the trial court did not abuse its discretion. *See State v. Lewis*, 298 N.C. 771, 259 S.E. 2d 876 (1979); *State v. Lyles*, 298 N.C. 179, 257 S.E. 2d 410 (1979).

[3] Next, the defendant contends that the trial court should have sustained his objections to two leading questions posed during redirect examination of a Department of Social Services worker who was present during defense counsel's interview of the victim. The questions at issue are: "And so basically your testimony is that this appears to be an accurate transcript . . . of what was done?" and "You couldn't say for sure whether this . . . question was asked and this answer was given or not, could you?" Both these questions were leading in that they suggested the answer desired, and were susceptible of a "yes" or "no" response. However, the social worker had already given testimony of similar import without objection during the defendant's cross-examination of her. The defendant, therefore, was not prejudiced and has shown no abuse of the trial court's discretionary power to allow leading questions. *State v. Manuel*, 291 N.C. 705, 231 S.E. 2d 588 (1977); N.C.G.S. § 8C-1, Rule 611(c) (1986). The contention is without merit.

[4] The defendant further contends that the trial court erred by denying his motion to dismiss for insufficient evidence at the close of all of the evidence. We disagree. Taking the evidence in the light most favorable to it, the State introduced substantial evidence of each element of the crimes charged, and that the defendant was the perpetrator. *See* N.C.G.S. § 14-27.4(a) (1986) (first degree sexual offense); § 14-202.1 (1986) (indecent liberties with a child). No more was required to withstand the motion to dismiss. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

[5] The defendant also contends that the evidence was insufficient because the victim was unable to testify on her own, without leading questions, concerning the offenses charged. Be this as it may, the victim did testify to each element of the charged of-

fenses. She testified that her grandfather touched her with his finger between her legs and hurt her "inside." Even if the victim's testimony had been improperly admitted, that fact would not have entitled the defendant to have his motion to dismiss allowed. In reviewing the denial of such a motion to dismiss, we must consider all the evidence of record, both competent and incompetent. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984).

[6] Finally, the defendant assigns as error the trial court's failure to sustain his objection to the following portion of the prosecutor's closing argument:

> And then I brought in Officer Anton just to show you that it was the early morning hours of Thursday, the 31st, instead of what Miss Bryant was testifying under oath to. It has been demonstrated to you, ladies and gentlemen, from her own handwritten statement which conflicted from the trial testimony, from the changes she made in her own trial testimony from Direct Examination and then in Cross-Examination, the Laura Mae Bryant did not tell you the truth in this courtroom. And I contend to you that she would have come in here and placed her hand on the Bible and told you she had been to the moon and it was made of cheese, if she thought that it—
>
> MR. BYRD: Object. I'm sorry.
>
> MRS. BROWN: —could help her father.

The defendant asserts that this statement injected the prosecutor's personal opinion and belief into the closing argument and was both incompetent and prejudicial. *See State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983) (prosecutor's calling defendant "conman" and "disciple of Satan" improper when not supported by the evidence); *State v. Smith*, 279 N.C. 163, 181 S.E. 2d 458 (1971) (new trial awarded when prosecutor expressed opinion that defendant was "lower than the bone belly of a cur dog"). We find no merit in this assignment of error.

An attorney may attack the credibility of witnesses when a proper basis exists. *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974), *death sentence vacated*, 428 U.S. 902, 49 L.Ed. 2d 1205 (1976). Here the witness had made inconsistent statements both before and during trial. An example will suffice to illustrate the

point. The witness, the defendant's daughter and the victim's aunt, gave testimony directly contradicting that of the child concerning the events surrounding the charged offenses. She said that she had been present in the house at the time, a point which demonstrates the significance of her testimony as follows:

> Q. Is that what you told Detective Budd, that you were off every Wednesday?
>
> A. Thursday, it should have been Thursday.
>
> . . . .
>
> Q. Wednesdays and Thursdays are your days off?
>
> A. No, ma'am, Thursdays.
>
> Q. Thursdays are your days off? And did you work, if you can remember, October 30th on Wednesday?
>
> A. Yes, ma'am, I did.
>
> Q. Then you were off on Thursday?
>
> A. Yes, ma'am.
>
> . . . .
>
> Q. Now your testimony here today is that you're off every Thursday?
>
> A. Wednesday or Thursday. I thought Halloween was on a Wednesday.
>
> Q. Miss Bryant, didn't I ask you before I came up with this statement if you were off on Wednesday, and wasn't your answer, "No"?
>
> A. (Witness shakes head in the negative.)
>
> Q. So let me try and get it straight with you, Miss Bryant. Are you off on Wednesdays?
>
> A. Wednesday and Thursdays.
>
> Q. So you're off on Wednesdays?
>
> A. Yes, ma'am.

The inference the prosecutor invited the jury to draw was permissible, given the witness's inconsistent statements under

oath. From the foregoing testimony it could be inferred reasonably that the witness was uncertain whether Halloween, 31 October 1985, had fallen on a Wednesday or a Thursday. It also could be inferred reasonably that she was willing to testify that she had been at home on either day, if it would lend credence to her testimony that she was present at the time of the offenses for which her father was on trial.

Further, the prosecutor was not giving her personal opinion or belief. She clearly identified her argument as a contention, not a statement of fact, when she prefaced her statements with, "I contend to you . . . ."

The defendant has not shown error in this instance. Counsel is allowed wide latitude in argument of hotly contested issues. *State v. Harris*, 319 N.C. 383, 354 S.E. 2d 222 (1987). The trial court did not abuse its discretion by overruling the defendant's objection to the prosecutor's argument.

We hold that the defendant received a fair trial, free from prejudicial error.

No error.

HUGH JOSEPH BEARD, JR. v. THE NORTH CAROLINA STATE BAR

No. 94PA87

(Filed 7 July 1987)

1. **Constitutional Law § 10— constitutional challenge to Client Security Fund—may not be brought under Administrative Procedure Act—must be original action**

The Administrative Procedure Act was not the proper method of challenging the constitutionality of the Supreme Court order establishing the Client Security Fund. A direct challenge to the constitutionality of an order of the Supreme Court must be litigated as an original action in the General Court of Justice.

2. **Constitutional Law §§ 5, 6.1 and 10— Client Security Fund—no violation of separation of powers—not a tax**

The order of the North Carolina Supreme Court establishing the Client Security Fund did not violate Secs. 6 and 8 of Art. I of the Constitution of North Carolina, which provide for separation of powers and that the people of

the state shall not be taxed without the consent of the General Assembly, because the payments required of plaintiff attorney were not taxes but were funds required for the proper administration of justice, a matter within the Supreme Court's inherent authority.

ON appeal by plaintiff from the judgment of *Farmer, J.*, filed in Superior Court, WAKE County, on 25 August 1986. The North Carolina State Bar's petition for discretionary review prior to determination by the Court of Appeals was allowed 7 April 1987. Heard in the Supreme Court 11 May 1987.

Hugh Joseph Beard, Jr., in propria persona, plaintiff-appellant.

James E. Tucker and L. Thomas Lunsford, II for The North Carolina State Bar, defendant-appellee.

MARTIN, Justice.

Plaintiff challenges the constitutionality of the order of this Court, 29 August 1984, establishing the Client Security Fund and requiring each attorney admitted to practice in North Carolina to pay $50 each year into the fund. We hold the order to be constitutional and affirm the judgment of the superior court.

The facts are undisputed. On 13 April 1984 defendant petitioned the Supreme Court of North Carolina to approve the establishment of the Client Security Fund. Thereupon an order of the Court was issued on 29 August 1984 which required each attorney admitted to practice in North Carolina to pay $50 each year into the fund, beginning with the year 1985. Plaintiff refused to make any payments pursuant to the Court order. For failing to make the 1985 payments, plaintiff's license to practice law in North Carolina was suspended by The North Carolina State Bar on 2 November 1985. Plaintiff does not challenge the validity of the structure and procedures of the fund.

Plaintiff's challenge is to the constitutionality of the Court's order requiring the annual payments. As plaintiff argues, if the order is valid, then the suspension of his license was lawful; otherwise, not.

I.

[1] Plaintiff first argues that the trial court erred in concluding that the Administrative Procedure Act, Chapter 150A of the General Statutes of North Carolina, was not a proper method of challenging the constitutionality of an order of the Supreme Court. We affirm the ruling of the trial court. The Administrative Procedure Act is for the review of *agency* action. Here, plaintiff does not challenge the acts of The North Carolina State Bar but directs his attack to the action of this Court in issuing the order in question. A direct challenge of the constitutionality of an order of this Court cannot be adjudicated under the Administrative Procedure Act. The issue must be litigated as an original action in the General Court of Justice. *See Jernigan v. State*, 279 N.C. 556, 184 S.E. 2d 259 (1971); *Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. 168, 118 S.E. 2d 792 (1961).

II.

[2] Plaintiff bases his challenge to the order requiring payments to the Client Security Fund solely on state constitutional grounds. No federal constitutional questions are at issue. Therefore, our decision on this appeal is based solely upon adequate and independent state grounds. *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed. 2d 1201 (1983).

Plaintiff relies upon sections 6 and 8 of article I of the Constitution of North Carolina, the Declaration of Rights. Section 6 reads:

> The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

Section 8 reads:

> The people of this State shall not be taxed or made subject to the payment of any impost or duty without the consent of themselves or their representatives in the General Assembly, freely given.

Simply put, plaintiff contends the payment is unconstitutional because under either provision only the General Assembly can impose such an obligation upon lawyers. We find no violation of either constitutional provision.

We recognize that our state constitution limits the plenary powers already existing in the government. *Lassiter v. Board of Elections*, 248 N.C. 102, 102 S.E. 2d 853 (1958), *aff'd*, 360 U.S. 45, 3 L.Ed. 2d 1072 (1959). *See generally State v. Lewis*, 142 N.C. 626, 55 S.E. 600 (1906); 16 Am. Jur. 2d *Constitutional Law* § 58 (1979). Except as expressly limited by the constitution, the inherent power of the judicial branch of government continues.

The inherent power of the Court has not been limited by our constitution. To the contrary, the constitution protects such power. The General Assembly has no authority to deprive the judicial department "of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government . . . ." N.C. Const. art. IV, § 1. *See generally* 20 Am. Jur. 2d *Courts* §§ 78, 79 (1965). This Court has recognized the inherent power of the courts in many cases and circumstances, *e.g.*, *Gardner v. N.C. State Bar*, 316 N.C. 285, 341 S.E. 2d 517 (1986); *In re Superior Court Order*, 315 N.C. 378, 338 S.E. 2d 307 (1986); *State v. Davis*, 270 N.C. 1, 153 S.E. 2d 749, *cert. denied*, 389 U.S. 828, 19 L.Ed. 2d 84 (1967); *In re Burton*, 257 N.C. 534, 126 S.E. 2d 581 (1962); *State v. Cannon*, 244 N.C. 399, 94 S.E. 2d 339 (1956). *See also Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279 (1978), *cert. denied, appeal dismissed*, 296 N.C. 740, 254 S.E. 2d 182 (1979); *In re Bonding Co.*, 16 N.C. App. 272, 192 S.E. 2d 33, *cert. denied, appeal dismissed*, 282 N.C. 426, 192 S.E. 2d 837 (1972). Our courts have repeatedly made reference to and affirmed the existence and exercise of inherent judicial power. The existence of inherent judicial power is not dependent upon legislative action; however, we note that the General Assembly has recognized the existence of the inherent power of the court and that the General Assembly cannot abridge that power. N.C.G.S. § 84-36 (1985).

Inherent power is that which the court necessarily possesses irrespective of constitutional provisions. Such power may not be abridged by the legislature. Inherent power is essential to the existence of the court and the orderly and efficient exercise of the administration of justice. Through its inherent power the court has authority to do all things that are reasonably necessary for the proper administration of justice. *See* 20 Am. Jur. 2d *Courts* §§ 78, 79 (and cases above cited).

We now turn to the issue of whether this Court's inherent power includes the authority to issue the order in question. We

hold that it does. This Court has the inherent power to deal with its attorneys. *Gardner v. N.C. State Bar*, 316 N.C. 285, 341 S.E. 2d 517. As stated in *In re Burton*:

> "The power is based upon the relationship of the attorney to the court and the authority which the court has over its own officers to prevent them from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice."

257 N.C. at 542-43, 126 S.E. 2d at 587-88 (quoting 5 Am. Jur. *Attorneys at Law* § 143 (1936)).

The order by this Court requiring annual payments by attorneys to the Client Security Fund is an essential corollary to this function of the Court. This Court found in the order under consideration that attorneys by misuse of clients' property were bringing public disrespect upon the legal profession, the courts, and the administration of justice. It was necessary to establish the Client Security Fund to better protect the public and to promote public confidence in the courts and the administration of justice.

In ordering the assessment from attorneys for the support of the Client Security Fund, the Court was not imposing a tax, which is a legislative function. Rather, it was an act, found necessary by the Court, in aid of its own responsibility to see to the proper administration of justice. It is essential that the public have confidence in our system of justice in order for it to be effective. The public needed to know that it could safely entrust its property to members of the bar. Maintenance of the Client Security Fund through the assessment of attorneys was a major step in restoring that lost confidence.

The Court has the inherent authority to do what is reasonably necessary to effectuate its constitutional duty: the administration of justice. This Court has already manifested that inherent power. *In re Superior Court Order*, 315 N.C. 378, 338 S.E. 2d 307 (requiring banks to disclose to district attorney bank records of customer); *State v. Davis*, 270 N.C. 1, 153 S.E. 2d 749 (inherent power to appoint counsel for indigents). The order of this Court establishing the Client Security Fund was reasonably necessary to carry out the Court's constitutional duty to effectively administer justice.

We find three cases from our sister states to be persuasive on this appeal. *In re Member of Bar*, 257 A. 2d 382 (Del. 1969), *appeal dismissed*, 396 U.S. 274, 24 L.Ed. 2d 464 (1970), is on all fours with the case at bar. The Delaware Supreme Court by rule of court established a client security fund and required attorneys to contribute to it. Respondent failed to make the required payments and appropriate disciplinary action was recommended. On appeal, the Delaware court was faced with the same issues arising here. That court held that the court rule was constitutional, not being a tax and being promulgated under the inherent power of the court to establish, control, and sustain the standards of the bar.

A three-judge panel of the United States District Court of Massachusetts upheld a similar attack on rules by the Supreme Judicial Court of Massachusetts establishing a client security fund. Although this case involved the Federal Constitution, the panel relied entirely upon *In re Member of Bar*. The panel dismissed the complaint for the reasons stated in the Delaware case. *Hagopian v. Justices of Supreme Judicial Court*, 429 F. Supp. 367 (D. Mass.), *aff'd*, 434 U.S. 802, 54 L.Ed. 2d 63 (1977).

The Supreme Court of Maine upheld an assessment imposed on lawyers to support the regulation of the bar by the court. Although a client security fund was not involved, like issues were determined, the Maine court holding that the rule of court did not violate the state constitution. In determining that the assessment was not a tax, the court looked to the purpose of the payment, not its effect on the lawyers, and held that the court's duty to regulate the practice of law carried with it the inherent power to impose the charge against attorneys to fund such regulation. *Board of Overseers of Bar v. Lee*, 422 A. 2d 998 (Me. 1980), *appeal dismissed*, 450 U.S. 1036, 68 L.Ed. 2d 233 (1981).

We find the decisions of all three courts to be persuasive authority, and we adopt the reasoning of the Delaware court in *In re Member of Bar*, which is equally applicable to the instant case. *See also Petition of Florida State Bar Ass'n*, 40 So. 2d 902 (Fla. 1949); *Matter of Mississippi State Bar*, 361 So. 2d 503 (Miss. 1978); *Bennett v. Oregon State Bar*, 256 Or. 37, 470 P. 2d 945 (1970).

Thus we conclude that the payments required of plaintiff were not taxes but were funds required for the proper ad-

ministration of justice. They were not for revenue, but regulation. They were not levied generally, but only on a specific group involved with the administration of justice as officers of the court. Nor were the payments a general levy to support a public service. *See Lathrop v. Donohue*, 367 U.S. 820, 881, 6 L.Ed. 2d 1191, 1227 (Douglas, J., dissenting), *reh'g denied*, 368 U.S. 871, 7 L.Ed. 2d 72 (1961).

An attorney, as an officer of the court, accepts his office *cum onere*, subject to the burdens of the profession both in respect to the attorney's time and his purse. The order of this Court lawfully imposed such a burden upon the bar.

We hold the order of this Court of 29 August 1984 does not violate the Constitution of North Carolina. The judgment of the superior court is

Affirmed.

AUSTIN BRADSHAW v. ADMINISTRATIVE OFFICE OF THE COURTS AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 699PA86

(Filed 7 July 1987)

Master and Servant § 101— unemployment compensation—ineligibility of magistrate

A magistrate is a "member of the judiciary" within the meaning of N.C.G.S. § 96-8(6)i so as to be excluded from unemployment insurance benefits since constitutional and statutory provisions make magistrates officers of the District Court, and magistrates perform certain judicial functions. Art. IV, §§ 2 and 20 of the N.C. Constitution; N.C.G.S. § 7A-170.

Justice WHICHARD dissenting.

Justice MEYER joins in this dissenting opinion.

ON discretionary review of a decision of the Court of Appeals, 83 N.C. App. 237, 349 S.E. 2d 621 (1986), which found no error in the judgment entered by *Snepp, J.*, on 4 February 1986 in Superior Court, LINCOLN County. Presented before the Supreme Court on 9 June 1987 for decision upon written brief without oral

arguments according to Rule 30(d) of the North Carolina Rules of Appellate Procedure.

Douglas Johnston for respondent appellant Administrative Office of the Courts.

C. Coleman Billingsley, Jr. for respondent appellant Employment Security Commission of North Carolina.

No counsel contra.

MITCHELL, Justice.

The only issue before us is whether a magistrate is a "member of the judiciary" within the meaning of N.C.G.S. § 96-8(6)i so as to be excluded from benefits under the North Carolina Employment Security Law. We hold that a magistrate is a member of the judiciary for such purpose and, accordingly, reverse the decision of the Court of Appeals. We emphasize that we are not called upon to decide, and do not decide, the status of magistrates for any other purpose.

The claimant, Austin Bradshaw, served as a magistrate in Lincoln County for a period of twelve years, which ended on 31 December 1984. At that time, he was not reappointed to another term. He then filed a claim for unemployment benefits, but his claim was denied. He filed a protest to that determination.

After an evidentiary hearing was held on the matter, a Special Deputy Commissioner of the Employment Security Commission held that the claimant was an exempt employee within the meaning of the Employment Security Law and was therefore not eligible to receive unemployment benefits. The claimant appealed the decision to the Chief Deputy Commissioner, who issued an order upholding the ruling. The claimant then appealed to the Superior Court.

On 4 February 1986, the Superior Court issued an order reversing the decision of the Employment Security Commission. The Court of Appeals found "no error" in the Superior Court's order.

The respondents argue that the Court of Appeals erred, and that magistrates are members of the judiciary who are therefore not entitled to unemployment benefits. Chapter 96 of the General

Statutes, entitled the "Employment Security Law," provides unemployment insurance benefits for the protection of workers from the effects of involuntary unemployment. N.C.G.S. § 96-8(6)i exempts from the term "employment"—and thereby excludes from unemployment insurance benefits—"members of the judiciary." That statute provides, in pertinent part, as follows:

> On and after January 1, 1978, the term "employment" includes service performed for any State and local governmental employing unit. Provided, however, that employment shall not include service performed (a) as an elected official; (b) as a member of a legislative body or a *member of the judiciary*, of a State or political subdivision thereof . . . .

N.C.G.S. § 96-8(6)i (1985) (emphasis added). We conclude that this section does include magistrates as members of the judiciary. As a result it excludes them from unemployment insurance benefits.

Article IV, section 2 of the Constitution of North Carolina provides the following:

> The General Court of Justice shall constitute a unified judicial system for purposes of jurisdiction, operation, and administration, and shall consist of an Appellate Division, a Superior Court Division, and a District Court Division.

Further, article IV, section 10 specifically provides that "[m]agistrates . . . shall be officers of the District Court." Likewise, N.C.G.S. § 7A-170 provides that a magistrate is an officer of the district court. Because magistrates are officers of the District Court which is one part of a "unified judicial system," magistrates are judicial officers.

This Court, as well as the Supreme Court of the United States has recognized that magistrates perform certain functions that may be performed only by independent judicial officers. *E.g.*, *North v. Russell*, 427 U.S. 328, 49 L.Ed. 2d 534 (1976); *State v. Matthews*, 270 N.C. 35, 153 S.E. 2d 791 (1967). Our legislature has prescribed by statute many of the functions performed by magistrates, most of which require such independent judgment by a judicial officer. *See* N.C.G.S. §§ 7A-211, 7A-211.1, 7A-273, 7A-292. For example, any magistrate has the power to issue arrest warrants valid throughout the State. N.C.G.S. § 7A-273(3). This Court has held that "[t]he issuance of a warrant of arrest is a judicial

act." *State v. Matthews*, 270 N.C. at 39, 153 S.E. 2d at 795 (quoting *State v. McGowan*, 243 N.C. 431, 90 S.E. 2d 703 (1956)). Further, "[t]hat the exercise of judicial power is prerequisite to the issuance of a valid warrant is emphasized in decisions of the Supreme Court of the United States interpreting the Fourth Amendment to the Constitution of the United States." *State v. Matthews*, 270 N.C. at 39, 153 S.E. 2d at 795.

The Court of Appeals in this case concluded that the employment status of magistrates more closely resembles that of other state employees than judges, citing the fact that magistrates are appointed. We disagree with this reasoning. We note, for instance, that in some circumstances judges may be appointed. Article IV, section 9 of the Constitution of North Carolina allows the General Assembly to provide by general law for the selection or appointment of special or emergency Superior Court judges.

The Court of Appeals further stated that because the underlying purpose of the North Carolina Employment Security Law is protection from involuntary unemployment, strict construction is mandated of those sections which impose disqualification for its benefits. We find, however, that it is not necessary to apply such rules of statutory construction in the present case, because the language of N.C.G.S. § 96-8(6)i is not ambiguous or vague.

We hold that the Constitution of North Carolina, our statutes and our case law, by referring to magistrates as officers of the court and bestowing upon them judicial powers, clearly contemplate their performance as members of the judiciary within the meaning of our Employment Security Law.

For the foregoing reasons, the decision of the Court of Appeals is reversed.

Reversed.

Justice WHICHARD dissenting.

The majority hinges its interpretation of the phrase "members of the judiciary," as used in N.C.G.S. § 96-8(6)i (1985), on the facts that: (1) constitutional and statutory provisions[1] make

1. N.C. Const. Art. IV, sec. 10; N.C.G.S. § 7A-170 (1986).

magistrates officers of the district court, and (2) magistrates perform certain judicial or quasi-judicial functions. I find these facts neither dispositive nor persuasive.

As to (1), every attorney is "a sworn officer of the Court." *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E. 2d 303, 306 (1965) (quoting *Baker v. Varser*, 240 N.C. 260, 267, 82 S.E. 2d 90, 95 (1954)). The majority would hardly conclude that all attorneys are therefore "members of the judiciary" within the meaning and intent of N.C.G.S. § 96-8(6)i.

As to (2), as stated by Judge Orr in the opinion for the Court of Appeals: "Despite any similarity in function between judges and magistrates, the employment status of magistrates more closely resembles that of other state employees than [that of] judges." *Bradshaw v. Administrative Office of the Courts*, 83 N.C. App. 237, 239, 349 S.E. 2d 621, 622 (1986).

The statement in the majority opinion that "the language of N.C.G.S. § 96-8(6)i is not ambiguous or vague" is patently ridiculous. Eleven people who without question are members of the judiciary have now passed upon the phrase at issue. Six—one judge of the superior court, three judges of the Court of Appeals, and two justices of this Court—would hold that magistrates are not "members of the judiciary" within the meaning and intent of N.C.G.S. § 96-8(6)i; five—all justices of this Court—would hold that they are. Clearer evidence of the ambiguity or vagueness of the language used is difficult to imagine.

Because the language is ambiguous or vague, it should be construed so as to effectuate the intent of the legislature, which controls the interpretation of a statute. *Quick v. Insurance Co.*, 287 N.C. 47, 56, 213 S.E. 2d 563, 569 (1975). A construction which will defeat or impair the object of a statute must be avoided if that can reasonably be done without violence to the legislative language. *In re Hardy*, 294 N.C. 90, 96, 240 S.E. 2d 367, 372 (1978).

The object of the Employment Security Law is to protect the citizens of North Carolina from "[e]conomic insecurity due to unemployment." N.C.G.S. § 96-2 (1985). To effectuate that object, "sections of the act imposing disqualifications for its benefits should be strictly construed in favor of the claimant . . . ." *In re Watson*, 273 N.C. 629, 639, 161 S.E. 2d 1, 10 (1968).

If the disqualification section in question is strictly construed in favor of the claimant, an award of benefits is mandated. I further believe an award to this claimant accords with the intent of the legislature and the object of the statute. Magistrates need only have a high school education or its equivalent. N.C.G.S. § 7A-171.2 (1986). They thus are subject to "[e]conomic insecurity due to unemployment," N.C.G.S. § 96-2 (1985), to the same extent as others who lack more advanced or specialized education or training. By contrast, those who are indisputably "members of the judiciary"—*i.e.*, justices of the Supreme Court, judges of the Court of Appeals, and judges of the superior and district courts—with rare exceptions have been, and now must be,[2] licensed attorneys. They thus have a learned profession to revert to for a livelihood upon leaving office and therefore are considerably less likely to experience "[e]conomic insecurity due to unemployment." Magistrates thus would appear to be within the class the act was intended to protect, while justices of the Supreme Court, judges of the Court of Appeals, and judges of the superior and district courts would not.

By declaring the phrase "members of the judiciary" to be unambiguous, which—in the context presented—it patently is not, the majority avoids the requirement of strict construction of disqualifications in favor of the claimant. In doing so it defeats legislative intent and frustrates the express purpose of the act. I therefore respectfully dissent and vote to affirm the Court of Appeals.

Justice MEYER joins in this dissenting opinion.

2. N.C. Const. Art. IV, sec. 22.

STATE OF NORTH CAROLINA v. RANDY JOE PAYNE

No. 66A85

(Filed 7 July 1987)

Constitutional Law § 66— admonishment to jury—in jury room out of presence of defendant, court reporter, and counsel—error

The defendant was entitled to a new trial in a prosecution for first degree murder and first degree rape where, at the conclusion of jury selection, the trial court told the court reporter, "You may show that I am going to give the jury a break and that I am going to administer my admonitions to them in the jury room." As there was no indication in the record to the contrary, it is assumed that the trial court actually took the steps indicated and, because the defendant, counsel, and the court reporter were absent during the ensuing admonitions, the State could not meet its burden of showing that the trial court's error was harmless beyond a reasonable doubt.

Justice MEYER dissenting.

APPEAL by the defendant from judgment entered by *Lewis (John B.), J.*, at the 14 January 1985 Special Criminal Session of Superior Court, DAVIDSON County. The defendant was indicted for first degree murder and first degree rape; the cases were consolidated for trial. The jury convicted him of each offense as charged. He was sentenced to death for the first degree murder and to life imprisonment for the first degree rape. The defendant appealed the convictions and sentences to the Supreme Court as a matter of right. Heard in the Supreme Court 14 May 1987.

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

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

Randy Joe Payne, pro se as to additional issues.

MITCHELL, Justice.

The defendant contends, *inter alia*, that the trial court committed reversible error by communicating with the jurors out of open court and in the absence of the defendant, counsel, or a court reporter. We agree and hold that the defendant is entitled to a new trial. Because the defendant's other assignments of error

are not likely to arise upon retrial, we do not reach or discuss them.

A complete review of the evidence is not necessary to an understanding of the legal issues involved in this case. Briefly, the State's evidence tended to show that the victim was killed with a hatchet and had been penetrated vaginally shortly before death. A man was seen running from the victim's house into a nearby barn. Police arrived and found the defendant in the barn's loft.

At the conclusion of jury selection, the trial court told the court reporter:

> THE COURT: You may show that I am giving the jury a break and that I am going to administer my admonitions to them in the jury room.

As there is no indication of record to the contrary, we must assume that the trial court caused the record to speak the complete truth in this regard, and that the trial court actually took the steps indicated.

Article I, section 23 of the Constitution of North Carolina provides: "In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony . . . ." The sixth amendment to the Constitution of the United States gives an accused the same protection. *Pointer v. Texas*, 380 U.S. 400, 13 L.Ed. 2d 923 (1965). This protection guarantees an accused the right to be present in person at every stage of his trial. *State v. Moore*, 275 N.C. 198, 208, 166 S.E. 2d 652, 659 (1969). "[I]t is well established in this State that an accused cannot waive his right to be present at every stage of his trial upon an indictment charging him with a capital felony . . . ." *Id.* In capital cases such as the present case, "it is the duty of the court to see that he is actually present at each and every step taken in the progress of the trial." *State v. Jenkins*, 84 N.C. 813, 814 (1881). Furthermore, the trial court's admonitions to the jury came at a critical stage in the present case, because the defendant's presence at that time could have had a reasonably substantial relation to his ability to present a full defense. *See Snyder v. Massachusetts*, 291 U.S. 97, 105-106, 78 L.Ed. 674, 678 (1934).

"Every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of the particular case, . . . where the appellate court can declare a belief that it was harmless beyond a reasonable doubt." *State v. Taylor*, 280 N.C. 273, 280, 185 S.E. 2d 677, 682 (1971). *See* N.C.G.S. § 15A-1443(b) (1983). The State cannot meet its burden of showing that the trial court's error was harmless beyond a reasonable doubt in the present case, however, because the defendant, counsel, and the court reporter all were absent during the ensuing admonitions. *See Graves v. State*, 377 So. 2d 1129 (Ala. Crim. App. 1979) (new trial ordered under similar circumstances); *People v. Heard*, 388 Mich. 182, 200 N.W. 2d 73 (1972) (same); *State v. Murphy*, 17 N.D. 48, 115 N.W. 84 (1908) (same); *State v. Mims*, 306 Minn. 159, 235 N.W. 2d 381 (1975) (same); *Graham v. State*, 73 Okla. Crim. 337, 121 P. 2d 308 (1942) (same); *State v. Elmore*, 279 S.C. 417, 308 S.E. 2d 781 (1983) (same); *State v. Wroth*, 15 Wash. 621, 47 P. 106 (1896) (same). *Cf., State v. Moya*, 138 Ariz. 12, 672 P. 2d 964 (1983) (conviction affirmed where court reporter present in similar situation); *Smith v. Commonwealth*, 321 S.W. 2d 786 (Ky. 1959) (conviction affirmed where counsel for both parties were present). Therefore, the defendant is entitled to a new trial. *See State v. Bailey*, 307 N.C. 110, 296 S.E. 2d 287 (1982) (prejudicial error found in non-capital case where sheriff, a prosecution witness, had apparently innocent *ex parte* contact with jurors); *State v. Mettrick*, 305 N.C. 383, 289 S.E. 2d 354 (1982) (prejudice conclusively presumed in non-capital case where sheriff and deputy, key prosecution witnesses, had apparently innocent *ex parte* contact with jurors).

We do not doubt that the action of the trial court was taken in good faith and resulted from its concern for the efficient conduct of the trial and for the comfort of the jurors who faced a long and arduous task in this capital case. Nevertheless, we must hold that the trial court's *ex parte* admonitions to the jury amounted to error requiring a new trial of the defendant for these charges.

New trial.

Justice MEYER dissenting.

The defendant was convicted of first-degree murder and of rape and received the death sentence for the murder and a life sentence for the rape. The record reflects that the murder was brutal and that the evidence against the defendant was overwhelming. Unlike the majority, I am unwilling to overturn defendant's convictions by "assuming" that the trial judge had an *ex parte* communication with the jury for the purpose of admonishing them. Not only does the majority assume that the admonitions actually took place, but that the defendant, counsel, and court reporter were not present.

The record in this case does not affirmatively show that the trial judge administered an admonition to the jury *ex parte* or, if he did so, who was present. The majority "assumes" that he did so because he stated his intention to do so and because "there is no indication of record to the contrary." At this stage, no one is able to say what actually happened or who was present. Trial judges often have second thoughts on such matters and catch such possible mistakes before they actually commit them. In this instance, the majority should act upon what the record shows, not what it fails to show. Rather than acting on assumptions, this Court should remand this case to the trial division to establish a record of precisely what transpired, as we have done in a legion of similar cases. It is unfair to the trial judge to fail to do so.

Even if a remand for findings should confirm that the trial judge actually admonished the jury *ex parte*, in an innocuous way, not to discuss the matter during the break in the trial, such error is not reversible error per se, but is subject to a harmless error analysis. The majority recognizes as much but makes the incredible statement that "[t]he State cannot meet its burden of showing that the trial court's error was harmless beyond a reasonable doubt in the present case, however, because the defendant, counsel, and the court reporter all were absent during the admonitions."

In virtually every case of an *ex parte* communication with jurors, whether by a judge, bailiff, witness, or anyone else, the court has been able to establish what actually occurred by remanding the case for a hearing and the taking of testimony of the trial judge, the jurors, and others involved and having the results

of the hearing certified to this Court. I believe that even if the admonitions were given here *ex parte*, the chances of the State proving harmless error are substantial.

Several times during the course of the jury selection process, the trial judge gave admonitions to the jury in the presence of defendant and counsel not to discuss the case with anyone nor to allow anyone to discuss it with them or in their presence, not to attempt to gather evidence on their own, not to pay any attention to any media reports, and not to form an opinion until they had heard all the evidence and arguments of counsel and the court's instructions on the law. Following the initial acceptance of the jury and the last of three alternatives by defendant, the trial court again gave these admonitions to the jury. The trial court then recessed the jury for the day, further advising the jurors to return the following morning at 10:00 a.m., at which time they would be given further instructions and be impaneled.

The following morning, the jurors were again briefly admonished by the trial court in the presence of defendant not to discuss the case with anyone; not to allow anyone to discuss it with them; not to pay any attention to any media report, if there should be any; and not to form an opinion until they had heard all the evidence, arguments of counsel, and the court's instructions on the law. Immediately following the court's admonitions to the jury, a recess was taken, during which a further voir dire was made as to one of the jurors concerning his having discovered that his wife was distantly related to the victim, Mrs. Weaver. Defendant was present during this voir dire and was consulted by counsel concerning his right not to have to accept the juror.

Following the voir dire and a reaffirmation of defendant's acceptance of this juror, the district attorney requested a ten-minute recess, upon which the court advised that it would be at rest for ten minutes. The court further stated:

> You may show that I am giving the jury a break and that I am going to administer my admonitions to them in the jury room.

Upon conclusion of the break, the jury was returned to the courtroom and impaneled. Immediately following their being impaneled, the jurors were fully instructed and admonished by the

trial court in the presence of defendant as to their duties and responsibilities.

In *Rushen v. Spain*, 464 U.S. 114, 78 L.Ed. 2d 267 (1984), the United States Supreme Court, in a *per curiam* decision, affirmed the California State Supreme Court's decision finding harmless error *ex parte* communications between the trial judge and a juror where the communications were innocuous, did not discuss any fact and controversy or any law applicable to the case, and where the jurors' deliberation could not have been biased by the communication. It is not my position that *ex parte* communications are never of serious concern or that they may never constitute error. But, where, as in the instant case, such communication by the trial judge is innocuous and it does not involve the discussion of any fact or controversy or any law applicable to the case, and where the jurors could not have been biased by the communication, such communication constitutes harmless error.

Should findings, supported by convincing evidence, and conclusions on remand reflect a completely innocuous admonition not prejudicial to defendant, harmless error will have been demonstrated and this Court could then proceed to examine the defendant's other assignments of error and arguments on this appeal. I vote to remand the case for a hearing and findings and conclusions as to this assignment of error.

STATE OF NORTH CAROLINA v. EVELYN McLAURIN

No. 249PA86

(Filed 7 July 1987)

Narcotics § 4.4— constructive possession of drug paraphernalia—insufficient evidence

The State's evidence was insufficient to permit the jury to find that defendant had constructive possession of drug paraphernalia where it showed that defendant's control over the premises in which the paraphernalia were found was nonexclusive, and where there was no evidence of other incriminating circumstances linking defendant to those items.

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

ON discretionary review of an unpublished opinion of the Court of Appeals finding no error in the trial before *Farmer, J.*, at the 13 March 1985 Criminal Session of Superior Court, CUMBERLAND County. Heard in the Supreme Court 11 May 1987.

Lacy H. Thornburg, Attorney General, by Augusta B. Turner, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Geoffrey G. Mangum, Assistant Appellate Defender, for defendant-appellant.

WHICHARD, Justice.

Defendant was tried for conspiracy to traffic in heroin, possession of cocaine, and possession of drug paraphernalia. The trial court dismissed the conspiracy charge at the close of the State's evidence. The jury acquitted defendant on the possession of cocaine charge but found her guilty of possession of drug paraphernalia. The Court of Appeals, in an unpublished opinion, found no error. We reverse for insufficiency of the evidence.

As part of an undercover investigation, agents from the State Bureau of Investigation were posted to watch a house at 106 Starhill Avenue in Fayetteville on 19 January 1984. At defendant's trial, a police officer testified that the agents had seen two men, Edward McLaurin and Horace King, enter and leave the house. These two men were later arrested for their roles in illegal drug transactions exposed by the investigation.

Pursuant to a search warrant, officers combed the Starhill Avenue house the evening of 19 January 1984. In the kitchen the officers found a set of Deering scales, which one officer testified are "often found and associated with measuring drugs for sale." The scales, a brown vial found in the pocket of a man's overcoat hanging in a closet near the living room, and a plastic baggie found on a bar between the living and dining rooms all bore traces of a white powder later tested and determined to be cocaine residue. A box containing a spoon, eighteen small tinfoil squares, and a plastic bag were found in a drawer full of children's clothing in a bedroom apparently occupied by children. The officer testified that he was familiar with the use of tinfoil squares to package cocaine or, more typically, heroin.

In a crawl space beneath the house, officers found three marked one hundred dollar bills from the undercover drug transaction that had occurred earlier in the day, and, in the bushes behind the house, they found a bar of mannitol, which one officer testified is sometimes used as a cutting agent in the manufacture of heroin.

In addition to the drug paraphernalia, the officers seized photographs of defendant and Edward McLaurin. The officers also seized a notice of reduction in payments of aid to dependent children and a Medicaid identification card bearing the name of "Evelyn McNeill." Upon her arrest, defendant gave her name as "Evelyn McNeill McLaurin" and her address as 106 Starhill Avenue.

Defendant presented no evidence at trial. She moved for dismissal at the close of the State's evidence. As indicated above, the trial court granted defendant's motion only as to the charge of conspiracy to traffic in heroin, and defendant was acquitted of a charge of possession of cocaine. She was convicted of misdemeanor possession of drug paraphernalia and sentenced to two years imprisonment.

The Court of Appeals held that the trial court had properly denied defendant's motion to dismiss the charge of possessing drug paraphernalia, since the evidence was sufficient for the jury to find that defendant had constructive possession of the seized paraphernalia. It also held that guns seized pursuant to the same warrant were properly admitted because they were relevant to the dismissed charge of conspiracy to traffic in heroin. We reverse as to the sufficiency of the evidence supporting the charge of possession of drug paraphernalia; we thus need not reach the question of whether the guns were properly admitted.

Defendant was convicted of violating N.C.G.S. § 90-113.22, which provides, in pertinent part:

> (a) It is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia to . . . manufacture, compound, convert, produce, process, prepare, test, analyze, package, repackage, store, contain, or conceal a controlled substance which it would be unlawful to possess.

N.C.G.S. § 90-113.22 (1985). A person has actual possession when she has "both the power and the intent to control . . . disposition or use." *State v. Baxter*, 285 N.C. 735, 738, 208 S.E. 2d 696, 698 (1974); *State v. Harvey*, 281 N.C. 1, 12, 187 S.E. 2d 706, 714 (1972). This Court has recognized numerous times that constructive possession is sufficient for purposes of the statute: "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey*, 281 N.C. at 12, 187 S.E. 2d at 714. *See, e.g., State v. Williams*, 307 N.C. 452, 455, 298 S.E. 2d 372, 375 (1983). It is not necessary to show that an accused has exclusive control of the premises where paraphernalia are found, but "where possession . . . is nonexclusive, constructive possession . . . may not be inferred without other incriminating circumstances." *State v. Brown*, 310 N.C. 563, 569, 313 S.E. 2d 585, 589 (1984). *Cf. State v. Spencer*, 281 N.C. 121, 130, 187 S.E. 2d 779, 784 (1972) (close physical proximity of defendant to marijuana sufficient for jury to conclude it was in defendant's possession).

The Court of Appeals correctly noted ample evidence that defendant resided at 106 Starhill Avenue and that she was in control of the premises. That control, however, was patently nonexclusive: Edward McLaurin and Horace King had both been observed entering and leaving the day of the search, there was no evidence that defendant was so observed, and the presence of children's and adult male clothes in closets and bureaus indicated that defendant did not reside there alone. No other incriminating circumstances were cited by the Court of Appeals and none are apparent in the record that might suffice to carry the case to the jury on the charge of unlawful possession.

In determining whether to grant a defendant's motion to dismiss, the trial court must consider all the evidence admitted in the light most favorable to the State and decide whether there is substantial evidence of each element of the offense charged and that the defendant committed it. *State v. LeDuc*, 306 N.C. 62, 74-75, 291 S.E. 2d 607, 615 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. at 566, 313 S.E. 2d at 587. "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 for nonsuit should be allowed. . . . This is true even though the suspicion so aroused by the evidence is strong.' " *State v. LeDuc*, 306 N.C. at 75, 291 S.E. 2d at 615, quoting *In re Vinson*, 298 N.C. 640, 656-57, 260 S.E. 2d 591, 602 (1979).

We conclude that because defendant's control over the premises in which the paraphernalia were found was nonexclusive, and because there was no evidence of other incriminating circumstances linking her to those items, her control was insufficiently substantial to support a conclusion of her possession of the seized paraphernalia. Accordingly, we hold that it was error not to grant defendant's motion to dismiss at the close of the State's evidence. The decision of the Court of Appeals holding otherwise is therefore

Reversed.

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

STATE OF NORTH CAROLINA v. SHIRLEY JACK GOODWIN

No. 274A86

(Filed 7 July 1987)

Criminal Law § 53; Rape and Allied Offenses § 4— post traumatic stress disorder —witness improperly qualified as expert

The trial court erred in a prosecution for first degree sexual offense, indecent liberties, and attempted rape by admitting expert testimony that the alleged victim was suffering from post traumatic stress disorder where the questions posed and the answers given in qualifying the witness as an expert in the field of clinical social work failed to establish that the witness had any particularized training or experience relating to post traumatic stress disorder; the witness may have received his graduate degrees as much as ten years prior to medical recognition of this disorder and, given the relative newness of recognition of this disorder, the court could not assume that the witness received training in it during his graduate studies; and the prosecutor failed to inquire as to whether the witness had received any postgraduate education on the disorder or had actual experience in identifying and counselling regarding it. N.C.G.S. § 8C-1, Rule 702.

State v. Goodwin

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by *Tillery, J.*, at the 20 January 1986 Mixed Session of Superior Court, DARE County. Heard in the Supreme Court 13 May 1987.

Lacy H. Thornburg, Attorney General, by Sylvia Thibaut, Assistant Attorney General, for the State.

Russell E. Twiford; Cheshire, Parker & Hughes, by Joseph B. Cheshire V, and Gordon Widenhouse, for defendant-appellant.

WHICHARD, Justice.

The sole issue we must decide is whether the trial court erred in allowing expert testimony that the alleged victim was suffering from post traumatic stress disorder. Because the foundation to qualify the witness to offer this testimony was insufficient, we hold that it was error to allow it and accordingly award a new trial.

Defendant was tried and convicted of two counts of first degree sexual offense, two counts of taking indecent liberties, and attempted rape. He was sentenced to life imprisonment for the first degree sexual offenses, six years imprisonment on the indecent liberties convictions, and three years imprisonment on the attempted rape conviction. The court ordered all sentences served concurrently.

Evidence at trial showed that defendant, a fifty-nine year old naval architect, invited his girlfriend and her two children to his cottage at Kill Devil Hills. The girlfriend's daughter asked another child to accompany them to the beach. According to the invited child (the victim here), while defendant's girlfriend was at the store, defendant took the two girls into a bedroom and showed them "dirty magazines" and two vibrators. He also had them touch his private parts. Later that evening defendant came into their bedroom with no clothes on and put his mouth on their private parts. He also placed a vibrator on the children's private parts, placed his penis on their private parts, and had both put their mouths on his privates. The pediatrician who examined the prosecutrix testified that he found no evidence of sexual abuse or physical trauma to her female organs.

Defendant's evidence, presented through the girlfriend and her two children, tended to show that the two girls went with the girlfriend to the store that day rather than remaining at the cottage, and that both girls slept on the couch that night, rather than in a bedroom, because it was near the air conditioner. The girlfriend's son testified that the two girls were on the couch when he returned to the cottage around 3:00 a.m. According to the girlfriend and her daughter, defendant never abused or molested either of the two children. A physical examination of the girlfriend's daughter also revealed no evidence of physical trauma to her female organs.

The State sought to present expert testimony by a licensed clinical social worker that the daughter's friend suffered from post traumatic stress disorder. The witness was qualified as an expert in the field of clinical social work based on the following testimony:

Q. What is your occupation?

A. I am a licensed clinical social worker.

Q. And licensed by whom?

A. By the Commonwealth of Virginia.

Q. And that gives you authority to do what?

A. Basically, to practice in mental health and psychotherapeutic counselling with people for emotional and psychological reasons.

Q. In the course of that work . . . do you diagnose disorders that people may have?

A. Yes, emotional disorders.

Q. Would you give the jury a little bit of your background please, in the field in which you work?

A. Yes, I have approximately fifteen years of mental health experience. I worked for a long period of time in San Antonio, Texas, and then in the last seven and ½ years I have worked at Portsmouth Psychiatric Hospital on a children's inpatient unit which treated exclusively children with emotional problems, and children who have experienced trauma. I am currently in private practice.

* * *

Q. What is your education in that field?

A. I have a master's degree in psychology and sociology, and a master's degree in social work from the University of Kansas.

Following the court's ruling qualifying this witness to testify as an expert in the field of licensed clinical social work, the prosecutor asked: "Can you tell the jury *in your capacity as an expert* what post-traumatic stress syndrome is?" (Emphasis added.) Over objection the witness was allowed to describe this disorder and to testify that in his opinion the daughter's friend was suffering from post traumatic stress syndrome as a result of sexual abuse. Defendant assigns error to the admission of this testimony.

Post traumatic stress syndrome is a relatively newly recognized medical disorder. *See Funchess v. Wainwright*, 788 F. 2d 1443, 1445 (1986) (post traumatic stress disorder not generally recognized until publication of the third edition of the *Diagnostic and Statistical Manual of Mental Disorders* by the American Psychiatric Association in 1980). Its essential feature is the development of characteristic symptoms following a psychologically traumatic event generally outside the range of normal human experience. *Diagnostic and Statistical Manual of Mental Disorders*, (DSM-III) (3d ed. 1980), 236. While the admissibility of testimony concerning this disorder and its analogue, rape trauma syndrome, has recently been debated in a number of jurisdictions, *see, e.g.*, 42 A.L.R. 4th 879 (1985), in those jurisdictions that allow such testimony courts have examined not only the academic degrees held by the witness, but practical experience as well, in determining whether the witness qualified as an expert in this area. *See, e.g.*, McCord, The Admissibility of Expert Testimony Regarding Rape Trauma Syndrome in Rape Prosecutions, 26 B.C.L. Rev. 1143, 1200 (1985).

Whether a witness has the requisite skill to qualify as an expert in a given area is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial court. *State v. Bullard*, 312 N.C. 129, 140, 322 S.E. 2d 370, 376 (1984), quoting *State v. King*, 287 N.C. 645, 658, 215 S.E. 2d 540, 548-49, *death sentence vacated*, 428 U.S. 903 (1976). Under N.C.G.S. § 8C-1, Rule 702 a witness may be qualified as an expert

if the trial court finds that through "knowledge, skill, experience, training, or education" the witness has acquired such skill that he or she is better qualified than the jury to form an opinion on the particular subject.

Here the questions posed and answers given in qualifying the witness as an expert in the field of clinical social work failed to establish that the witness had any particularized training or experience relating to post traumatic stress disorder. Such training or experience is not inherent in the designation "licensed clinical social worker." It is unclear when the witness received his graduate degrees, but the transcript suggests that it may have been as much as ten years prior to medical recognition of this disorder. Given the relative newness of recognition of this disorder, the court could not assume that the witness received training in it during his graduate studies. The prosecutor also failed to inquire as to whether the witness had received any postgraduate education on the disorder or had actual experience in identifying and counselling regarding it. Without a foundation showing the witness to have sufficient skill, knowledge, or experience in or related to the syndrome, it was impossible to determine whether his opinion would aid the trier of fact in the search for truth. McCormick on Evidence Sec. 13 (3d ed. 1984).

As in *State v. Stafford*, "[w]e neither reach nor decide the question of whether in a proper case expert testimony concerning [post traumatic stress syndrome] will be admitted in the trial courts of this state." *State v. Stafford*, 317 N.C. 568, 569, 346 S.E. 2d 463, 464 (1986). We hold only that the testimony was improperly admitted here because the State failed to lay a sufficient foundation to establish that the witness was qualified to offer it. We thus award a new trial, obviating the need to address defendant's remaining assignments of error.

New trial.

STATE OF NORTH CAROLINA v. WILLIAM HARVEY BLANKENSHIP

No. 552PA86

(Filed 7 July 1987)

Homicide § 28.2— failure to instruct on self-defense—no error

The Court of Appeals improperly awarded a new trial in a homicide prosecution based on the trial court's failure to charge the jury on self-defense where defendant's evidence tended to show that the shooting was an accident; there was no evidence to show that defendant in fact formed a belief that it was necessary to kill the victim to protect himself; and the trial court gave proper instructions concerning the defense of accident.

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

ON discretionary review of a decision of the Court of Appeals, 82 N.C. App. 285, 346 S.E. 2d 171 (1986), vacating judgment entered by *Barefoot, J.*, at the 12 August 1985 Session of Superior Court, BEAUFORT County, and awarding the defendant a new trial.

The defendant was indicted for first degree murder. A jury found him guilty of second degree murder. He was sentenced to imprisonment for a term of forty years. The Court of Appeals awarded the defendant a new trial. The State's petition for discretionary review was allowed by the Supreme Court on 6 January 1987. Heard in the Supreme Court on 13 May 1987.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State, appellant.

Wayland J. Sermons, Jr. for the defendant appellee.

MITCHELL, Justice.

The defendant contended in the Court of Appeals that the trial court had committed reversible error by failing to instruct the jury on a theory of self-defense. The Court of Appeals agreed and awarded the defendant a new trial. We reverse the decision of the Court of Appeals.

The State's evidence tended to show that on 22 November 1984, Joy Wright invited Betty Jean Dixon to her apartment in Washington, North Carolina (the original city of that name in this

country) for Thanksgiving dinner. Wright had been living with her boyfriend, the victim Charles S. Foster, for two months. Dixon brought the defendant, William Harvey Blankenship, and her brother with her. Wright had never met the defendant before.

After they drank two six-packs of beer, Wright said that her boyfriend got mean when he was drinking and liked to fight. She thought he might be drinking that day and might not like the two men and the two women being together in the apartment. If he said anything, Wright told them all, the two men would have to leave.

The defendant gave Betty Jean Dixon $20.00 with which to buy more beer. Joy Wright accompanied her to the store. On their way out of the apartment, they met the victim Foster. Wright told him about her visitors. The victim said, "I don't like [the defendant]. He sent a lot of my friends to prison at Morehead, and I don't want to be around him." Wright told Foster that he was the man of the house and should ask the defendant Blankenship to leave if he did not want him there. As the two women returned from the store, the defendant ran across the yard toward them. Wright told the defendant that he should leave if the victim had said anything to him.

The defendant Blankenship returned to his mother's house where his girlfriend, Martha Harrison, also lived. He slammed the living room door with such force that a picture fell off the wall. He said a man had called him a "narc" and that he was going to kill the man. The defendant changed into his "ass kicking outfit" which included a knife. Around 6:00 p.m., the defendant gave a friend $60.00 for a .38 caliber pistol. He test-fired it on the way to Wright's apartment. He gave his knife to Harrison to hold.

Meanwhile, various other guests arrived at Wright's for dinner. Around 6:30 p.m., the defendant came in Wright's back door demanding, "Who called me a narc?" The victim walked toward the defendant saying, "I told you that I didn't want you in here." The defendant shot the victim from three to four feet away and threatened to "blow the brains out" of the others in the living room if they moved. The defendant later returned the gun to his friend, saying he no longer wanted it, and got his money back.

The defendant testified that when the victim had entered the apartment earlier that afternoon, the defendant had tried to be

friendly to him. The victim called him "a snitch from Morehead" and asked if the defendant wanted to fight. The defendant left Wright's apartment and went home. He and his girlfriend then drove around, trying to find someone to aid him in getting his change from the $20.00 he had given Betty Jean Dixon. One friend refused to go with him, but gave him a .38 caliber pistol to use for protection from the victim. When they went to Wright's, the defendant told Harrison that she should go inside if a man answered the door, because the defendant did not want to fight. If a woman answered the door, the defendant would go inside. When the defendant knocked, a woman said, "Come in." The defendant entered while Harrison stayed on the doorstep.

The defendant testified that when he entered, the victim said, "I didn't like your looks the first time you were here. Now I'm going to kick your ass good." The victim grabbed the defendant by the neck and slammed him against the door. The defendant hit him, but the victim would not let go. The defendant's feet were not touching the floor. He pulled out his gun to hit the victim on the head with it, but the victim grabbed it by the barrel and said, "Give it here." The victim jerked and twisted the gun. It fired, wounding him in the stomach. He died around 4:00 a.m. The defendant further testified: "[I]t never occurred to me to shoot . . . . If it hadn't went off when it did, . . . I don't know whether I would have shot or not, but he had hold of the gun, so I couldn't get it up to hit him with it."

The trial court did not charge the jury on a theory of self-defense, despite the defendant's request. The Court of Appeals concluded that this was reversible error and awarded the defendant a new trial.

The State contends that the trial court properly refused to instruct the jury on a theory of self-defense, because no evidence tended to show that the defendant *in fact* formed a belief that it was necessary to kill the victim to protect himself from death or great bodily harm. We agree.

Even in the light most favorable to the defendant, the evidence tended to show only that he intended to repel the victim with non-deadly force and was equivocal about whether he would have ever formed an intention to shoot, reasonable or not. Even if at some later point he had formed an intent to shoot, it does not

follow necessarily that he would have intended to shoot to kill. *See State v. Berry*, 35 N.C. App. 128, 240 S.E. 2d 633, *cert. denied*, 294 N.C. 737, 244 S.E. 2d 155 (1978) (no self-defense instruction warranted where defendant holding gun by side and victim struck it causing it to discharge). Where, as in the present case, "there is no evidence from which the jury reasonably could find that the defendant *in fact* believed that it was necessary to kill his adversary to protect himself from death or great bodily harm, the defendant is not entitled to have the jury instructed on self-defense." *State v. Bush*, 307 N.C. 152, 160, 297 S.E. 2d 563, 569 (1982) (emphasis added). Therefore, the trial court was correct in refusing to instruct the jury on either perfect or imperfect self-defense. *Id.*

In sum, the defendant's evidence tended to show that the shooting was an accident. The trial court gave proper instructions to the jury concerning the defense of accident. The evidence did not warrant more.

We hold that the Court of Appeals improperly awarded the defendant a new trial on this issue. The decision of the Court of Appeals is reversed, and this case is remanded to it for its consideration of the defendant's remaining assignments of error.

Reversed and remanded.

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

GAROLD E. BALLENGER, JR., DEPENDENT CHILD OF GAROLD E. BALLENGER, DECEASED, THROUGH HIS GUARDIAN AD LITEM, BRYAN K. HUSFELT, EMPLOYEE, PLAINTIFF v. ITT GRINNELL INDUSTRIAL PIPING, INC., EMPLOYER, AND INSURANCE COMPANY OF NORTH AMERICA, CARRIER, DEFENDANTS

No. 736PA86

(Filed 7 July 1987)

Master and Servant § 97.1— workers' compensation—weighing of evidence—improper standard—remand for findings under correct standard

Where the Industrial Commission applied the incorrect "some evidence" standard rather than the correct preponderance of the evidence standard in a

workers' compensation case, the Court of Appeals erred in remanding the case to the Commission for clarification of its opinion rather than for new findings of fact and conclusions of law applying the correct legal standard.

ON discretionary review of a unanimous decision of the Court of Appeals, 83 N.C. App. 55, 348 S.E. 2d 814 (1986), remanding the case to the Industrial Commission for a reconsideration of an opinion and award of compensation to plaintiff. Heard in the Supreme Court 12 May 1987.

Pfefferkorn, Pishko & Elliot, P.A., by Robert M. Elliot, for plaintiff-appellee.

Petree Stockton & Robinson, by Robert J. Lawing and Jane C. Jackson, for defendant-appellants.

MEYER, Justice.

On 14 May 1981, plaintiff's intestate, Garold E. Ballenger, was working for defendant ITT Grinnell Industrial Piping, Inc., as a maintenance mechanic. His normal duties included making small plumbing repairs. Sometime during the morning, Mr. Ballenger's foreman instructed him to repair a leak in one of the fixtures in the men's rest room. After lunch, Ballenger went into the rest room to undertake the repair. He was next seen by his foreman at about 1:00 p.m. coming out of the rest room. Water was gushing from a pipe in the rest room wall. Several inches of water were on the floor, and Ballenger was soaking wet. He was also very agitated, repeatedly trying to explain to his foreman what had happened. Ballenger went home to change into dry clothes. When he returned, he was calm and appeared normal. However, at about 3:15 p.m., Ballenger began having difficulty breathing. The manager of the maintenance department sent Ballenger home, sending a fellow employee to drive him. At about 4:15 p.m., an ambulance took Ballenger from his home to the hospital. He was complaining of a burning sensation in his chest and difficulty in moving his legs. Mr. Ballenger died at approximately 9:45 p.m.

An autopsy revealed that Ballenger died of a myocardial infarction. The autopsy also revealed a ninety percent narrowing of the right coronary artery and a fifty percent narrowing of the left coronary artery due to coronary artery disease.

Plaintiff's theory of the case before the Deputy Commissioner was that Ballenger overexerted himself trying to repair the fixture; that he improperly loosened the pipe he was working on; that he was then hit in the chest with a stream of cold water; and that this sudden shock constricted his already narrowed arteries, precipitating the heart attack. Plaintiff put on expert testimony from several doctors to support this theory. Defendant also presented expert medical testimony to the effect that the "water incident" did not trigger the heart attack; rather, the heart attack was solely the result of Ballenger's coronary artery disease. In fact, two doctors testified that the heart attack occurred several hours before Ballenger undertook to repair the bathroom fixture. The Deputy Commissioner concluded that the heart attack was not precipitated by the "water incident" and denied compensation.

The full Commission reversed the Deputy Commissioner. It noted that the "water incident" was an accident within the meaning of the Workers' Compensation Act. It went on to consider the conflicting testimony regarding the cause of Ballenger's heart attack. The Commission's opinion contains the following paragraph:

> After considering all of the testimony in the record in the light of the foregoing well-established principles of law and viewing the totality of the expert testimony in the light most favorable to plaintiff, there was "some evidence that the accident at least might have or could have produced the particular . . . [disability] in question."

(Quoting *Buck v. Procter & Gamble Co.*, 52 N.C. App. 88, 96, 278 S.E. 2d 268, 273 (1981), quoting with approval from *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E. 2d 389, 391 (1980).)

On appeal, the Court of Appeals affirmed the opinion of the Commission in part but noted that the Commission's opinion set out an incorrect standard for resolving the conflicting medical testimony. The Commission had apparently relied on the "some evidence" language cited in *Click*. *Click*, however, concerned the scope of review by an appellate court of a factual finding of the Commission, not the standard for the Commission to apply in resolving conflicts in testimony. Accordingly, the Court of Appeals remanded the case to the Commission "for a determination whether, uninfluenced by the . . . misstatement, the Commission

actually and dispassionately weighed the evidence before it concluded that there was sufficient evidence to support a finding in plaintiff's favor." *Ballenger v. ITT Grinnell*, 83 N.C. App. at 57, 348 S.E. 2d at 815.

Defendant argues before this Court that the Court of Appeals' instructions to the Commission were insufficient to ensure that the award to the plaintiff is based upon the proper legal standard. We agree and hold that the Court of Appeals erred in not remanding to the Commission for new findings of fact and conclusions of law applying the correct legal standard.

When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard. *Conrad v. Cook-Lewis Foundry Co.*, 198 N.C. 723, 153 S.E. 266 (1930). *See also Davis v. Sanford Construction Co.*, 247 N.C. 332, 101 S.E. 2d 40 (1957); *Butts v. Montague Bros.*, 208 N.C. 186, 179 S.E. 799 (1935). The standard that the Commission apparently applied in making its award was incorrect. *See Cauble v. The Macke Co.*, 78 N.C. App. 793, 338 S.E. 2d 320 (1986); *Wagoner v. Douglas Battery Mfg. Co.*, 80 N.C. App. 163, 341 S.E. 2d 120 (1986). The instructions to the Commission on remand contained in the Court of Appeals opinion do not require a complete redetermination of the factual issues. Rather, the instructions require only that the Commission report to that court whether the Commission applied the correct standard to the evidence before it when it made its award on 21 March 1985 in spite of its misstatement of the standard for resolving conflicts in the evidence.

Plaintiff argues that the Commission was in fact applying the correct standard and that, if anything, clarification is all that is necessary. *Heffner v. Cone Mills Corp.*, 83 N.C. App. 84, 349 S.E. 2d 70 (1986); *Horne v. Marvin L. Goodson Logging Co.*, 83 N.C. App. 96, 349 S.E. 2d 293 (1986). However, the plain language in the Commission's opinion is to the effect that it applied the incorrect "some evidence" standard, rather than the correct preponderance of the evidence standard.

We, of course, express no opinion as to the merits of plaintiff's case. We hold only that the full Commission must make a complete redetermination, based upon the evidence before it, as to whether the plaintiff has shown by a preponderance of the evi-

dence that there was a causal link between the "water incident" and the heart attack for which the plaintiff seeks compensation.

We affirm the decision of the Court of Appeals to remand the case to the full Commission, but modify that portion of the Court of Appeals opinion that requires only clarification by the Commission rather than a complete redetermination based upon the correct legal standard.

Modified and affirmed.

ATLANTIC INSURANCE & REALTY COMPANY v. IDA MAE DAVIDSON

No. 563A86

(Filed 7 July 1987)

1. **Appeal and Error § 19— appeal from magistrate to district court—may appeal as pauper**

A party may petition to proceed in forma pauperis in the trial de novo of cases appealed to the district court judge from judgments of a magistrate in small claims actions. N.C.G.S. § 7A-305. N.C. Constitution Art. I, Secs. 18 and 19.

2. **Appeal and Error § 19— appeal as pauper denied based on home ownership—error**

The district court erred in denying defendant's petition to proceed in forma pauperis by failing to make adequate findings of fact and conclusions of law to support the order; the finding that defendant owned a home valued at $27,150 and other unencumbered property was not alone sufficient to sustain the order when coupled with the abundance of evidence as to defendant's age, health, income, living expenses, inability to work or borrow, indebtedness, and the unreasonableness of selling her house.

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

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported in 82 N.C. App. 251, 346 S.E. 2d 218 (1986), which affirmed the order of *Bencini, J.*, filed 11 October 1985 in District Court, GUILFORD County, denying defendant's petition to appeal in forma pauperis from a magistrate's judgment to the district court. Heard in the Supreme Court 14 May 1987.

Central Carolina Legal Services, Inc., by Stanley B. Sprague, for defendant-appellant.

No counsel contra.

MARTIN, Justice.

The issue on this appeal is whether the trial judge properly denied defendant's petition to proceed in forma pauperis in the district court upon trial de novo of the claim resolved against her before a magistrate in the small claims court. We conclude that the trial judge erred, and we therefore reverse the decision of the Court of Appeals.

This case was instituted in the small claims court of the district court of the Eighteenth Judicial District. Judgment was entered against the defendant by the magistrate presiding in the district court small claims court. Thereupon, defendant was entitled to a trial de novo before a district court judge and, if requested, a jury. The procedural method of securing the trial de novo is by giving notice of appeal. N.C.G.S. § 7A-228 (1986).

On 10 October 1985 defendant petitioned to proceed as a pauper at the trial de novo. She filed an affidavit of indigency on the same date. This affidavit disclosed that defendant was unemployed; that she was receiving Social Security benefits of $340 per month as her sole income; that she owned a $50 black-and-white television and furniture worth $200 but did not own a motor vehicle; and that she had $10 cash and debts amounting to $300. The affidavit also disclosed that defendant owned her home valued at $27,150.

At 8:23 a.m. on 12 October 1985, defendant filed an additional affidavit showing that there was no mortgage or lien on her home, which had been given to her by her daughter. Mrs. Davidson was then sixty-five years old and unable to work because of high blood pressure, a heart condition, and other ailments. She lived alone and her total monthly income was $340 Social Security benefits. Her monthly expenses were: food, $150; water and electricity (including heat), $100; phone, $20; cab fare to doctor (as she was unable to walk to bus stop), $30; repairs to house, $20; real estate taxes, $22; and clothing, $20; totaling $362. Each month she ran out of money about the 20th and had to survive on crackers,

bread, and beans until the next check was received. She had no way to borrow the $31 costs of court.

On 11 October 1985, the trial judge entered an order denying defendant's petition to appear as a pauper, finding "[d]efendant owns a home worth $27,150.00 or more and has personal property that is unincumbered."

[1] The threshold issue before us is whether a litigant can appear as a pauper upon a trial de novo upon appeal from a judgment by a magistrate of the district court. The giving of notice of appeal is the procedural method of transferring the small claims action to the district court civil issue docket for trial de novo. N.C.G.S. § 7A-229 (1986).

We find the controlling statute on this issue to be N.C.G.S. § 7A-305. This statute provides in pertinent part:

> (a) In every civil action in the superior or district court the following costs shall be assessed:
>
> . . . .
>
> (b) On appeal, costs are cumulative, and when cases heard before a magistrate are appealed to the district court, the General Court of Justice fee and the facilities fee applicable in the district court shall be added to the fees assessed before the magistrate. . . .
>
> . . . .
>
> (c) The clerk of superior court, at the time of the filing of the papers initiating the action *or the appeal,* shall collect as advance court costs, the facilities fee and General Court of Justice fee, except in suits in forma pauperis.

(Emphasis added.) Subsection (c) clearly permits suits in forma pauperis on appeal. To construe the statute otherwise would be constitutionally suspect, *see* N.C. Const. art. I, §§ 18, 19, thwart the intent of the legislature, and render an injustice to the people of our state who frequently utilize the services of the district court division for the resolution of disputes. We hold that a party, plaintiff or defendant, may petition to appear in forma pauperis in the trial de novo of cases appealed to the district court judge from judgments of a magistrate in small claims actions.

[2] Turning now to the propriety of the order of the district court judge denying defendant's petition, we hold that the judge, upon an apparent misapprehension of the law, failed to make adequate findings of fact and conclusions of law to support the order. *See Edmonds v. Hall*, 236 N.C. 153, 72 S.E. 2d 221 (1952). The finding that defendant owned a home valued at $27,150 and other unencumbered personal property is not sufficient to sustain the order when considered with the abundance of evidence as to defendant's age, health, income, living expenses, inability to work or borrow, indebtedness, and unreasonableness of selling her house.

The trial judge's reliance solely upon defendant's ownership of a modest home was a misapprehension of the law. All of the relevant circumstances of defendant must be considered in making this decision. Reliance solely upon home ownership has been held to be error. *Adkins v. E. I. DuPont de Nemours & Co.*, 335 U.S. 331, 93 L.Ed. 43 (1948) ($3,450 home); *United States v. Cohen*, 419 F. 2d 1124 (8th Cir. 1969) (1,520 acres); *Loy v. State*, 74 So. 2d 650 (Fla. 1954) ($1,900 encumbered house); *Benjamin v. National Super Markets, Inc.*, 351 So. 2d 138 (La. 1977), *writ denied*, 366 So. 2d 561 (1979) ($27,500 encumbered house); *Jolivette v. Jolivette*, 386 So. 2d 707 (La. App. 1980) (one-fifth interest — $15,000 house). Likewise, requiring one to mortgage or sell his home to obtain court costs is generally unreasonable and counterproductive. *Benjamin*, 351 So. 2d at 141.

It is not required that a litigant deprive himself of the daily necessities of life to qualify to appear in forma pauperis. *See Boddie v. Connecticut*, 401 U.S. 371, 28 L.Ed. 2d 113 (1971). The courts of North Carolina are not going to require a litigant to become absolutely destitute before being granted permission to appear as a pauper. Such would destroy the dignity of our people. The trial judge erred in entering the order denying defendant's petition to appear in forma pauperis.

The decision of the Court of Appeals is reversed, and this cause is remanded to that court for further remand to the District Court, Guilford County, for the entry of an order not inconsistent with this opinion.

Reversed and remanded.

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

IN RE: INQUIRY CONCERNING A JUDGE, NO. 96 KENNETH A. GRIFFIN, RESPONDENT

No. 713A86

(Filed 7 July 1987)

Judges § 7— censure of judge for misconduct

A superior court judge is censured by the Supreme Court for conduct prejudicial to the administration of justice that brings the judicial office into disrepute because of his inappropriate comments and injudicious response to comments by a spectator during the nonjury acceptance of guilty pleas and sentencing hearing involving two defendants in the Mecklenburg County Superior Court.

THIS matter is before this Court upon a recommendation by the Judicial Standards Commission (Commission), filed with the Court on 12 December 1986, that Judge Kenneth A. Griffin, a judge of the General Court of Justice, Superior Court Division, Twenty-Sixth Judicial District of the State of North Carolina, be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of Canons 2A, 3A(2), and 3A(3) of the North Carolina Code of Judicial Conduct.

No counsel for respondent.

PER CURIAM.

The events in this proceeding occurred 25 April 1985 during the nonjury acceptance of pleas of guilty and sentencing hearing involving two defendants in Mecklenburg County Superior Court. The conduct involved inappropriate comments by Judge Griffin and an injudicious response to comments by a spectator. We find no need for a further recital of the evidence.

The findings of fact by the Commission are fully supported by the record and this Court adopts them. The conclusion and recommendation of the Commission are supported by the record and are appropriate.

The conduct of Judge Griffin at the time in question was prejudicial to the administration of justice and brought the judicial office into disrepute, in violation of Canons 2A, 3A(2), and 3A(3) of the Code of Judicial Conduct. For this conduct, Judge Griffin merits censure.

Now, therefore, it is ordered by the Supreme Court in Conference that Judge Kenneth A. Griffin be, and he is hereby, censured by this Court for the conduct specified in the Commission's findings.

CARTWOOD CONSTRUCTION COMPANY, INC., PLAINTIFF v. WACHOVIA BANK & TRUST COMPANY, N.A., NORTHWESTERN BANK, FIRST FINANCIAL SAVINGS & LOAN ASSOCIATION, INC., DEFENDANTS, AND WACHOVIA BANK & TRUST COMPANY, N.A., DEFENDANT AND THIRD PARTY PLAINTIFF v. VIRGIL REID PATTERSON, D/B/A THE PATTERSON COMPANY, THIRD PARTY DEFENDANT

No. 60A87

(Filed 7 July 1987)

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

APPEAL of right under N.C.G.S. § 7A-30(2) by the defendants and the defendant third party plaintiff from the decision of a divided panel of the Court of Appeals, 84 N.C. App. 245, 352 S.E. 2d 241 (1987), affirming in part and reversing and remanding in part judgment entered by *Seay, J.*, on 3 February 1986 in Superior Court, FORSYTH County. Heard in the Supreme Court on 9 June 1987.

Nifong, Ferguson & Sinal, by Paul A. Sinal, for plaintiff appellee.

Bell, Davis & Pitt, P.A., by William Kearns Davis and Stephen M. Russell, for defendant appellant, Wachovia Bank & Trust Company, N.A.

Petree, Stockton & Robinson, by William R. Loftis, Jr. and Penni Pearson Bradshaw, for defendant appellant, Northwestern Bank.

PER CURIAM.

Affirmed.

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

STATE OF NORTH CAROLINA v. TRACY DEMONT HUMPHRIES AND JAMES EDWARD JAMISON

No. 613PA86

(Filed 7 July 1987)

ON discretionary review, upon petitions by the State and defendants allowed by this Court on 3 February 1987, of a unanimous opinion of the Court of Appeals (*Arnold, J.*, with *Wells, J.*, and *Eagles, J.*, concurring) reported at 82 N.C. App. 749, 348 S.E. 2d 167 (1986), vacating judgments entered against defendants and remanding the cases with instructions to strike the felony charges against defendants and resentence them for the lesser included offense of misdemeanor breaking or entering.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State-appellant.

Charles A. Lloyd for defendant-appellee Humphries.

Charles L. White for defendant-appellee Jamison.

PER CURIAM.

After reviewing the record and briefs and hearing oral arguments on the questions presented, we conclude that the petitions for discretionary review were improvidently allowed.

Petitions for discretionary review improvidently allowed.

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

ALLRED v. TUCCI

No. 241P87.

Case below: 85 N.C. App. 138.

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

APPLE v. GUILFORD COUNTY

No. 217PA87.

Case below: 84 N.C. App. 679.

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

ARCHER v. TRI-CITY TERMINALS, INC.

No. 135P87.

Case below: 84 N.C. App. 567; 319 N.C. 671.

Motion by defendant 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 7 July 1987.

ARONOV v. SEC. OF REV.

No. 336PA87.

Case below: 85 N.C. App. 677.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 June 1987. Petition by defendant for writ of supersedeas allowed 24 June 1987. Motion by plaintiff to dismiss appeal for lack of substantial constitutional question denied 10 July 1987. Motion to dissolve supersedeas denied 10 July 1987.

BURNS v. BURNS

No. 319P87.

Case below: 84 N.C. App. 700.

Motion by plaintiff to dismiss defendant's petition for discretionary review pursuant to G.S. 7A-31 for failure to comply with Rules of App. Procedure allowed 7 July 1987. Petition by defendant for writ of certiorari by defendant to the North Carolina Court of Appeals denied 7 July 1987.

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

CAMPBELL v. PITT COUNTY MEMORIAL HOSP.

No. 133A87.

Case below: 84 N.C. App. 314; 319 N.C. 458.

Motion by defendant pursuant to Rule 27, N. C. Rules of App. Procedure, for reconsideration of petition dismissed 7 July 1987.

CHERRY v. HARRELL

No. 180P87.

Case below: 84 N.C. App. 598.

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

CONTRACT STEEL SALES, INC. v.
FREEDOM CONSTRUCTION CO.

No. 154PA87.

Case below: 84 N.C. App. 460.

Petition by defendant (Du Pont) for discretionary review pursuant to G.S. 7A-31 allowed 7 July 1987.

DAVIDSON COUNTY v. CITY OF HIGH POINT

No. 228PA87.

Case below: 85 N.C. App. 26.

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

DOCKERY v. MCMILLAN

No. 314P87.

Case below: 85 N.C. App. 469.

Petition by defendant (McMillan Homes, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 7 July 1987.

GUALTIERI v. BURLESON

No. 185P87.

Case below: 84 N.C. App. 650.

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

HARMON v. STEPHENS

No. 142P87.

Case below: 84 N.C. App. 457.

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

HARRIS v. MAREADY

No. 183P87.

Case below: 84 N.C. App. 607.

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

HINSON v. HINSON

No. 178P87.

Case below: 84 N.C. App. 700.

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

HUBBARD v. GATHINGS

No. 70P87.

Case below: 84 N.C. App. 147.

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

IN RE ESTATE OF KATSOS

No. 181P87.

Case below: 84 N.C. App. 682.

Petition by Tim Katsos for discretionary review pursuant to G.S. 7A-31 denied 7 July 1987.

IN RE WADDELL

No. 192P87.

Case below: 84 N.C. App. 700.

Petition by Durham County Department of Social Services, et al. for discretionary review pursuant to G.S. 7A-31 denied 7 July 1987.

IPOCK v. GILMORE

No. 251P87.

Case below: 85 N.C. App. 70.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 7 July 1987. Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 July 1987.

LOWDER v. ALL STAR MILLS, INC.

No. 282P87.

Case below: 85 N.C. App. 329.

Petition by several defendants for writ of certiorari to the North Carolina Court of Appeals denied 7 July 1987.

MADDEN v. CHASE

No. 115P87.

Case below: 84 N.C. App. 289.

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

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

MARSHBURN v. ASSOCIATED INDEMNITY CORP.

No. 103P87.

Case below: 84 N.C. App. 365; 319 N.C. 673.

Motion by plaintiffs 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 7 July 1987.

PERRY v. PERRY

No. 282PA86.

Case below: 80 N.C. App. 169; 317 N.C. 336.

Motion by plaintiff to dismiss appeal by petition for discretionary review allowed 3 February 1987.

PETERSON v. ALDRIDGE

No. 226A87.

Case below: 85 N.C. App. 171.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and App. Rule 16(b) as to additional issues denied 7 July 1987.

PETTY v. CITY OF CHARLOTTE

No. 283P87.

Case below: 85 N.C. App. 391.

Petition by defendant (Housing Authority) for discretionary review pursuant to G.S. 7A-31 denied 7 July 1987. Petition by defendant for writ of supersedeas denied and temporary stay dissolved 7 July 1987.

PINEWOOD MANOR MOBILE HOMES, INC. v.
N. C. MANUFACTURED HOUSING BD.

No. 246P87.

Case below: 84 N.C. App. 564; 319 N.C. 674.

Motion by plaintiff pursuant to Rule 27, N. C. Rules of App. Procedure for reconsideration of petition for review of the decision of the Court of Appeals dismissed 7 July 1987.

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

PYCO SUPPLY CO., INC. v.
AMERICAN CENTENNIAL INS. CO.

No. 223A87.

Case below: 85 N.C. App. 114.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and App. Rule 16(b) of issues in addition to those presented as basis for dissenting opinion allowed 7 July 1987.

SHEEHAN v. HARPER BUILDERS, INC.

No. 155P87.

Case below: 83 N.C. App. 630.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 July 1987. Motion by defendant to dismiss appeal for lack of legal principles of major significance allowed 7 July 1987.

STATE v. ANDERSON

No. 202PA87.

Case below: 85 N.C. App. 104.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 7 July 1987.

STATE v. ANSTEAD

No. 287P87.

Case below: 85 N.C. App. 539.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and petition by defendant for writ of supersedeas and temporary stay denied 16 June 1987.

STATE v. BENDER

No. 197P87.

Case below: 84 N.C. App. 702.

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

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

STATE v. BOONE

No. 225P87.

Case below: 85 N.C. App. 171.

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

STATE v. BROWN

No. 206P87.

Case below: 85 N.C. App. 583.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 July 1987. Petition by defendant for writ of supersedeas denied and temporary stay dissolved 7 July 1987.

STATE v. COBB

No. 339P87.

Case below: 85 N.C. App. 720.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 24 June 1987.

STATE v. DAVIS

No. 318P87.

Case below: 86 N.C. App. 232.

Petition by Attorney General for writ of supersedeas and temporary stay allowed 12 June 1987.

STATE v. EDWARDS AND STATE v. JONES

No. 263P87.

Case below: 85 N.C. App. 145.

Petition by defendant (Edwards) for writ of certiorari to the North Carolina Court of Appeals denied 7 July 1987.

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

STATE v. FAIRCLOTH

No. 322P87.

Case below: 85 N.C. App. 349.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 July 1987.

STATE v. GARTEN

No. 220P87.

Case below: 85 N.C. App. 171.

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

STATE v. HARLEE

No. 219P87.

Case below: 85 N.C. App. 159.

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

STATE v. JENNINGS

No. 214P87.

Case below: 85 N.C. App. 349.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 7 July 1987. Petition by Attorney General for writ of supersedeas denied and temporary stay dissolved 7 July 1987.

STATE v. JONES

No. 231P87.

Case below: 85 N.C. App. 56.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 July 1987. Petition by Attorney General for discretionary review of Willie Kate Jones case pursuant to G.S. 7A-31 denied 7 July 1987.

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

STATE v. JONES

No. 266P87.

Case below: 85 N.C. App. 349.

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

STATE v. KIRKPATRICK

No. 255P87.

Case below: 85 N.C. App. 172.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 July 1987.

STATE v. MCLEAN

No. 234P87.

Case below: 85 N.C. App. 172.

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

STATE v. NICHOLSON

No. 249P87.

Case below: 85 N.C. App. 539.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 July 1987. Petition by defendant for writ of supersedeas denied and temporary stay dissolved 7 July 1987.

STATE v. OLIVER

No. 204P87.

Case below: 85 N.C. App. 1.

Petition by defendants (Oliver and Brummitt) for discretionary review pursuant to G.S. 7A-31 denied 7 July 1987. Petition by defendant Oliver for writ of supersedeas denied and temporary stay dissolved 7 July 1987.

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

STATE v. RAWLES

No. 218P87.

Case below: 85 N.C. App. 350.

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

STATE v. SALKEY

No. 286P87.

Case below: 85 N.C. App. 539.

Petition by defendant for writ of supersedeas and temporary stay denied 10 June 1987. Notice of appeal by defendant pursuant to G.S. 7A-30 dismissed 10 June 1987. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 June 1987.

STATE v. SPRINGS

No. 265P87.

Case below: 82 N.C. App. 593.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 July 1987.

STATE v. STANFIELD

No. 144P87.

Case below: 84 N.C. App. 459.

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

STATE v. TEETER

No. 327P87.

Case below: 85 N.C. App. 624.

Petition by defendant for writ of supersedeas and temporary stay denied 7 July 1987. Motion by the State to dismiss appeal for lack of substantial constitutional question allowed 7 July 1987. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 July 1987.

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

STATE v. VANSTORY

No. 158P87.

Case below: 84 N.C. App. 535.

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

STATE v. WHITE

No. 222A87.

Case below: 85 N.C. App. 81.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 July 1987.

STATE v. WILLARD

No. 195P87.

Case below: 84 N.C. App. 703.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed 7 July 1987.

STATE v. WOODS

No. 250P87.

Case below: 85 N.C. App. 350.

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

STATE v. YOUNG

No. 209P87.

Case below: 85 N.C. App. 173.

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

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

TWITTY v. STATE

No. 229P87.

Case below: 85 N.C. App. 42.

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

W. S. CLARK & SONS, INC. v. UNION NATIONAL BANK

No. 194P87.

Case below: 84 N.C. App. 686.

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

WAGNER v. R, J & S ASSOC.

No. 200P87.

Case below: 84 N.C. App. 555.

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

WARD v. ZABADY

No. 227P87.

Case below: 85 N.C. App. 130.

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

WHITTINGTON v. WILKERSON

No. 162P87.

Case below: 84 N.C. App. 568.

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

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

WIGGINS v. CITY OF MONROE

No. 247P87.

Case below: 85 N.C. App. 237.

Petition by defendants for writ of certiorari to the North Carolina Court of Appeals denied 7 July 1987.

PETITION TO REHEAR

NEWTON v. WHITAKER

No. 686A86.

Case below: 319 N.C. 455.

Petition denied 7 July 1987.

STATE OF NORTH CAROLINA v. THOMAS JACK BROWN

No. 65A85

(Filed 7 July 1987)

1. **Jury § 6.3— prospective juror—voir dire—acquaintance with defendant in prison—absence of prejudice**

The *voir dire* examination of a prospective juror ultimately excused for cause which elicited information that the prospective juror had been at a prison camp with defendant did not prejudice two jurors in whose presence the *voir dire* was conducted so as to have required the trial court to intervene *ex mero motu* where defendant neither objected to this line of questioning nor requested an individual *voir dire*; defendant did not challenge the two jurors for cause or exhaust his peremptory challenges; and the error, if any, was not a fundamental error which would permit appellate review absent an objection in that it is unlikely that the deliberations of these two or other jurors might have been infected by this testimony.

2. **Jury § 7.11— prospective juror—ambivalence toward death penalty—inability to follow law—excusal for cause**

Although the *voir dire* testimony of a prospective juror may have indicated her ambivalence toward the death penalty, she was properly excused for cause where that testimony also demonstrated that she would be unable to render a verdict in accordance with the trial court's charge and the laws of the state.

3. **Homicide § 21.6— first degree murder—lying in wait—sufficient evidence**

The State's evidence was sufficient to support defendant's conviction of first degree murder perpetrated by lying in wait where it tended to show that defendant announced to several people his intention to kill the victim; defendant walked alone to the window beside the victim's office, waited for the victim to "bend down," and shot him; and the shot resulted in the victim's death.

4. **Homicide § 12— first degree murder by lying in wait—short-form indictment**

The State's proof of a murder perpetrated by lying in wait did not fatally vary from the "short-form" indictment charging defendant with first degree murder since (1) the indictment specifically referred to N.C.G.S. § 14-17, which expressly includes murder perpetrated by means of lying in wait in its definitions of first degree murder; (2) the short-form indictment drawn in accordance with N.C.G.S. § 15-144 is sufficient to charge murder in the first degree under a theory of lying in wait just as it is sufficient to charge murder in the first degree on the theory of felony murder or premeditation and deliberation; and (3) if defendant was at a loss to determine the specific facts underlying the charge alleged in the indictment, his proper recourse was to move for a bill of particulars. N.C.G.S. § 15A-925 (1983).

5. **Homicide § 30.1— first degree murder by lying in wait—submission of second degree murder not required by evidence**

In a prosecution for first degree murder perpetrated by lying in wait, evidence concerning defendant's intoxication and the provocation of an old

grudge and taunts by defendant's brother reflected upon intent to kill, which was irrelevant, and did not require the trial court to submit an issue as to second degree murder to the jury. Also, evidence of the short duration of the pause before the kill was irrelevant and did not require the submission of an issue as to second degree murder.

6. Homicide § 24— instructions—lying in wait—no presumption of premeditation and deliberation

The theory of lying in wait, as explained to the jury by the trial court, did not rely upon a conclusive presumption of premeditation and deliberation in violation of defendant's due process rights since the charge neither mentioned premeditation and deliberation nor urged the jury to presume their presence, and these elements are not presumed but are irrelevant in a prosecution for first degree murder perpetrated by lying in wait.

7. Criminal Law § 102.6— jury argument—no impropriety

In a prosecution for first degree murder perpetrated by lying in wait, the prosecutor's jury argument that "when a deadly weapon is used in certain ways and fashions, it gives rise to the crime of murder in the first degree" was so general as to be unobjectionable, and the prosecutor's argument that "it's not necessary for you to consider the question of premeditation and deliberation and malice aforethought" was an accurate statement of the law.

8. Criminal Law § 102.6— jury argument—need for justice by victim's family

The prosecutor's remarks in his jury argument in a first degree murder case reminding the jury of the victim's family's need for justice that only it could render had no effect on the verdict in light of the overwhelming evidence of defendant's guilt, and the trial court's failure to intervene *ex mero motu* was not error.

9. Criminal Law § 34.2— evidence of prior crimes—absence of prejudice

A witness's testimony that defendant "kept saying that he killed him; that it wasn't the first time; that he had killed two others besides" should have been excluded because it bore only upon defendant's propensity and disposition to commit such offenses. However, the admission of such testimony was not prejudicial and did not require the trial court to intervene *ex mero motu* when considered in the context of defendant's repeated boasting to the witness and other witnesses about his having killed the victim and in light of the overwhelming evidence that defendant had slain his victim by lying in wait.

10. Criminal Law § 135.6— capital sentencing hearing—defendant's criminal record

Defendant's copious criminal record was admissible in his sentencing hearing for first degree murder to rebut evidence of his good character offered through the testimony of his mother and his brother who both stated that defendant was generally amicable except when he had been drinking.

11. Criminal Law §§ 102.9, 135.8— jury argument—defendant's lack of contrition—no improper aggravating factor

The prosecutor's argument during the sentencing phase of a capital case concerning defendant's apparent lack of contrition did not improperly place this characteristic before the jury for consideration as an aggravating factor.

12. Criminal Law § 102.9— jury argument—defendant's lack of contrition—no injection of opinion

The prosecutor's argument in a capital case concerning defendant's apparent lack of contrition did not inject the prosecutor's own opinions into his argument but was rooted in the evidence and related to the demeanor of the defendant, which was before the jury at all times.

13. Criminal Law § 102.8— jury argument—defendant's lack of contrition—no comment upon failure to testify

The prosecutor's argument concerning defendant's apparent lack of contrition did not constitute an improper comment upon defendant's failure to testify. N.C.G.S. § 8-54.

14. Criminal Law § 102.13— jury argument—no comment on right to appellate review

The prosecutor's argument in a capital case that, no matter what sentence the jury recommended, defendant would "still be here in 90 days" did not constitute an improper remark on defendant's right to appellate review that required *ex mero motu* intervention by the trial court.

15. Criminal Law § 102.13— jury argument—no comment on possibility of parole

The prosecutor's argument during the sentencing phase of a capital case that defendant had been sentenced to prison in 1978 for five years but was out in 1980, committing another sixteen offenses "in the three years before his so-called prison sentence expired" and his further reference to "that three-year period during which he should have been in prison" did not constitute an improper comment on the possibility of parole if defendant received a life sentence so as to require *ex mero motu* intervention by the trial court.

16. Criminal Law § 102.6— jury argument on sanctity of home—no injection of opinion

Where all the evidence in a first degree murder case showed that the killing took place in the victim's home, the prosecutor's jury argument concerning the sanctity of the home was founded upon the evidence, not upon prosecutorial opinion or belief, and was not improper.

17. Criminal Law § 102.6— jury argument—rights of victim's family—absence of prejudice

The prosecutor's argument during the sentencing phase of a capital case concerning the rights of the victim's family, even if erroneously admitted, was *de minimis*, and the trial court did not abuse its discretion in failing to correct the error *ex mero motu*.

18. Criminal Law § 102.6— jury argument—jury as conscience of the community

The prosecutor's argument during the sentencing phase of a capital case which reminded the jury that, for purposes of defendant's trial, they are the voice and conscience of the community was not improper.

19. Criminal Law § 102.12— jury argument—life sentence unfair to other murderers receiving death penalty

The prosecutor's argument urging the jury to recommend death because not to do so would be unfair to other convicted murderers sentenced to death was not so grossly improper as to require the trial court to strike the remark *sua sponte*.

20. Criminal Law § 102.6— jury argument—failure of siblings to testify—reason for lack of schooling

Although the prosecutor may have strained the rational connection between evidence and inference in commenting upon defendant's production of only one of his six siblings to testify in his behalf and in suggesting that defendant's lack of schooling was his own fault, he did not strain it so far as to require *ex mero motu* intervention by the trial court or to have affected adversely the jury's consideration of a nonstatutory mitigating circumstance.

21. Criminal Law § 102.6— jury argument—portrayal as playing God

The prosecutor's comments in a capital case portraying defendant as one who dared to play God and one who selfishly deprived the victim of his opportunity to "get right with the Lord" while retaining that opportunity for himself were not so improper as to have required intervention by the trial court *ex mero motu*.

22. Criminal Law § 102.13— jury argument—death penalty as Biblical law

The prosecutor's arguments in a capital case that the Bible approves punishment and condemns defendant's acts and that N.C.G.S. § 15A-2000 is a statute of judgment equivalent to Biblical law that a murderer shall be put to death were not equivalent to saying that state law is divinely inspired or that law officers are ordained by God and were not so improper as to have mandated *ex mero motu* intervention by the trial court.

23. Criminal Law § 102.9— jury argument—disparagement of mitigating circumstances reflecting on character

Remarks by the prosecutor which disparaged mitigating circumstances that reflect on a defendant's character as opposed to those that reflect on the particular crime did not improperly and prejudicially force the jury's focus away from considering factors regarding defendant's character.

24. Criminal Law § 135.9— mitigating circumstances—definition—burden of proof

Neither the prosecutor nor the trial court was incorrect in emphasizing that the burden of persuading the jury that mitigating circumstances exist is upon the defendant. Nor was it incorrect for the prosecutor to define a mitigating circumstance as one that may reduce the moral culpability of a crime or make it less deserving of extreme punishment than other first degree murders.

25. Criminal Law §§ 102.12, 135.9— diminished capacity mitigating circumstance—argument unsupported by evidence—absence of prejudice

In his argument that the diminished capacity mitigating circumstance should not be found by the jury in a capital case, the prosecutor's references

to insanity, mental illness, and whether defendant "knew" what he was doing, while irrelevant under the evidence presented, had no prejudicial impact sufficient to require *ex mero motu* intervention by the trial court. N.C.G.S. § 15A-2000(f)(6).

26. Criminal Law §§ 102.6, 135.8— jury argument—victim's lack of opportunity to plead for life

In a prosecution for murder by lying in wait, the prosecutor's argument at the sentencing hearing that the victim had no chance to plead with defendant for his life was not an improper argument that the jury should find the precipitous manner of the victim's death as an aggravating circumstance but was a proper description of the offense as it had occurred.

27. Criminal Law § 135.8— capital sentencing hearing—conviction record—prior violent felony aggravating factor

The State's introduction of the record of defendant's conviction of discharging a firearm into occupied property was sufficient to support the trial court's submission as an aggravating factor for murder by lying in wait that defendant had a prior conviction of a felony involving the use of violence to a person. N.C.G.S. § 15A-2000(e)(3).

28. Criminal Law § 135.8— death penalty statute—murder by lying in wait—no violation of equal protection

The death penalty statute, N.C.G.S. § 15A-2000, does not violate a defendant's right to equal protection where the same evidence may underlie a case of murder by premeditation and deliberation and a case of murder by lying in wait because a lesser included offense is available under the former charge but not under the latter.

29. Criminal Law § 135.8— prior violent felony aggravating factor—constitutionality

The aggravating factor that defendant had a prior conviction of a felony involving the use of violence to a person, N.C.G.S. § 15A-2000(e)(3), is not unconstitutionally vague and overbroad.

30. Criminal Law § 122.2— capital case—instructions to deadlocked jury not required

The Supreme Court declines to adopt a rule requiring the trial court in a capital case to instruct a deadlocked jury in accordance with N.C.G.S. § 15A-1235 because (1) it is the clear intent of the Legislature that instructions to a deadlocked jury be within the trial court's discretion, and (2) the provisions of N.C.G.S. § 15A-1235 do not govern sentencing procedures in capital cases.

31. Criminal Law § 135.7— mitigating circumstance—instruction defining "extenuating"

The trial court did not err in responding to the jury foreman's question during the sentencing phase of a capital case as to the meaning of "extenuating" in a nonstatutory mitigating circumstance by reading the definition from a dictionary since "extenuating" is neither a term of art nor clearly explained by its context.

32. Criminal Law § 135.6— capital sentencing hearing—evidence from guilt-innocence phase

The trial court in a capital case did not err in instructing the jury that evidence from the guilt-innocence phase was competent for its consideration in the punishment phase. N.C.G.S. § 15A-2000(a)(3).

33. Criminal Law § 135.9— mitigating circumstances—burden of proof—due process

Due process does not prohibit placing upon the defendant in a capital case the burden of proving mitigating circumstances by a preponderance of the evidence.

34. Criminal Law § 135.9— capital case—mitigating circumstances—requirement of unanimity

Requiring juries in a capital case to reach unanimous decisions regarding the presence or absence of mitigating circumstances does not render the sentencing proceeding arbitrary and capricious on the ground that a single juror can deprive all other jurors of consideration of such circumstances.

35. Criminal Law § 135.7— capital case—instruction on substantiality of aggravating factor

It was not error for the trial court to instruct the jury that it must determine the substantiality of the aggravating factor in light of mitigating circumstances "found" to exist since the jury is not permitted to consider unarticulated mitigating circumstances.

36. Criminal Law § 135.10— murder by lying in wait—death penalty not disproportionate

A sentence of death imposed on defendant for a murder perpetrated by lying in wait outside the victim's home was not imposed under the influence of passion, prejudice or any other arbitrary factor, the record supported the jury's finding of the aggravating circumstance upon which the sentencing court based its sentence of death, and the sentence of death was not disproportionate to the penalty imposed in similar cases considering the crime and the defendant.

DEFENDANT appeals of right pursuant to N.C.G.S. § 7A-27(a) from judgment entered by *Pope, J.*, at the 21 January 1985 Criminal Session of Superior Court, ROBESON County. Defendant was convicted of murder in the first degree and sentenced to death. Heard in the Supreme Court 13 April 1987.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Geoffrey C. Mangum, Assistant Appellate Defender, for defendant-appellant.

WHICHARD, Justice.

This is a case of murder perpetrated by lying in wait. *See* N.C.G.S. § 14-17 (1986). The victim, Wayne Gerald, who had been working at his desk at home the evening of 5 May 1984, was killed by a single shotgun blast fired through the window beside him. He died instantaneously.

In pertinent part, the evidence at trial showed the following:

Around five o'clock the afternoon of 5 May 1984 defendant's brother Ray Brown and his friend Gary Presnell dropped by defendant's house. The three drank beer, played with defendant's children, and chatted. Presnell testified that defendant suddenly ran into the house, brought out a twelve-gauge shotgun, and urged his brother and Presnell to shoot it. The brother deferred, but Presnell shot the gun once into the air. Defendant returned the gun to the house and conversation resumed, eventually turning to the subject of defendant's missing moped. Defendant said he suspected Wayne Gerald had it and that he would "get him one way or another." Defendant told Presnell that Gerald had pistol-whipped him once, and he showed Presnell the scars.

The three continued to converse and drink beer, and the subject of the moped and Gerald's name came up repeatedly. At one point defendant jumped up, asked his companions if they would give him a ride, went in the house, and returned with the shotgun.

Presnell drove. Defendant asked him to go by Gerald's house and remarked that the lights were on and that Gerald was in his office. Presnell then drove to defendant's mother's house nearby, separated from Gerald's house by a rental house and a storage shed. The three got out and eventually walked to the backyard of defendant's mother's house. Presnell heard defendant's brother tell defendant that he "shouldn't do it" and heard defendant reply, "I'll kill him. If I don't, I'm a self-made son-of-a-bitch." A fourth friend joined the group and all but defendant then walked to the front of the house. They heard a shot, and defendant's brother said, "He's killed him."

Defendant's mother-in-law testified that the evening of 5 May defendant came to her trailer and told her "he had just killed the son-of-a-bitch," and he showed her with his hands how he had shot

the gun. He then laughed and asked her to take him home. On the ride back to defendant's house, he laughed again and said, "The son-of-a-bitch won't beat me no more." Once home, defendant repeated to his wife and later to his sister and brother-in-law that he had killed "the son-of-a-bitch," both times within his mother-in-law's earshot. Defendant also said he had disposed of the gun in the ditch behind the mailboxes near the mother-in-law's trailer.

Defendant's brother-in-law testified that he and his wife had just picked up his seventeen-year-old sister Angela from defendant's house the night of 5 May when defendant stopped him, bent down beside the car window, and

> asked me if I could keep a secret, and I told him yeah, and he said he killed the son-of-a-bitch, and I paused a minute and I said who, and he said Wayne Gerald, and he said that he had beat him and he pointed to his head, and he said "He won't beat me no more," and I told him that I said, you know, "The law is going to get you." He said, "No one will find out," and then he told me how he done it. He went up to the window. . . . . [T]ook the shotgun, he said, like this . . . . He said that Wayne Gerald looked over or something, he said he shot him right there [indicating the left eye] . . . . He said that he then run through the woods and hid the gun in a ditch, in water. And he said no one would ever find out.

Angela testified that she was on the porch at defendant's house waiting for her mother and stepfather to pick her up when defendant was dropped off by his mother-in-law. She testified that defendant demonstrated to her how he shot Gerald, saying "he snuck up to Wayne Gerald's house and he looked through the window and he said he had the gun like this, and he waited for Wayne Gerald to bend over . . . and he let it go, and he went 'boom' . . . ." Angela also testified that defendant told her he had thrown the gun in some water in a ditch. She walked with defendant and his wife to a nearby graveyard where defendant took an empty shotgun shell from his pocket and discarded it. Several times he repeated, laughing, that he had killed the "son-of-a-bitch" and that he had blown his brains out.

Medical testimony established that Gerald died instantaneously of a gunshot wound to the head. He had "multiple penetrating wounds on the left side of the face and head; and multiple

scalp lacerations and skull fractures of the head, with actual brain tissue protruding from some of those lacerations and fractures." There was "severe damage to the brain."

The jury found defendant guilty of first degree murder and recommended that he be sentenced to death. The trial court entered judgment accordingly.

GUILT PHASE

[1] Defendant first contends that the voir dire examination of a prospective juror who was ultimately excused for cause prejudiced the two jurors in whose presence the voir dire was conducted. The examination elicited the information that the prospective juror was already acquainted with defendant from their having been together at a prison camp. The prospective juror was asked whether defendant was at the camp before he arrived and after he left. Defendant argues that the prospective juror's affirmative answers were evidence of defendant's bad character deliberately and prejudicially placed before the jury, and that it was error for the trial court not to intervene *ex mero motu.*

Although defendant objected once to the leading form of one question during the voir dire, he neither objected to the line of questioning nor requested an individual voir dire. Further, he did not challenge any jurors for cause on this account, and he failed to exhaust his peremptory challenges. When a defendant challenges a juror for cause but fails to exhaust his peremptory challenges, he has waived his right to appeal the refusal of that challenge for cause. N.C.G.S. § 15A-1214(h)(1) (1983). *See State v. Johnson*, 317 N.C. 417, 431-33, 347 S.E. 2d 7, 16-17 (1986). When, as here, a defendant does not even attempt to challenge jurors whose impartiality he questions, logic compels a similar presumption of waiver. "A person charged with crime . . . may, after his plea, challenge individual jurors for cause or peremptorily. [Citation omitted.] But he cannot wait until the jury has returned a verdict of guilty to challenge the competency of the jury to determine the question." *State v. Rorie*, 258 N.C. 162, 165, 128 S.E. 2d 229, 231 (1962).

In addition, Rule 10(b)(1) of the Rules of Appellate Procedure requires that any exception urged on appeal must be preceded

"by objection noted" unless "by rule or law [the objection] was deemed preserved or taken without such action." *See, e.g., State v. Oliver*, 309 N.C. 326, 334, 307 S.E. 2d 304, 312 (1983). Absent objection, either noted or deemed taken by rule or law, review will be limited to those errors

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

Id. at 335-36, 307 S.E. 2d at 312, quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E. 2d 375, 378 (1983). *See also* N.C.G.S. § 15A-1446 (1983). It is unlikely that any prejudice colored the deliberations of these two jurors or that the deliberations of other jurors might have been infected by this testimony. The weight and abundance of evidence of defendant's guilt, and the negligible probability of prejudice resulting from the voir dire, do not qualify this as the "exceptional case" in which the error, if any, had a probable impact upon the jury's verdict.

[2] Defendant asserts it was also error for the trial court to excuse a prospective juror for cause based upon her statements that she had "mixed feelings" about the death penalty. The prospective juror was initially asked if she "could and would vote to impose" the death penalty if the State were to satisfy her beyond a reasonable doubt that it was the appropriate penalty in this case. Defendant's objection to the question was sustained, and the question was rephrased:

> Mr. Britt: Okay. Let me ask you this: If you are selected to sit on this jury, and if the State satisfies you, and satisfies you beyond a reasonable doubt, that the defendant . . . is guilty of exactly what he's charged with, would you vote to find him guilty?

Juror Number 2: I don't know.

Mr. Britt: Let me ask the question again: If the State satisfies you and satisfies you beyond a reasonable doubt that the defendant . . . is guilty of murder in the first degree . . . would you vote to find him guilty?

Juror Number 2: Well, like I said, I have mixed feelings about it.

Mr. Britt: I understand.

Juror Number 2: I don't know if I could.

Mr. Britt: You are saying, then, that you might not be able to find him guilty?

Juror Number 2: I might not.

Mr. Britt: Under no circumstances?

Juror Number 2: Yes.

Mr. Britt: So, what you are saying is you are not sure that you could be fair and impartial at the guilt phase?

Juror Number 2: Right.

Mr. Britt: And you are unable to say at this time that you would vote to find him guilty if the State satisfies you beyond a reasonable doubt that he's guilty; is that correct?

Juror Number 2: Yes, sir.

Defendant interprets these responses as the product of a misunderstanding and contends that they do not indicate that the prospective juror was either unwilling or unable to follow the law and her oath. *See, e.g., State v. Johnson*, 317 N.C. 343, 376-78, 346 S.E. 2d 596, 614-15 (1986). This is precisely what they do indicate, however. Regardless of the juror's feelings concerning the death penalty, a challenge for cause may be made if the voir dire demonstrates that "[a]s a matter of conscience, regardless of the facts and circumstances, [the juror] would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina." N.C.G.S. § 15A-1212(8) (1983). Although the voir dire testimony of this prospective juror may have indicated her ambivalence toward the death penalty, she was properly excused

for cause because that testimony also demonstrated that she would be unable to render a verdict in accordance with the trial court's charge and the laws of the State.

[3] Defendant next argues that the trial court erred in denying his motion to dismiss the charge of first degree murder because the State's evidence was insufficient to convince a rational trier of fact beyond a reasonable doubt of defendant's guilt as to each element of the offense.

The trial court instructed the jury on murder in the first degree solely on the basis of lying in wait. Murder perpetrated by lying in wait "refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim." *State v. Allison*, 298 N.C. 135, 147, 257 S.E. 2d 417, 425 (1979). *See State v. Wiseman*, 178 N.C. 784, 789-90, 101 S.E. 629, 631 (1919). The assassin need not be concealed, nor need the victim be unaware of his presence: "If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait." *State v. Allison*, 298 N.C. at 148, 257 S.E. 2d at 425.

There is ample evidence that defendant's announced intention was to kill the victim, that he walked alone to the window beside the victim's office, that he waited for the victim to "bend down," that he shot him, and that the shot resulted in death. Even a moment's deliberate pause before killing one unaware of the impending assault and consequently "without opportunity to defend himself," *State v. Wiseman*, 178 N.C. at 790, 101 S.E. at 631, satisfies the definition of murder perpetrated by lying in wait. We hold that the testimony of several witnesses recounting defendant's announced purpose and his iterative description of the killing itself was abundant evidence to convince a rational jury beyond a reasonable doubt that defendant was guilty of this crime.

[4] As alternative support for his argument that his motion to dismiss was erroneously denied, defendant contends that the State's proof fatally varied from the indictment. *E.g., State v. Waddell*, 279 N.C. 442, 445, 183 S.E. 2d 644, 646 (1971). Defendant

was charged in a "short-form" indictment, authorized by N.C.G.S. § 15-144, that read in pertinent part:

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

The short-form indictment has been held sufficient to charge murder in the first degree on the basis of either felony murder or premeditation and deliberation. *State v. Avery*, 315 N.C. 1, 13-14, 337 S.E. 2d 786, 792 (1985). Defendant suggests that the holding in *Avery* rests only upon the notice rationale, such that a defendant who has been indicted for both murder and the underlying felony has notice as to the need to defend a felony-murder. *See State v. Silhan*, 302 N.C. 223, 235, 275 S.E. 2d 450, 461 (1981). N.C.G.S. § 15-144 provides that indictments for murder need not allege "matter not required to be proved on the trial." Defendant argues that, by negative implication, a short-form indictment must allege matters necessary to proof of the offense of murder perpetrated by lying in wait. In support of this argument defendant cites N.C.G.S. § 15A-924(a)(5), which requires that a criminal pleading contain

> [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

For three reasons we disagree with defendant's contention that the indictment fatally varied from the proof:

First, N.C.G.S. § 14-17 does not divide first degree murder into separate offenses, each of which has its own essential elements, but divides the offense into four distinct classes according to the proof required for each. *State v. Strickland*, 307 N.C. 274, 282, 298 S.E. 2d 645, 651 (1983), *modified on other grounds, State v. Johnson*, 317 N.C. 193, 344 S.E. 2d 775 (1986). The indictment charging defendant with murder in the first degree referred specifically to N.C.G.S. § 14-17. That statute provides, *inter alia*: "A

murder which shall be perpetrated by means of . . . lying in wait . . . shall be deemed to be murder in the first degree . . . ." N.C.G.S. § 14-17 (1986). Because the indictment specifically referred to N.C.G.S. § 14-17, which expressly includes murder perpetrated by means of lying in wait in its definitions of first degree murder, defendant cannot realistically claim, under the facts here, to have been altogether unapprised of the theory of the case against him.

Second, we observed in *State v. Freeman*, 314 N.C. 432, 436, 333 S.E. 2d 743, 746 (1985) that the new Criminal Procedure Act, of which § 15A-924 is a part, was "adopted for the purpose of making the law more understandable and improving the administration of justice." It was not the intention of the General Assembly to obfuscate and complicate procedure, but to clarify and simplify it. In the spirit of this intention, we hold that the short-form indictment drawn in accordance with N.C.G.S. § 15-144 is sufficient to charge murder in the first degree under a theory of lying in wait, just as it is sufficient to charge murder in the first degree on the theory of felony murder or premeditation and deliberation. *State v. Avery*, 315 N.C. at 13-14, 337 S.E. 2d at 793.

Third, if, despite the sufficiency of the indictment, defendant was at a loss to determine the specific facts underlying the charges alleged in the indictment, his proper recourse was to move for a bill of particulars. N.C.G.S. § 15A-925 (1983). *See, e.g., State v. Hawley*, 186 N.C. 433, 437, 119 S.E. 888, 891 (1923).

[5] Next, defendant contends that the evidence of lying in wait was in conflict and that the evidence supported submitting to the jury the charge of murder in the second degree. This Court has recently held

> that premeditation and deliberation is not an element of the crime of first-degree murder perpetrated by means of poison, lying in wait, imprisonment, starving, or torture. Likewise, a specific intent to kill is equally irrelevant when the homicide is perpetrated by means of poison, lying in wait, imprisonment, starving, or torture; and . . . an intent to kill is not an element of first-degree murder where the homicide is carried out by one of these methods.

State v. Johnson, 317 N.C. at 203, 344 S.E. 2d at 781. *See State v. Evangelista*, 319 N.C. 152, 158, 353 S.E. 2d 375, 380 (1987). The

Court accordingly held that it was not error for the trial court not to instruct the jury on murder in the second degree, even though defendant urged that he did not administer poison with the intent to kill the victim: intent was irrelevant.

Here, as in *Johnson*, the State's evidence was sufficient to satisfy its burden, and there was no evidence other than defendant's plea of not guilty to negate the elements of murder perpetrated by lying in wait. The evidentiary conflict defendant urges us to recognize concerns defendant's intoxication, and the provocation of an old grudge and taunts by defendant's brother. These facts reflect upon intent to kill, which is irrelevant. Defendant also urges that the period of time in which he lay in wait and shot the victim encompassed a brief, unbroken course of conduct. The duration of the pause before the kill is likewise irrelevant. Neither contention suggests a conflict sufficient to negate the State's evidentiary proof that defendant committed murder perpetrated by lying in wait.

Just as "[a]ny murder committed by means of poison is automatically first-degree murder[,]" *id.* at 204, 344 S.E. 2d at 782, so any murder committed by means of lying in wait is automatically first degree murder. We accordingly hold there was no error in the failure to instruct on murder in the second degree.

[6] Defendant argues in the alternative that the theory of lying in wait, as explained to the jury by the trial court, relied upon a conclusive presumption of premeditation and deliberation in violation of defendant's due process rights. *See Francis v. Franklin*, 471 U.S. 307, 313-15, 85 L.Ed. 2d 344, 353-54 (1985). The trial court charged:

> [F]or you to find the defendant guilty of first degree murder, perpetrated by lying in wait, the State must prove three things beyond a reasonable doubt:
>
> First, that the defendant lay in wait for Robert Wayne Gerald. That is, waited and watched for Robert Wayne Gerald, in secret ambush, for the purpose of killing Robert Wayne Gerald.
>
> Second, that the defendant shot Robert Wayne Gerald, intending to kill him.

> And third, that the shooting was a proximate cause of Robert Wayne Gerald's death. A proximate cause is a real cause, a cause without which Robert Wayne Gerald's death would not have occurred.

In most respects,[1] this charge is an accurate statement of the law and neither mentions premeditation and deliberation nor urges that the jury presume their presence. These elements are not presumed but irrelevant. *State v. Johnson*, 317 N.C. at 203, 433 S.E. 2d at 781.

Defendant next contends that the trial court erred in failing to intervene *ex mero motu* at three points in the prosecutor's closing argument. We note at the outset the high threshold for abusing the license to argue the evidence, its inferences, and the law:

> [C]ounsel will be allowed wide latitude in the argument of hotly contested cases. [Citation omitted.] Counsel for each side may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his or her side of the case. [Citation omitted.] Decisions as to whether an advocate has abused this privilege must be left largely to the sound discretion of the trial court.

State v. Huffstetler, 312 N.C. 92, 112, 322 S.E. 2d 110, 123 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985).

Defendant failed to object at any one of these opportunities. Under these circumstances the standard for review is the following:

> In capital cases . . . an appellate court may review the prosecution's argument, even though defendant raised no objection at trial, but the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex*

1. At the time of defendant's trial, *State v. Johnson*, 317 N.C. 193, 344 S.E. 2d 375, holding that an intent to kill is not an element of murder in the first degree perpetrated by one of the methods described in N.C.G.S. § 14-17, had not been filed. However, it is obvious that the trial court's inclusion of specific intent as one of the elements the State must prove in no way disadvantaged defendant.

mero motu an argument which defense counsel apparently did not believe was prejudicial when he heard it.

State v. Johnson, 298 N.C. 355, 369, 259 S.E. 2d 752, 761 (1979).

[7] In the first instance of which defendant complains, the prosecutor told the jury that "when a deadly weapon is used in certain ways and fashions, it gives rise to the crime of murder in the first degree." In the second instance, the prosecutor told the jury,

> [t]herefore, in a case of secret ambush, such as you have here before you today, your job is immensely simplified, because the law only requires th[e] State to prove three things beyond a reasonable doubt, and it's not necessary for you to consider the question of premeditation and deliberation and malice aforethought.

Each remark, defendant avers, was an "improper and prejudicial misstatement of the law" that operated to diminish the State's burden of proving guilt beyond a reasonable doubt. Such an error in violation of defendant's constitutional rights is presumed prejudicial. *See* N.C.G.S. § 15A-1443(b) (1983).

We disagree, however, with defendant's assessment of the impropriety or error in the prosecutor's remarks. The first remark is so general as to be unobjectionable. The second is, on the whole, an accurate statement of the law similar to the jury instruction later given by the trial court. Neither was so grossly improper that the court should have been expected to intervene *ex mero motu.*

[8] Defendant also excepts to a third portion of the prosecutor's closing argument in which he urged the jury:

> Please remember something when you go back in the jury room. The 5th of May, 1984, was the most important day in the life of Wayne Gerald's family, as well as the most important day for [defendant] . . . . The family of the victim has no one to turn to but you. You are the triers of the facts. You are justice today. You are justice.

This Court has stressed that a jury's decision "must be based solely on the evidence presented at trial and the law with respect thereto, and not upon the jury's perceived accountability to the witnesses, to the victim, to the community, or to society in

general." *State v. Boyd*, 311 N.C. 408, 418, 319 S.E. 2d 189, 197 (1984), *cert. denied*, 471 U.S. 1030, 85 L.Ed. 2d 324 (1985). Such arguments are not appropriate in the guilt phase of the trial, in which the jury's focus is properly upon guilt or innocence, not upon mercy, prejudice, pity or fear. *State v. Oliver*, 309 N.C. at 360, 307 S.E. 2d at 326.

While the remarks in question veer toward a disregard of the admonitions in *Boyd* and *Oliver*, it cannot be said that the court erred in failing to recognize and correct "*ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. at 369, 259 S.E. 2d at 761. Evidence in the record supporting a finding of defendant's guilt was overwhelming. Under such circumstances, we hold that the prosecutor's remark reminding the jury of the victim's family's need for justice that only it could render had no effect on the verdict. *See* N.C.G.S. § 15A-1443(a) (1983).

[9] In defendant's final assignment of error from the guilt phase of his trial, he contends that the trial court committed prejudicial error in failing to intervene *ex mero motu* when Angela, the sister of defendant's brother-in-law, testified that defendant "kept saying that he killed him; that it wasn't the first time; that he had killed two others besides." Again, defendant failed to object at trial but now asserts that the trial court's failure to take curative action constituted plain error. *See State v. Black*, 308 N.C. 736, 740-41, 303 S.E. 2d 804, 806-7 (1983).

Defendant's statement about his role in other offenses unrelated to the offense for which he was being tried was not admissible, for it bore only upon his propensity and predisposition to commit such offenses. *See, e.g., State v. Shane*, 304 N.C. 643, 653-54, 285 S.E. 2d 813, 820 (1982); *State v. McQueen*, 295 N.C. 96, 123, 244 S.E. 2d 414, 430 (1978), *overruled on other grounds, State v. Peoples*, 311 N.C. 515, 319 S.E. 2d 177 (1984). However, in the context of defendant's iterative boasting to Angela and other witnesses about his having killed the victim, the mere mention that he had killed two others besides, without any elaboration, could not have been prejudicial. Nor could it have been so in the face of the overwhelming evidence that defendant had slain his victim by lying in wait.

We conclude that, as to the guilt-innocence phase of his trial, defendant received a fair trial free from prejudicial error.

SENTENCING PHASE

[10] Defendant first contends that the State improperly introduced his criminal record from 1970 to 1984. Defendant had made no effort to rely upon the mitigating factor of no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1) (1983), and he argues that the State's offering his criminal record in rebuttal of a factor that was never relied upon was improper and prejudicial.

Bad reputation or character is not listed in N.C.G.S. § 15A-2000(e) as an aggravating circumstance, and the State may not offer evidence of the defendant's bad character in its case in chief. *State v. Silhan*, 302 N.C. at 273, 275 S.E. 2d at 484. Nor is such evidence admissible when its sole purpose is to rebut mitigating circumstances upon which the defendant might later rely. *State v. Taylor*, 304 N.C. 249, 277, 283 S.E. 2d 761, 779 (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). However, when a defendant offers evidence of any circumstance that may reasonably be deemed to have mitigating value, whether or not it appears in the statutory list, the State may rebut this with evidence of a defendant's bad character. *State v. Silhan*, 302 N.C. at 273, 275 S.E. 2d at 484.

At his sentencing hearing defendant offered evidence of his good character through the testimony of his mother and his brother Bennett, who both said on direct examination that defendant was generally amicable except when he had been drinking. Defendant's copious criminal record, listing over thirty offenses, the bulk of which were associated with intoxication and a third of which were assaults, was offered to rebut this testimony. On the authority of *Silhan*, we thus hold this assignment of error meritless.

The bulk of defendant's remaining arguments concerning sentencing focus upon remarks in the prosecutor's closing argument. We have repeatedly held that counsels' arguments must be left to the control and discretion of the trial court and that counsel for both sides are entitled to argue to the jury the law and the facts in evidence and all reasonable inferences that may be drawn

therefrom. *E.g., State v. Huffstetler*, 312 N.C. at 112, 322 S.E. 2d at 123, *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169; *State v. Monk*, 286 N.C. 509, 515, 212 S.E. 2d 125, 131 (1975).

Defendant objected to only one of these remarks—that in which the prosecutor called attention to defendant's stoic appearance at trial, suggesting that defendant neither felt nor indicated contrition for his act. Defendant avers that these remarks were, in effect, an improper comment upon his failure to testify and that it was improper to raise the issue of an absence of remorse. The prosecutor argued:

> Did you hear, did you hear the lawyer's argument in phase I? Did you hear him say, "We are in sympathy with the widow. I'm in sympathy with the widow. Thomas Brown is in sympathy with the widow." Did you hear that? Let me ask you something, Ladies and Gentlemen of the Jury. One of the most salient facts in this case, a fact that you cannot escape, was: Have you seen this defendant express one iota of being sorry in this case, of being contrite? Has he demonstrated to you any contrition . . . . any contrition at all, Ladies and Gentlemen of the Jury? Has he demonstrated to you any remorse, any desire for forgiveness in this case?
>
> Did you observe, when this widow was on this witness stand testifying and broke down into sobs and it took several minutes for her to gain control of herself, did you see one tear roll down the face of this defendant sitting over here? If you watched him—and some of you did—you saw him sitting there very coolly, very coolly, musing, watching, calculating.

[11] Defendant insists that lack of remorse is an irrelevant factor in a case such as this in which the heinous, atrocious or cruel aggravating circumstance (N.C.G.S. § 15A-2000(e)(9)) was not submitted, *e.g., State v. Oliver*, 309 N.C. at 346-47, 307 S.E. 2d at 318-19, or in which remorselessness was not offered to rebut the nonstatutory mitigating circumstance that although the act itself may have been harmful, defendant had not shown himself to be otherwise evil. *See State v. Brown*, 306 N.C. 151, 180, 293 S.E. 2d 569, 588, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982). Evidence of the absence of remorse "sometime after the commission [of the offense] when defendant has had an opportunity to reflect on his criminal deed" has been approved to support a nonstatuto-

ry aggravating factor under the Fair Sentencing Act, N.C.G.S. § 15A-1340.4 (1983). *State v. Parker*, 315 N.C. 249, 257, 337 S.E. 2d 497, 502 (1985).

N.C.G.S. § 15A-2000(e) dictates that aggravating factors to be considered shall be limited to those listed in the statute. *See State v. Silhan*, 302 N.C. at 273, 275 S.E. 2d at 484. Remorselessness is not one of these and may not be submitted to the jury as an aggravating factor in capital sentencing cases. Here, however, the State made no attempt to submit this characteristic as an aggravating circumstance. It was not placed before the jury for consideration as an aggravating factor, either verbally or on the verdict sheet. Defendant's argument in this regard is unavailing.

[12] Defendant also complains that the prosecutor's argument concerning defendant's apparent absence of contrition improperly placed before the jury "incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence." *State v. Britt*, 288 N.C. 699, 711, 220 S.E. 2d 283, 291 (1975); N.C.G.S. § 15A-1230(a) (1983). We disagree. Urging the jurors to observe defendant's demeanor for themselves does not inject the prosecutor's own opinions into his argument, but calls to the jurors' attention the fact that evidence is not only what they hear on the stand but what they witness in the courtroom. In *State v. Myers*, 299 N.C. 671, 679-80, 263 S.E. 2d 768, 773-74 (1980), this Court considered the propriety of a similar argument, in which the prosecuting attorney noted that defendant "didn't flinch. Didn't bat an eye" when photographs of the crime were passed amongst the jury. "I don't know if you were watching him but no remorse [showed in his face]. . . . Not a word of remorse and not a sign of it here in the courtroom during this trial." *Id.* We held unanimously that these remarks were "rooted in the evidence," and related "to the demeanor of the defendant, which was before the jury at all times." *Id.* at 680, 263 S.E. 2d at 774. The same can be said concerning the prosecutor's remarks at issue here.

[13] Nor are these remarks truly tantamount to commenting on defendant's failure to testify, as defendant contends. This Court has been vigilant in protecting defendants' constitutional and statutory privilege not to testify. N.C.G.S. § 8-54 (1986). *E.g., State v. Monk*, 286 N.C. at 516-17, 212 S.E. 2d at 131-32. But we have held

it proper for the prosecution to comment upon defendant's failure to produce exculpatory evidence, his failure to offer evidence to rebut the State's case, or his failure to produce witnesses to corroborate the truth of an alibi. *See State v. Young*, 317 N.C. 396, 414, 346 S.E. 2d 626, 637 (1986), and cases cited therein. Just as such remarks do not infringe upon defendant's right not to testify because they were not directed at his failure to take the stand, so the prosecutor's calling the jury's attention to the defendant's demeanor made no reference to or inference about his decision not to testify. *Cf. State v. Monk*, 286 N.C. at 514-16, 212 S.E. 2d at 130 (prosecutor's direct reference to rule of law that a defendant's criminal record cannot be introduced "unless that person testified from this witness stand" held improper). This assignment of error is overruled.

Defendant next contends that the prosecutor improperly argued to the jury concerning: defendant's right to appellate review, the possibility of parole, the sanctity of the home, the rights of the victim and his family, community sentiment, the jury's role in assisting the prosecution, and the unfair impact on others convicted of murder if defendant was not sentenced to death. Defendant failed to object to any of these remarks. As we have already indicated with regard to the prosecutor's arguments in the guilt phase, in a capital case "an appellate court may review the prosecution's argument in spite of counsel's laxity." *State v. Smith*, 294 N.C. 365, 377, 241 S.E. 2d 674, 681-82 (1978). But again, in such cases "the alleged impropriety must be glaring or grossly egregious for this Court to determine that the trial court erred in failing to take corrective action *sua sponte*." *State v. Pinch*, 306 N.C. 1, 18, 292 S.E. 2d 203, 218 (1982), *cert. denied, Smith v. North Carolina*, 459 U.S. 1056, 74 L.Ed. 2d 622, *reh'g denied, Pinch v. North Carolina*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983). *See State v. Hill*, 311 N.C. 465, 472-73, 319 S.E. 2d 163, 168 (1984); *State v. Kirkley*, 308 N.C. 196, 209-11, 302 S.E. 2d 144, 152-53 (1983); *State v. Johnson*, 298 N.C. at 369, 259 S.E. 2d at 761.

[14] Defendant first argues that the prosecutor's reminder that, no matter what sentence the jury recommended, defendant would "still be here in ninety days" improperly suggested defendant's right to appellate review. We acknowledge the bar in capital cases against comment on a defendant's right to appellate review, *e.g., State v. Jones*, 296 N.C. 495, 501-02, 251 S.E. 2d 425, 429

(1979), but the connection between the remark here and the right to appellate review was tenuous at best. Consequently, we find no gross impropriety that required *ex mero motu* intervention by the trial court.

[15] In addition, defendant argues that improper and prejudicial reference to the possibility of parole was implied in the prosecutor's remark that defendant had been sentenced to prison in 1978 for five years but was out in 1980, committing another sixteen offenses "in the three years before his so-called prison sentence expired." The prosecutor concluded, "Now, we aren't talking about his whole criminal record[;] we are just talking about that three-year period during which he should have been in prison. Does that mean anything to you, Ladies and Gentlemen?" Defendant suggests that what the prosecutor intended that information to convey was that parole was a likelihood and recidivism a certainty if the jury recommended a life sentence.

Although a defendant's eligibility for parole is not a proper matter for the jury's consideration, *State v. Cherry*, 298 N.C. 86, 101, 257 S.E. 2d 551, 561 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 796 (1980), the subject is not directly apparent in the prosecutor's argument. The word "parole" was never used, and there was no mention of the possibility that a life sentence could mean release in twenty years. *See State v. Johnson*, 298 N.C. at 367, 259 S.E. 2d at 760. Here, as in *Johnson*, the prosecutor "argue[d] vigorously for the imposition of the death penalty," as it is his right and duty to do in a prosecution for murder in the first degree. *Id.* And, as in *Johnson*, "[w]e are of the opinion that the District Attorney's argument did not suggest the possibility of parole." *Id.* In any event, it did not do so in so direct a manner as to amount to a gross impropriety that required *ex mero motu* intervention by the trial court.

[16] Defendant next contends that the prosecutor's reference to the sanctity of the home is akin to the argument that execution is required to deter other criminals, which was held improper as an expression of the prosecutor's personal opinion in *State v. Kirkley*, 308 N.C. at 215, 302 S.E. 2d at 155. In *Kirkley*, however, this Court held that the deterrence argument, more blatantly asserted in that case yet similarly made without objection, was not so grossly improper as to require intervention by the trial

court *ex mero motu*. *Id.* *See also State v. Hamlet*, 312 N.C. 162, 174, 321 S.E. 2d 837, 845 (1984); *State v. Hill*, 311 N.C. at 475, 319 S.E. 2d at 169-70. Here, where all the evidence showed that the killing took place in the victim's home, the prosecutor's remarks concerning the sanctity of the home were not improper. They were clearly founded upon the evidence, not upon prosecutorial opinion, belief or personal knowledge. *See State v. Pinch*, 306 N.C. at 17-18, 292 S.E. 2d at 218, *cert. denied, Smith v. North Carolina*, 459 U.S. 1056, 74 L.Ed. 2d 622, *reh'g denied, Pinch v. North Carolina*, 459 U.S. 1189, 74 L.Ed. 2d 1031.

[17] Defendant also complains that the prosecutor crossed the boundary into improper argument when he urged the death penalty in acknowledgment of the rights not only of the victim, held proper in *State v. Pinch*, 306 N.C. at 25, 292 S.E. 2d at 222, *cert. denied, Smith v. North Carolina*, 459 U.S. 1056, 74 L.Ed. 2d 622, *reh'g denied, Pinch v. North Carolina*, 459 U.S. 1189, 74 L.Ed. 2d 1031, but those of his family also. The United States Supreme Court has recently held in *Booth v. Maryland*, 55 U.S.L.W. 4836 (U.S. June 15, 1987) (No. 86-5020), that consideration of a "victim impact statement" at the sentencing phase of a capital trial violates the Eighth Amendment because its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner. *Id.* at 4837. The Court stated that two types of information elicited by the statement—1) "the personal characteristics of the victims and the emotional impact of the crimes on the family" and 2) "the family members' opinions and characterizations of the crimes and the defendant"—are irrelevant to a capital sentencing decision. *Id.* This information "could well distract the sentencing jury from its constitutionally required task—determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." *Id.* at 4839.

The Supreme Court's decision in *Booth* brings into question language in *Pinch* and *Oliver* that the value of the victim's life may be considered by the jury during sentencing. *See State v. Pinch*, 306 N.C. at 25, 292 S.E. 2d at 222, *cert. denied, Smith v. North Carolina*, 459 U.S. 1056, 74 L.Ed. 2d 622, *reh'g denied, Pinch v. North Carolina*, 459 U.S. 1189, 74 L.Ed. 2d 1031; *State v. Oliver*, 309 N.C. at 360, 307 S.E. 2d at 326. If the touchstone for

propriety in sentencing arguments is whether the argument relates to the character of the criminal or the nature of the crime, *see State v. Oliver*, 309 N.C. at 360, 307 S.E. 2d at 326, then, arguably, the effects of that crime on those the victim leaves behind are not relevant.

In this case, however, no evidence was placed before the jury concerning the personal qualities of the victim or the devastation wrought upon his family by his death. The prosecutor's argument merely alluded generally to the fact that, not only does a defendant have certain rights under our laws, but so do the victim and his family. The prosecutor argued:

> [I]t's not all a matter of the rights of this defendant. It's the rights of others. It's the rights of you. It's the rights of your family; of the community that you live in; of the family of this victim sitting out here in the Courtroom.

This reference to the family's rights, even if erroneously admitted, was *de minimis*. The trial court did not abuse its discretion in failing to recognize and correct the error *ex mero motu*. *State v. Johnson*, 298 N.C. at 368-69, 259 S.E. 2d at 761.

[18] Defendant also excepts to portions of the prosecutor's argument in which he attempted to impress the jury with the importance of its role in the criminal justice system:

> This defendant displayed a heartless, evil, callous disregard for the victim. He was without conscience, he was without pity. His was a wicked and vile act, Ladies and Gentlemen of the Jury, and when you hear of such acts, you say, "Gee, somebody ought to do something about that."
>
> You know something, Ladies and Gentlemen of the Jury, today you are the somebody that everybody talks about, and justice is in your lap. The officers can't do any more. The State can't do any more. You speak for all the people of the State of North Carolina as to this bloody murder in the first degree.

Defendant contends that these remarks improperly inform the jury that community or public sentiment urges the death penalty and that the jury is effectively an arm of the State in the prosecution of the defendant. These would be improper suggestions. The

State must not ask the jury "to lend an ear to the community rather than a voice." *State v. Scott*, 314 N.C. 309, 312, 333 S.E. 2d 296, 298 (1985), quoting *Prado v. State*, 626 S.W. 2d 775, 776 (Tex. Crim. App. 1982). But these suggestions do not arise from this argument, which does no more than remind the jurors that "the buck stops here" and that for purposes of defendant's trial, they are the voice and conscience of the community. *State v. Scott*, 314 N.C. at 311-12, 333 S.E. 2d at 297-98. Nor is there any improper suggestion that the jury is the last link in the State's chain of law enforcement. The jury is merely admonished of its general responsibility impartially to assimilate the evidence of aggravating and mitigating circumstances, to weigh them, and to recommend defendant's sentence accordingly. *See State v. Goodman*, 298 N.C. 1, 21, 257 S.E. 2d 569, 583 (1979).

[19] Defendant also argues the impropriety of a remark made by the prosecutor while reviewing the verdict sheet with the jury. The prosecutor urged the jury to recommend death because not to do so would be unfair to other convicted murderers sentenced to death.

N.C.G.S. § 15A-2000(d)(2) requires this Court to assess every capital case in which the defendant was sentenced to death under the provisions of N.C.G.S. 15A, Article 100, and to gauge the fairness of that sentence in the light of similar capital cases reviewed by this Court. The fate of other capital offenders thus is the concern of this Court pursuant to its proportionality review function. It is not a proper concern of jurors. The "factors to be considered by the jury in sentencing are 'the *defendant's* age, character, education, environment, habits, mentality, propensities and record.' " *State v. Taylor*, 304 N.C. at 284, 283 S.E. 2d at 783, *cert. denied*, 463 N.C. 1213, 77 L.Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456, quoting *State v. Cherry*, 298 N.C. at 98, 257 S.E. 2d at 559, *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 796. We do not find the prosecutor's remarks here so grossly improper, however, that it was an abuse of the trial court's discretion not to strike them *sua sponte*.

[20] Defendant next argues that the prosecutor deprived him of a fair sentencing hearing by asserting improper arguments concerning defendant's failure to produce siblings who could testify on his behalf. The prosecutor asked:

> Of six brothers and sisters, how many did he have up here begging for him? Testifying for him? Out of six of them, how many did he have? Out of his whole family, how many brothers and sisters did he have? One. Bennett, a man with a record of his own. That tell you something, Ladies and Gentlemen of the Jury?

Defendant contends that such commentary is improper when there is no way to tell whether a witness is unavailable. In arguing that the prosecutor was commenting negatively on defendant's limitation of witnesses called to testify in his behalf, defendant recalls this Court's disapproval of sentencing hearings that are effectively "mini-trials," in which witnesses testify as to matters of dubious probative value for sentencing purposes. *See generally, State v. Moose*, 310 N.C. 482, 491, 313 S.E. 2d 507, 514 (1984); *State v. Pinch*, 306 N.C. at 19, 292 S.E. 2d at 219, *cert. denied, Smith v. North Carolina*, 459 U.S. 1056, 74 L.Ed. 2d 622, *reh'g denied, Pinch v. North Carolina*, 459 U.S. 1189, 74 L.Ed. 2d 1031; *State v. Silhan*, 302 N.C. at 272, 275 S.E. 2d at 484.

Defendant also contends that the prosecutor misstated the testimony of defendant's mother, who had said that she did not know why defendant had quit school in the eighth or ninth grade. The prosecutor argued that defendant had "voluntarily quit school, . . . [he] just wouldn't do it and quit." The jury did not find as a nonstatutory mitigating factor that defendant had little education, and defendant surmises that the reason it did not was the prosecutor's suggestion that defendant's lack of schooling was his own fault.

We find both contentions meritless. Generally, and in this particular instance, the prosecutor may draw the jury's attention to defendant's failure to produce exculpatory witnesses available to him. *State v. Thompson*, 293 N.C. 713, 717, 239 S.E. 2d 465, 469 (1977); *State v. Tilley*, 292 N.C. 132, 144, 232 S.E. 2d 433, 441 (1977). And although the prosecutor "should refrain from characterizations of defendant which are calculated to prejudice him in the eyes of the jury when there is no evidence from which such characterization may legitimately be inferred," *State v. Britt*, 288 N.C. at 712, 220 S.E. 2d at 291, the prosecutor may argue inferences reasonably drawn from the evidence. *State v. Huffstetler*, 312 N.C. at 112, 322 S.E. 2d at 123, *cert. denied*, 471 U.S. 1009,

85 L.Ed. 2d 169. Although the prosecutor may have strained the rational connection between evidence and inference, he did not strain it so far as to require *ex mero motu* intervention by the trial court nor so far as to have affected adversely the jury's consideration of a nonstatutory mitigating factor.

[21] Defendant also takes issue with the prosecutor's numerous references to the Bible. Among these was the prosecutor's portrait of defendant as one who dared to play God and one who selfishly deprived the victim of his opportunity to "get right with the Lord" while retaining that opportunity for himself. We do not find these comments so improper as to have required intervention by the trial court *ex mero motu.*

[22] In a similar vein the prosecutor remarked that the Bible approves punishment and condemns defendant's acts, and he argued that N.C.G.S. § 15A-2000 is a statute of judgment equivalent to the Biblical law that a murderer shall be put to death. These remarks are not equivalent to saying that state law is divinely inspired, *see State v. Oliver*, 309 N.C. at 359, 307 S.E. 2d at 326, or that law officers are "ordained" by God, *State v. Moose*, 310 N.C. at 501, 313 S.E. 2d at 519-20. The remarks are not so improper as to have mandated *ex mero motu* intervention by the trial court. *See State v. Boyd*, 311 N.C. at 423, 319 S.E. 2d at 199, *cert. denied*, 471 U.S. 1030, 85 L.Ed. 2d 324.

[23] Defendant next argues that the prosecutor's argument was grossly improper more than once in incorrectly stating the applicable law.

First, the prosecutor argued that mitigation "means to reduce the moral culpability of a killing." He continued,

> Have you seen anything in this lawsuit that reduces the moral, the moral culpability of this heinous, atrocious killing? Have you seen it, Ladies and Gentlemen of the Jury? Have you seen—it goes on to say ". . . to reduce the moral culpability of a killing or makes it less deserving of extreme punishment than other first degree murders."
>
> Why is this—why would this case be less deserving of extreme punishment than any other first degree murder? But that is your test, you see, in considering these mitigating circumstances.

> Now, let me tell you something else, before I get into the mitigating circumstances: The defendant, that's the fellow sitting over there. The defendant, the man you are trying, has the burden. He has the burden of persuading you that a mitigating circumstance exists in the first place. That's his burden. He has to do that.
>
> Secondly, he must satisfy you by the preponderance of the evidence. He has to satisfy you that one of these mitigating circumstances exists by the preponderance of the evidence.

Defendant contends that these remarks and portions of the argument that follow, which disparage mitigating circumstances that reflect on a defendant's character as opposed to those that reflect on the particular crime, improperly and prejudicially forced the jury's focus away from considering factors regarding his character. We discern no bias here for the aggravating or mitigating nature of crime over character. The term "mitigating circumstances" has consistently been defined as reflecting both the nature of the crime and the character of the accused. N.C.G.S. § 15A-2000(f) (1983); *State v. Silhan*, 302 N.C. at 273, 275 S.E. 2d at 484.

In addition, defendant insists that the trial court's instructions exacerbated rather than eliminated this erroneous focus. The trial court charged, in part:

> The defendant has the burden of persuading you that a given mitigating circumstance exists. The existence of any mitigating circumstance must be established by a preponderance of the evidence; that is, the evidence taken as a whole must satisfy you, not beyond a reasonable doubt, but simply satisfy you that any mitigating circumstance exists. If the evidence satisfies you that a mitigating circumstance exists, you would find that circumstance. If not, you would not find it.

[24] Neither the prosecutor nor the trial court was incorrect in emphasizing that the burden of persuading the jury that mitigating circumstances exist is upon the defendant. *See State v. Kirkley*, 308 N.C. at 224, 302 S.E. 2d at 160. Nor was it incorrect for the prosecutor to define a mitigating circumstance as one that

may reduce the moral culpability of a crime or make it less deserving of extreme punishment than other first degree murders. This was expressly approved as a jury instruction in *State v. Hutchins*, 303 N.C. 321, 351, 279 S.E. 2d 788, 806-07 (1981).

Defendant further argues that these portions of the argument and instructions had the effect of diminishing the jury's understanding that a mitigating circumstance is to be ascribed weight; it is not a tangible "thing" that either exists or does not. *See State v. Goodman*, 298 N.C. at 34, 257 S.E. 2d at 590. We share defendant's concern that the "nuances" of character and circumstance described by mitigating and aggravating circumstances be properly understood by a jury, but it is speculation to suggest that this argument or the trial court's instructions had the effect of misinforming the jury, particularly given the trial court's later instructions:

> [Y]ou are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. You should not merely add up the number of aggravating circumstances and mitigating circumstances; rather, you must decide from all the evidence what value to give to each circumstance, and then weigh the aggravating circumstances so valued against the mitigating circumstances so valued and finally determine whether the mitigating circumstances outweigh the aggravating circumstances.

[25] Second, defendant contends that the prosecutor misstated the law on diminished capacity. The prosecutor argued that the mitigating circumstance listed at N.C.G.S. § 15A-2000(f)(6)[2] should not be found because there was no evidence of any mental illness or insanity, because defendant fully appreciated the criminality of his acts and was fully capable of conforming his conduct to the requirements of the law, and because there was evidence that defendant was "high," but none that he was intoxicated or so intoxicated that he did not know what he was doing.

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2. "Mitigating circumstances which may be considered shall include, but not be limited to, the following:

. . .

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired." N.C.G.S. § 15A-2000(f)(6) (1983).

In pertinent part, this argument does not inaccurately state the law. In *State v. Johnson*, 298 N.C. 47, 68-70, 257 S.E. 2d 597, 613-14 (1979), this Court held that N.C.G.S. § 15A-2000(f)(6) requires a finding that the defendant's capacity to appreciate the criminality of his conduct or to conform that conduct to the requirements of the law was impaired. In *State v. Goodman*, we similarly made it clear that "[w]hen the defendant contends that his faculties were impaired by intoxication, such intoxication must be to a degree that it affects defendant's ability to understand and control his actions before subsection (f)(6) is applicable." 298 N.C. at 33, 257 S.E. 2d at 589. The trial court later instructed the jury:

> The defendant contends that from his drinking beer, he became high and that this condition impaired him from having the mental or physical capacity to appreciate the criminality of his conduct or to conform to the requirements of the law. The State contends that the defendant knew what he was doing and that his capacity was not impaired.

Clearly, the prosecutor and later the trial court described diminished capacity in nearly identical terms and in terms following the pattern of this Court's language in *Johnson* and *Goodman*. We hold that the prosecutor's reference to insanity, mental illness, and whether defendant "knew" what he was doing, *see State v. Johnson*, 298 N.C. at 67-68, 257 S.E. 2d at 612, while irrelevant under the evidence presented, had no prejudicial impact sufficient to require *ex mero motu* intervention by the trial court.

[26] In his last contention concerned with the propriety of the prosecutor's closing remarks, defendant asserts that the prosecutor misstated the law regarding aggravating circumstances in noting that the victim had no chance to plead with defendant for his life. We have held that under the Fair Sentencing Act, N.C.G.S. § 15A-1340.1 *et seq.* (1983), the mere fact that the victim was attacked without warning is not properly considered as a nonstatutory aggravating factor. *State v. Higson*, 310 N.C. 418, 424, 312 S.E. 2d 437, 441 (1984). As an aggravating circumstance, *per se*, such facts are also improperly considered under the provisions governing sentencing in capital cases. See N.C.G.S. § 15A-2000(e) (1983); *State v. Silhan*, 302 N.C. at 273, 275 S.E. 2d at 484. However, our review of the contested portion of the prosecutor's

argument convinces us that the prosecutor was not arguing that the jury should find the precipitous manner of the victim's death an aggravating circumstance: he was simply describing the offense as it had occurred. In counsels' arguments "[l]anguage may be used *consistent with the facts in evidence* to present each side of the case." *State v. Monk*, 286 N.C. at 515, 212 S.E. 2d at 131. Initiating the argument with a description of a situation in which a victim is killed without the opportunity to plead for his life is proper here because that situation is inherent in the offense of murder by lying in wait.

[27] Defendant next contends that the trial court erred in submitting as an aggravating factor that defendant had a prior conviction of a felony involving the use of violence to a person, N.C.G.S. § 15A-2000(e)(3). Despite defendant's lengthy criminal record, which included several assaults upon other persons, the State introduced evidence of only one offense in support of this aggravating factor. That offense was defendant's conviction, pursuant to a guilty plea, of discharging a firearm into occupied property. One of the State's witnesses testified that she was standing in the ticket booth at a drive-in with defendant's brother Ray when defendant came out of a house across the road, carrying a shotgun. He approached the booth, raised the gun, and fired. The witness felt the pellets fall onto her body; Ray was injured. Defendant suggests that introduction of the conviction and the witness's testimony was insufficient evidence to support the aggravating factor, contending that the State failed to prove that defendant fired "into" the ticket booth or that defendant knew or had reasonable grounds to believe the booth was occupied. *See State v. Williams*, 284 N.C. 67, 73, 199 S.E. 2d 409, 412 (1973).

Defendant pleaded guilty to the charge of firing into occupied property. A plea of guilty, accepted and entered by the trial court, is the equivalent of conviction. *State v. Neas*, 278 N.C. 506, 512, 180 S.E. 2d 12, 16 (1971). Moreover, a plea of guilty "means, nothing else appearing, that [defendant] is guilty upon any and all theories available to the state." *State v. Silhan*, 302 N.C. at 263, 275 S.E. 2d at 478. All that is required in support of this aggravating factor is for the State to show that defendant had been convicted of a felony, that the felony involved the use or threat of violence to the person, and that the conduct occurred prior to the events out of which this trial arose. *State v. Goodman*, 298 N.C. at

22, 257 S.E. 2d at 583. The State met these requisites simply by introducing the record of this offense. However, we have held that "the involvement of the use or threat of violence to the person in the commission of the prior felony may be proven or rebutted by the testimony of witnesses and that the state may initiate the introduction of this evidence notwithstanding defendant's stipulation of the record of conviction." *State v. McDougall*, 308 N.C. 1, 22-23, 301 S.E. 2d 308, 321 (1983).

Defendant also contends that the aggravating factor in N.C.G.S. § 15A-2000(e)(3) is itself unconstitutionally vague and overbroad, and he levels the same charge at the whole of the provisions governing capital sentencing. Defendant failed to raise this issue at the trial level, and ordinarily he is not entitled to appellate review without having done so. *State v. Cumber*, 280 N.C. 127, 131-32, 185 S.E. 2d 141, 144 (1971); *State v. Mitchell*, 276 N.C. 404, 410, 172 S.E. 2d 527, 530-31 (1970). However, in the exercise of its supervisory jurisdiction "[t]his Court may . . . pass upon constitutional questions not properly raised below." *State v. Elam*, 302 N.C. 157, 161, 273 S.E. 2d 661, 664 (1981); N.C.R. App. P. 2. Because this is a capital case, we elect to do so here.

[28] First, defendant's contention that the North Carolina death penalty statute is unconstitutional in its entirety has been consistently rejected. *E.g., State v. Boyd*, 311 N.C. at 435, 319 S.E. 2d at 206, *cert. denied*, 471 U.S. 1030, 85 L.Ed. 2d 324; *State v. Williams*, 304 N.C. 394, 409-10, 284 S.E. 2d 437, 448 (1981); *State v. Barfield*, 298 N.C. 306, 343-54, 259 S.E. 2d 510, 537-44 (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). Defendant's reasons why we should reverse this pattern rest in part on his argument that the unavailability of a lesser included offense instruction for murder by lying in wait "loads the deck" against him, arbitrarily increasing the chances of his being sentenced to death. In addition, defendant argues that his right to equal protection of the laws is violated where the same evidence may underlie a case of murder by premeditation and deliberation and a case of murder by lying in wait, but that under the former charge a lesser included offense is available, whereas under the latter it is not.

We have answered this contention hereinabove: there is no lesser included offense of murder by lying in wait. Defendant's

constitutional right to equal protection of the laws is not implicated by the class of murder in the first degree with which he is charged and convicted when "the uncontradicted evidence excludes the possibility of a verdict of a lesser degree of guilt than first degree murder." *State v. Allison*, 298 N.C. 135, 148, 257 S.E. 2d 417, 425 (1979). In general, "a defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support it." *State v. Johnson*, 317 N.C. at 204, 344 S.E. 2d at 782. This is so whether that murder was committed by means of lying in wait, *see, e.g., State v. Allison*, 298 N.C. at 148-49, 257 S.E. 2d at 425-26, or by means of poison, *see, e.g., State v. Johnson*, 317 N.C. at 204-05, 344 S.E. 2d at 782, or after premeditation and deliberation, *see, e.g., State v. Strickland*, 307 N.C. at 293, 298 S.E. 2d at 658, or in an attempt to perpetrate a felony, *see, e.g., State v. Warren*, 292 N.C. 235, 242, 232 S.E. 2d 419, 423 (1977). Accordingly, we again hold that N.C.G.S. § 15A-2000 does not violate defendant's constitutional rights.

We have also held that the list of aggravating circumstances in N.C.G.S. § 15A-2000(e) is not unconstitutionally vague. *E.g., State v. Rook*, 304 N.C. 201, 223, 283 S.E. 2d 732, 746 (1981), *cert. denied*, 455 U.S. 1038, 72 L.Ed. 2d 155 (1982); *State v. Barfield*, 298 N.C. at 353, 259 S.E. 2d at 543, *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L.Ed. 2d 1181. In *Barfield*, Justice Britt reasoned that:

> Sentencing standards are by necessity somewhat general. While they must be particular enough to afford fair warning to a defendant of the probable penalty which would attach upon a finding of guilt, they must also be general enough to allow the courts to respond to the various mutations of conduct which society has judged to warrant the application of the criminal sanction. [Citation omitted.] While the questions which these sentencing standards require juries to answer are difficult, they do not require the jury to do substantially more than is ordinarily required of a fact finder in any lawsuit. [Citation omitted.] The issues which are posed to a jury at the sentencing phase of North Carolina's bifurcated proceeding have a common sense core of meaning. Jurors who are sitting in a criminal trial ought to be capable of understanding them and applying them when they are

given appropriate instructions by the trial court judge. [Citation omitted.]

Barfield, 298 N.C. at 353, 259 S.E. 2d at 543, *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L.Ed. 2d 1181.

[29] Nevertheless, defendant argues that the "prior violent felony" aggravating factor is itself unconstitutionally vague and overbroad because it fails to define the class of offenders eligible for the death penalty in an "objective, evenhanded, and substantially rational way." *Zant v. Stephens*, 462 U.S. 862, 879, 77 L.Ed. 2d 235, 251 (1983). Defendant suggests this failure is exemplified in holdings that, for purposes of applying that factor, "felony" is not restricted to felonies committed in North Carolina, *see State v. Taylor*, 304 N.C. at 279, 283 S.E. 2d at 780, *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456 (Virginia conviction for rape admissible because defendant was convicted of what would be considered a felony in North Carolina), and the possibility of reading the phrases "use of violence" or "threat of violence" to include insignificant and harmless acts, such as slamming a car door on a kidnap victim or verbally challenging the officer arresting one later convicted of a felony.

Defendant then attacks the definition of "felony" in the trial court's instructions concerning this factor, contending that it illustrates this vagueness by including the mere threat of violence to the person. The trial court charged: "A felony involves the use or threat of violence to the person if the perpetrator kills or inflicts physical injury on the victim or threatens to do so in order to accomplish his criminal purpose." Because the only testimony offered concerning this factor was the witness' description of pellets falling onto her body, defendant insists this factor has been unconstitutionally applied because there was no indication that defendant intended to shoot at the witness or even that he knew she was inside the booth.

Defendant's reasoning here is unsupportable. The trial court's instruction was accurate but unnecessary. The action of discharging a firearm into an occupied building is a felony by statutory definition. "Any person who willfully or wantonly discharges or attempts to discharge: . . . (2) A firearm into any

building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class H felony." N.C.G.S. § 14-34.1 (1986). The jury was not required to determine whether the offense of which defendant had been convicted was a felony, but whether that felony "involv[ed] the use or threat of violence to the person." N.C.G.S. § 15A-2000(e)(3).

The wording of this factor is not vague or overbroad or so inscrutable that a jury is not "given sufficient guidance concerning the relevant factors about the defendant and the crime which he was found to have committed." *State v. Martin*, 303 N.C. 246, 254, 278 S.E. 2d 214, 219, *cert. denied*, 454 U.S. 933, 70 L.Ed. 2d 240, *reh'g denied*, 454 U.S. 1117, 70 L.Ed. 2d 655 (1981). Criminal felonies are clearly and specifically classified in Chapter 14 of the General Statutes. This aggravating factor contemplates those particular felonies, among those described in Chapter 14, in which violence or physical harm was threatened or intended by the defendant's actions. The factor singles out defendants who have not just harmed or threatened to harm others, but defendants who actually have been convicted of felonies of this nature. These are serious and memorable offenses, they signify materially in the assessment of a defendant's character for sentencing purposes, and their description in the aggravating circumstance in N.C.G.S. § 15A-2000(e)(3) is constitutionally adequate for purposes of guiding the jury to make an informed, not an arbitrary, sentence recommendation.

Defendant next asserts that the trial court twice erred in the midst of the jury's deliberations. In the first instance, the foreman returned to the courtroom after one and one-half hours of deliberations and reported to the trial court: "We haven't reached a decision. We are hung. We can't say that we have reached a verdict." The court held a brief conference in chambers and returned to tell the jury to continue its deliberations. In the second instance, the foreman returned approximately two hours later, reported that "there's a bad argument," and asked the meaning of "extenuating."

[30] Defendant notes the mandate of N.C.G.S. § 15A-2000(b) that, when a jury cannot within a reasonable time unanimously agree to its sentence recommendation, the trial court must impose a

sentence of life imprisonment. Defendant contends that, given the fact that the jury had only one aggravating factor and four mitigating factors to consider, one and one-half hours exceeded the "reasonable time" contemplated by the statute. In addition, defendant notes the language of N.C.G.S. § 15A-1235, which requires the court to instruct the jury before its deliberations that its verdict as to guilt must be unanimous, permits the trial court to instruct the jurors concerning the importance of voting their independent convictions, and permits the court to require a deadlocked jury to resume deliberations with or without a reiteration of the previous instructions. Defendant contends that by allowing the jurors to continue deliberations without further instructions, the court was pressuring the minority members to acquiesce to the will of the majority. He urges this Court to adopt a rule requiring the trial court to instruct a deadlocked jury in accordance with N.C.G.S. § 15A-1235.

We decline to do so for two reasons. First, this Court has recognized the clear intent of the legislature that instructions to a deadlocked jury be within the trial court's discretion. The language is permissive, not mandatory. *State v. Peek*, 313 N.C. 266, 271-72, 328 S.E. 2d 249, 253 (1985). Second, the provisions of N.C.G.S. § 15A-1235 do not govern sentencing procedures in capital cases. Such procedures are codified at N.C.G.S. § 15A-2000, which provides, in pertinent part that "[i]f the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment . . . ." N.C.G.S. § 15A-2000(b) (1983). This Court has consistently held that what constitutes a reasonable time for jury deliberation at this stage is left to the judgment of the trial judge, who is in the best position to gauge how much time is reasonable under the circumstances of that particular case. *State v. Kirkley*, 308 N.C. at 221, 302 S.E. 2d at 158; *State v. Johnson*, 298 N.C. at 370, 259 S.E. 2d at 762.

[31] Nor was there error when the trial court responded to the foreman's question as to the meaning of "extenuating" in a non-statutory mitigating factor by reading from *Webster's New World Dictionary*: "To lessen or seem to lessen the seriousness of . . . (an offense, guilt, et cetera) . . . by giving excuses or serving as an excuse . . . [Extenuating circumstances]." Defendant failed to object when told by the trial court in chambers that she in-

tended to give this response to the foreman's question, and review is therefore limited to determining whether it constituted plain error. *State v. Odom*, 307 N.C. at 660-61, 300 S.E. 2d at 378-79. Unless the words have a technical statutory meaning or one definitely indicated by their context, they should be understood according to their common and ordinary meaning. *State v. Lee*, 277 N.C. 242, 243, 176 S.E. 2d 772, 773 (1970). The dictionary is a universally recognized source of such meaning, one this Court has frequently consulted for definitions. *See, e.g., State v. Adcock*, 310 N.C. 1, 26, 310 S.E. 2d 587, 602 (1984); *State v. Ludlum*, 303 N.C. 666, 671, 281 S.E. 2d 159, 162 (1981). The trial court did not err in similarly resorting to this source in order to define for the jury a word that was neither a term of art nor clearly explained by its context.

[32] In his remaining assignments of error defendant urges the reconsideration of issues recently resolved by this Court. First, defendant argues that the trial court erred in instructing the jury that evidence from the guilt-innocence phase of the trial was competent for its consideration in the punishment phase. In *State v. Brown*, 306 N.C. at 179-80, 293 S.E. 2d at 587, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642, this Court noted that N.C.G.S. § 15A-2000(a)(3) permits any evidence that the trial court deems to have probative value to be received during the sentencing phase, and added specifically that all evidence submitted during the guilt determination phase is "competent for the jury's consideration in passing on punishment." *Id.* at 180, 293 S.E. 2d at 587. *See also Barfield v. Harris*, 540 F. Supp. 451, 469-70 (E.D.N.C. 1982), *aff'd*, 719 F. 2d 58 (4th Cir. 1983), *cert. denied*, 467 U.S. 1210, 81 L.Ed. 2d 357, *reh'g denied*, 468 U.S. 1227, 82 L.Ed. 2d 920 (1984). We again recall the statutory sanction for the trial court's instructions and hold that they were not erroneous.

[33] Second, defendant requests that we reconsider our holding in *State v. Barfield*, 298 N.C. at 353-54, 259 S.E. 2d at 544, *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L.Ed. 2d 1181, that the concept of due process does not require the State to disprove beyond a reasonable doubt the existence of mitigating circumstances. We decline to do so. Due process does not prohibit placing upon the defendant the burden of proving mitigating circumstances by a preponderance of the evidence. *State v. Kirkley*, 308 N.C. at 224, 302 S.E. 2d at 160.

[34] Third, defendant argues that requiring jurors to reach unanimous decisions regarding the presence or absence of mitigating circumstances renders the sentencing proceedings arbitrary and capricious because it vests a single juror with the power to deprive all other jurors of consideration of such circumstances. This Court has held that this requirement is constitutionally sound. *State v. Kirkley*, 308 N.C. at 217-19, 302 S.E. 2d at 156-57. Defendant presents no new reason to hold otherwise.

[35] Defendant next contends that it was error to instruct the jury that it must determine the substantiality of the aggravating factor in light of mitigating circumstances "found" to exist or not. The premise is fallacious, defendant contends: a failure to "find" a mitigating factor does not mean it does not exist. This includes mitigating circumstances that may exist but are not articulated on the issues and recommendation sheet. Defendant invites the Court to allow the jurors free range to "intuit" such unarticulated factors. In other words, defendant urges that we sanction an invitation to caprice in the penalty determination phase of a trial.[3] We decline to do so. "The consideration of mitigating circumstances must be the same as the consideration of aggravating circumstances." *State v. Kirkley*, 308 N.C. at 219, 302 S.E. 2d at 157. There is no reason to confound the jury's decision process with arbitrary, "inarticulable" factors that may be applied in mitigation of a sentence but not in aggravation of it. *See generally State v. Pinch*, 306 N.C. at 33, 292 S.E. 2d at 227, *cert. denied, Smith v. North Carolina*, 459 U.S. 1056, 74 L.Ed. 2d 622, *reh'g denied, Pinch v. North Carolina*, 459 U.S. 1189, 74 L.Ed. 2d 1031,

3. In their briefs both defendant and the State characterize this contention as the position taken by Justice (now Chief Justice) Exum in his dissent in *State v. Pinch*, 306 N.C. at 45, 292 S.E. 2d at 234, *cert. denied, Smith v. North Carolina*, 459 U.S. 1056, 74 L.Ed. 2d 622, *Pinch v. North Carolina, reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031. A careful reading of the dissent reveals that its point was not to permit the jury to find unarticulated mitigating circumstances on its own, but to abolish the mandate in the Pattern Jury Instruction that it is the jury's "duty to recommend that defendant be sentenced to death" upon the jury's finding aggravating circumstance(s) that are sufficiently substantial to call for the imposition of the death penalty and that outweigh any mitigating circumstance(s). N.C.P.I. Crim. 150.10, pp. 3-4 (Replacement May 1980). *See* N.C.G.S. § 15A-2000(b) (1983). What Justice Exum described as "nuances" or circumstances of the case that defy articulation are not additional mitigating factors the jury can invent on its own, but ever present influences that affect the *weight* of the factors actually before the jurors. *See State v. Goodman*, 298 N.C. at 34, 257 S.E. 2d at 590.

quoting *State v. Johnson*, 298 N.C. at 63, 257 S.E. 2d at 610: "[T]he jury may only exercise guided discretion in making the underlying findings required for a recommendation of the death penalty within the 'carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused.' " (Emphases omitted.) The opportunity for the input of such "nuances" is when the mitigating circumstances are weighed against those found to be aggravating. *See State v. Goodman*, 298 N.C. at 34, 257 S.E. 2d at 590.

Finally, defendant contends that he was denied his right to a fair trial free from arbitrary, capricious, and extraneous factors, including the influence of passion and prejudice, because of the cumulative effect of the prosecutor's arguments during both the guilt-innocence and penalty phases of his trial. Defendant asks no more than the law already requires. This Court must review the record in a capital case to determine whether it supports the jury's finding of any aggravating circumstance(s) and whether "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." N.C.G.S. § 15A-2000(d)(2) (1983). In accord with this responsibility, we have reviewed the trial records as well as the briefs and oral arguments before this Court. We conclude that the arguments had no malignant, cumulative effect upon the fairness of defendant's trial. This Court's conclusions regarding similar contentions made by the defendant in *State v. Thompson*, 293 N.C. at 719-20, 239 S.E. 2d at 470, are appropriate:

> The record does not reveal such prosecutorial misconduct nor such improprieties as those involved in *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975), or *State v. Smith*, 279 N.C. 163, 181 S.E. 2d 458 (1971). Nor does the record reveal an attempt to argue matters not legitimately arising on the evidence. Compare *State v. Roach*, 248 N.C. 63, 102 S.E. 2d 413 (1958). Moreover, no violation of G.S. 8-57 or G.S. 8-54 appears, as in *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976), and *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975).
>
> While the courtroom conduct of [this] District Attorney . . . in many cases reflects a callous indifference to decisions of this Court, . . . we find in this case no impropriety of sufficient moment to warrant a new trial.

In addition, the facts of record speak for themselves. There is ample evidence that defendant shot his victim after waiting for him to position himself in the window by his desk. The single aggravating factor found by the jury—that defendant had been convicted of a violent felony—is also solidly established in the record. The jury found that this aggravating circumstance was sufficiently substantial to warrant the imposition of the death penalty and found no mitigating circumstance to counterbalance it. The record objectively demonstrates that the jury's finding of guilt and its recommendation that the sentence of death be imposed met the standard of reliability that the Eighth Amendment requires. *See Caldwell v. Mississippi*, 472 U.S. 320, 340, 86 L.Ed. 2d 231, 246 (1985). We conclude that, as to the sentencing phase of his trial, defendant received a fair hearing free from prejudicial error.

PROPORTIONALITY REVIEW

[36] Statutory provisions governing capital sentencing direct this Court to review the record and determine (1) whether it supports the jury's finding of the aggravating circumstance 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." N.C.G.S. § 15A-2000(d)(2) (1983). We conclude, first, that the record from both the guilt and the sentencing phases reveals no suggestion that the sentence of death was influenced by passion, prejudice or any other arbitrary factor. Second, the introduction of defendant's criminal record was sufficient evidentiary support for the jury's finding of the single aggravating factor that 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). Third, proportionality review demonstrates that the sentence of death is neither excessive nor disproportionate.

For purposes of proportionality review, the pool of similar cases includes

> *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.

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, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983). The pool is further restricted to those cases that this Court has found to be free of error in both phases of the trial. *State v. Stokes*, 319 N.C. 1, 19-20, 352 S.E. 2d 653, 669 (1987). The Court's task is generally to compare the case at bar with other cases in the pool that 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). For this purpose, the manner in which the crime was committed and defendant's character, background, and physical and mental condition are relevant considerations. *Id.*

> 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.

Id.

We assume the task of proportionality review in this case by making the comparison twice. First, this crime and this defendant are compared with the crime and the defendant in cases with similar facts, including cases in which the same aggravating circumstance was found. Second, this case is compared to cases in which this Court has affirmed a sentence of death in order to determine whether this case "rise[s] to the level of those murders in which we have approved the death sentence upon proportionality review." *State v. Bondurant*, 309 N.C. 674, 693, 309 S.E. 2d 170, 182 (1983), quoting *State v. Jackson*, 309 N.C. 26, 46, 305 S.E. 2d 703, 717 (1983).

This case is distinguished by these features: it is a case of murder in the first degree on the basis of lying in wait; it is a

case in which a single aggravating circumstance was found—that defendant had been convicted of a felony of violence, N.C.G.S. § 15A-2000(e)(3); and it is a case in which no mitigating factors were found, although four were submitted to the consideration of the jury.[4]

There is only one other lying in wait case in the proportionality pool.[5] Its similarity to this case is merely generic, for it was a case in which the defendant was convicted of murder in the first degree as an accessory before the fact. In *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574, the defendant was sentenced to life imprisonment for having encouraged her lover to murder her husband. We noted in *Woods* that distinctions between an accessory before the fact and the principal had been abolished for purposes of sentencing and guilt by the enactment of N.C.G.S. § 14-5.2, but that the elements of being an accessory before the fact had remained the same, *viz*, that the defendant counseled, procured or commanded the principal to commit the offense, that the defendant was not present when the offense was committed, and that the principal committed the offense. N.C.G.S. § 14-5.2 (1981); *State v. Woods*, 307 N.C. at 217-18, 297 S.E. 2d at 577. Despite the legislature's recognition that the criminal responsibility of an accessory before the fact is equivalent to that of the principal who commits the murder by lying in wait, the criminal actions of each are dissimilar. For that reason *Woods* is not a true analogue to the case *sub judice* for purposes of proportionality review.

The current proportionality pool includes only one case similar to that at bar. In *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170, the defendant, riding in a car with several others, pointed a gun at the victim's head and taunted him, saying, "You don't believe I'll shoot you, do you?" After at least two minutes, the defendant pulled the trigger, despite the pleas of his companions

4. The jury considered but did not find that defendant's capacity to appreciate the criminality of his conduct or to conform that conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6), that defendant was reared without a father, that he had little education, and that there were extenuating circumstances between defendant and the deceased, N.C.G.S. § 15A-2000(f)(9).

5. *State v. Allison*, 298 N.C. 135, 257 S.E. 2d 417, also a lying in wait case, was tried on 20 June 1977. Because the offense was committed prior to the effective date of N.C.G.S. § 15A-2000, its provisions did not apply to sentencing. For this reason we disregard it as a comparable case for purposes of proportionality review.

not to do so. This Court held that the evidence supported submission of the "especially heinous" and the "course of violent conduct" aggravating circumstances, N.C.G.S. § 15A-2000(e)(11). The Court concluded, however, that the sentence of death was excessive and disproportionate, partly because defendant and his companions were highly intoxicated, because there was no apparent motive for the killing, and, most important, because defendant had immediately exhibited remorse and concern for the victim and had personally and immediately sought medical assistance for him. *State v. Bondurant*, 309 N.C. at 693-94, 309 S.E. 2d at 182-83. Comparison of this case to *Bondurant* is unenlightening because of the dramatic contrast between the remorseful character of the defendant in that case and the consummately uncontrite character of the defendant here.

There are no other lying in wait cases in the current proportionality pool. Outside the pool, however, there are four other "premeditated and deliberated" murder cases in which the defendant was sentenced to death but in which this Court found that the "heinous, atrocious or cruel" aggravating factor was erroneously submitted during the sentencing phase. These cases are similar to the case *sub judice* in that all are characterized by the unprovoked shooting of a victim who was singled out for attack.

In *State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837, the defendant lay in wait for the victim yet was tried for murder in the first degree on the basis of premeditation and deliberation. The defendant had waited briefly in the vestibule of a nightclub for his victim. As soon as the victim entered, the defendant shot him several times. There was evidence that the defendant and the deceased had fought the previous week and that ill will persisted between them. This Court held that it was error to submit to the jury the single aggravating factor that the murder had been especially heinous, atrocious or cruel, N.C.G.S. § 15A-2000(e)(9), because the victim had been wholly unaware of the defendant's presence and because he had been rendered unconscious by the first shot that struck him. *State v. Hamlet*, 312 N.C. at 176, 321 S.E. 2d at 846. The Court accordingly vacated the sentence of death and imposed one of life imprisonment. N.C.G.S. § 15A-2000 (c)(2).

In *State v. Stanley*, 310 N.C. 332, 312 S.E. 2d 393 (1984), the defendant drove his car to his mother-in-law's house and travelled

back and forth several times while his estranged wife ate supper inside with her family. Shortly afterwards, when his wife had gone out for a walk with her son and her sister, the defendant drove up next to the trio and shot his wife. This Court reduced the sentence of death to one of life imprisonment because the single, "especially heinous" aggravating factor was not borne out by the evidence: there was neither a prolonged, tortured death, nor evidence that the defendant had psychologically tortured his wife by "stalking" her or by killing her after she had begged for her life. *State v. Stanley*, 310 N.C. at 340-41, 312 S.E. 2d at 398.

In *State v. Moose*, 310 N.C. 482, 313 S.E. 2d 507, the defendant was closely "tailing" the car driven by the victim, honking his horn and bumping the back of the victim's car, and ignoring every opportunity to pass. The victim pulled into a parking lot. The defendant drove up beside him, pointed a shotgun at the victim, and, after about five seconds, shot and killed him. The jury found two aggravating factors: that the killing had been especially heinous and that defendant had knowingly created a great risk to the lives of more than one person by means of a hazardous weapon or device, N.C.G.S. § 15A-2000(e)(10) (1983). This Court remanded for resentencing, holding that the evidence was insufficient to support the finding of the "especially heinous" aggravating factor: the victim had indicated only that he was "wondering" what the defendant was doing; he had given no sign that he was suffering the anxiety or psychological agony of being "stalked." *State v. Moose*, 310 N.C. at 495-96, 313 S.E. 2d at 516.

In *State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 338 (1981), the defendant, without any established motive, shot the victim three times from behind. The jury found two aggravating circumstances: that the defendant had been previously convicted of a felony involving the threat or use of violence to the person, N.C.G.S. § 15A-2000(e)(3) (1983), and that the murder was especially heinous. This Court again found that submission of the "especially heinous" factor was not supported by the evidence and granted the defendant a new trial because of this and other errors. Although the victim had lingered twelve days before dying, this case was not "unnecessarily tortu[r]ous or outrageously wanton or vile" in comparison with other capital cases in which the factor had been found and its finding affirmed. *State v. Hamlette*, 302 N.C. at 504, 276 S.E. 2d at 347.

While this group of cases shares strongly analogous facts with the case *sub judice*, there are significant differences. All four cases are differentiated by the presence of the "especially heinous, atrocious or cruel" aggravating circumstance, and in all four that circumstance was held to have been erroneously submitted. The "especially heinous" aggravating circumstance was not submitted to the jury in this case, and for that reason the results of this Court's review of *Hamlet, Stanley, Moose,* and *Hamlette* do not provide a meaningful foil for appreciating the unique facts of the case before us. Moreover, because these cases are not in the pool, they provide no insights for purposes of proportionality review.

Another approach to describing a cohort of similar cases is to single out those in which the same aggravating circumstance was found. N.C.G.S. §§ 15A-2000(e)(3) and (e)(2)[6] are the only enumerated aggravating circumstances that reflect upon the defendant's character as a recidivist. N.C.G.S. § 15A-2000(e)(3) in particular tends to demonstrate that the crime committed was part of a long-term course of violent conduct, as opposed to the situational course of conduct culminating in the murder itself. *Cf.* N.C.G.S. § 15A-2000(e)(11).

There are thirteen cases in the proportionality pool and among capital cases outside the pool that are factually similar to the case at bar and in which the (e)(3) factor figured in the jury's determination of the defendant's sentence. In five of these the sentence of death was affirmed on review; in eight the jury either recommended life imprisonment or its recommendation of death did not withstand appellate review.

The five cases in the "death-affirmed" pool in which the (e)(3) factor was found are all distinguishable from this case by the finding in all five of multiple aggravating circumstances, notably including circumstances describing a course of violent or felonious conduct, N.C.G.S. § 15A-2000(e)(5) ("capital felony was committed while the defendant was engaged . . . in the commission of, . . . or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or air-

6. "The defendant had been previously convicted of another capital felony." N.C.G.S. § 15A-2000(e)(2) (1983). To date, this factor has not appeared in any case reviewed by this Court for proportionality purposes.

craft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb") or N.C.G.S. § 15A-2000(e)(11) ("murder . . . was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons").

In *State v. Robbins*, 319 N.C. 465, 356 S.E. 2d 279 (1987), defendant's sentence of death for the shooting of a fifty-three-year-old woman was upheld on appellate review. (Charges against defendant arising from a second murder resulted in a remand for resentencing.) This Court found evidentiary support for the two aggravating circumstances found by the jury—N.C.G.S. §§ 15A-2000(e)(3) and (e)(5). The jury found at least one of the three mitigating circumstances submitted but did not specify which one(s).

In *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808 (1985), *cert. denied*, --- U.S. ---, 90 L.Ed. 2d 733 (1986), the defendant murdered a clerk in the course of robbing a convenience store. Evidence was presented that the victim's death by bleeding from six bullet wounds over a course of fifteen minutes was accompanied by psychological torture and great physical pain. In support of its recommended sentence of death, the jury found no mitigating circumstances to outweigh its finding of the "prior violent felony," the "especially heinous," and the "course of violent conduct" aggravating circumstances, (e)(3), (e)(9), (e)(11).

In *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983), the defendant attacked the victim and her roommate with a knife, stabbing the victim twenty-two times. There was some evidence to show that the victim may have been sexually assaulted. In addition to the (e)(3) aggravating circumstance, the jury found that the murder had been committed as part of a course of violent conduct, (e)(11), and that it had been especially heinous, atrocious or cruel, (e)(9). It found three mitigating circumstances based in part upon evidence presented by the defendant that he suffered from cocaine-induced psychosis: mental or emotional disturbance, (f)(2), impaired capacity, (f)(6), and the "catchall" circumstance, (f)(9).

In *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761, *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456, the course of defendant's conduct included kidnap-

ping, armed robbery, and murder. In addition to the (e)(3) circumstance, the jury found that the murder was committed for pecuniary gain and that it was committed while defendant was engaged in the commission of a felony, (e)(5). It found no mitigating circumstances.

In *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025, *reh'g denied*, 451 U.S. 1012, 68 L.Ed. 2d 865 (1981), the defendant injured one girl and murdered another with a machete after the victims rebuffed his attempts at sexual assault. The jury found that the murder was heinous, atrocious or cruel, that it was committed as part of a course of violent conduct, (e)(11), as well as the (e)(3) circumstance.

In five other cases in the proportionality pool and among other capital cases that have come before us for review, the (e)(3) recidivist circumstance was found, but, with one exception, in which the sentence of death was reduced on review to life imprisonment, the cases were remanded for resentencing. Except for *State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 338, these cases appear more akin to the "death-affirmed" cases in which the (e)(3) circumstance was found than to the case at bar:

In *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551, *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 796, the defendant committed felony murder in the course of the armed robbery of a convenience store. The jury found three aggravating factors: "prior violent felony," (e)(3), "murder committed in the course of committing a felony," (e)(5), and "pecuniary gain," (e)(6). This Court held that it was error to submit as an aggravating circumstance the felony underlying the felony murder.

In *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569, the deceased was shot numerous times, cut with a knife, then, still alive and begging for his life, thrust into the trunk of a car, and finally taken out and shot in the head. The jury found five aggravating circumstances, including (e)(3), and no circumstances in mitigation. This Court held that it was error to submit more than one aggravating circumstance based upon the same evidence and remanded for resentencing.

In *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450, the defendant forced two girls into the woods, sexually assaulted them, and

stabbed them. One died. This Court held that it was error to submit the aggravating circumstance that the murder had occurred in the commission of a felony when the jury had not specified whether it based its first-degree murder verdict on felony murder or on premeditation and deliberation. The case was remanded for resentencing.

In *State v. Beal*, 311 N.C. 555, 319 S.E. 2d 557 (1984), the defendant sexually assaulted a female, beat her head in with a concrete block, then stuffed her body in a trash barrel, covered it with kerosene, and ignited it. This Court vacated the death sentence and imposed one of life imprisonment after holding that the trial court had erred in submitting an adjudication of defendant as a youthful offender as a "prior conviction" under the (e)(3) aggravating circumstance.

From the pool of cases in which the defendant was sentenced at trial to life imprisonment, only three share both the (e)(3) aggravating circumstance and facts similar to those in the case before us. *State v. Williams*, 315 N.C. 310, 338 S.E. 2d 75 (1986), is strikingly like *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574, in that the defendant conspired with his girlfriend to murder her mother for a portion of the insurance proceeds. In addition to (e)(3), the jury found that the murder had been committed for pecuniary gain, (e)(6). Five mitigating circumstances were submitted, but the jury did not specify which outweighed the aggravating factors, nor did it even indicate whether the aggravating factors were sufficiently substantial to merit the death penalty.

State v. Crawford, 301 N.C. 212, 270 S.E. 2d 102 (1980), and *State v. Pridgen*, 313 N.C. 80, 326 S.E. 2d 618 (1985), are more similar to the case before us, both in the submission of the single (e)(3) aggravating factor and in their facts. In *Crawford* the defendant told an acquaintance that he would kill somebody before the day was out. Shortly thereafter, the victim walked up to him, greeted him, met the response, "I'll show you how I'm doing," and was shot by a sawed-off shotgun the defendant was carrying in a paper bag. The defendant was taken into custody after he emerged from a crowd around the still-living victim, said "I shot the s--of a b----," and kicked the victim in the head, saying, "I thought you were dead." In *Pridgen* there was testimony from

one of the defendant's co-workers that the defendant had called the victim a "rat," and intimated that he was going to "take care" of the victim or have another do so. Shortly after the murder, the defendant was said to have smiled and stated, "somebody got that boy." In both of these cases there was obvious ill will between the defendants and the victims, and the murders were purposeful acts of exercising a grudge. There were three mitigating circumstances submitted for the consideration of the jury in each case; whether these were found was not specified in *Pridgen*. Despite their similarities, the submission of mitigating circumstances not submitted here and the absence of evidence indicating lying in wait differentiate these cases from this one.

A second approach to proportionality review is to classify "death-affirmed" cases according to characteristics *not* present in the case *sub judice* and to determine whether the absence of those characteristics reasonably excludes the case *sub judice* from that group. *See State v. Bondurant*, 309 N.C. at 693-94, 309 S.E. 2d at 182-83. The crime committed by defendant was, like that committed by the defendant in *Bondurant*, "a senseless . . . killing." *Id.* at 693, 309 S.E. 2d at 182. However, it was not a felony murder case or one in which the defendant was motivated to kill by avarice or lust. *Cf., e.g., State v. Vereen*, 312 N.C. 499, 324 S.E. 2d 250, *cert. denied*, 471 U.S. 1094, 85 L.Ed. 2d 526 (1985) (aggravating circumstances found: that murder committed while defendant was engaged in first-degree burglary and that murder was part of a course of violent conduct); *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) (murder committed in course of robbing a restaurant waitress and manager); *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) (defendants stabbed the victim thirty-seven times, then took her pocketbook); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510, *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L.Ed. 2d 1181 (murder by poison motivated by fear victim would reveal that defendant had forged a check on his account).

Nor was the murder a torturous one, such as those committed in these cases: *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 166 (1986) (victim shot, his throat slashed, and left to die in a ditch); *State v. Huffstetler*, 312

N.C. 92, 322 S.E. 2d 110, *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (victim battered to death by multiple and heavy blows of an iron skillet); *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197 (1984) (member of defendant's burglary gang bound, beaten, shot, and stabbed, despite begging for his life); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (victims stabbed repeatedly, then disemboweled); *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 (sentence recommendation by jury for defendant's sexual assault and murder of 100-year-old victim included heinous, atrocious or cruel and pecuniary gain aggravating circumstances); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (shooting of attendant and customer, although one pleaded for his life, during robbery of a convenience store); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, *Smith v. North Carolina*, 459 U.S. 1056, 74 L.Ed. 2d 622, *reh'g denied*, *Pinch v. North Carolina*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (murder of two people at motorcycle club, one of whom begged for his life); *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732, *cert. denied*, 455 U.S. 1038, 72 L.Ed. 2d 155 (defendant kidnapped, raped, beat victim, drove over her with automobile, and left her to die); *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, *Williams v. North Carolina*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983) (defendant kidnapped three girls at gunpoint, robbed them, forced two into the car trunk, raped and beat the third to death); *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. denied*, 454 N.C. 933, 70 L.Ed. 2d 240, *reh'g denied*, 454 U.S. 1117, 70 L.Ed. 2d 655 (victim alive and begging for her life during twenty-five-minute period in which she was shot six times, then beaten).

Nor was this a case like *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981), in which the jury found the aggravating circumstances that the murder was committed for the purpose of avoiding or preventing a lawful arrest, (e)(4), and that it had been committed against a law enforcement officer, (e)(8). *See also State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493, *cert. denied*, 471 U.S. 1120, 86 L.Ed. 2d 267 (aggravating circumstances found: murder committed as part of course of violent conduct, (e)(11), and in order to avoid arrest, (e)(4)).

The most striking feature of this list is the number of cases in which the heinous, atrocious or cruel aggravating circumstance was present. However, not all of the "death-affirmed" cases are characterized by a finding of this circumstance, and it is against these six other cases that the case *sub judice* can perhaps be more fruitfully juxtaposed. *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788, and *State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493, are markedly unlike the case at bar because they involved murders committed upon law enforcement officers or murders committed in the attempt to elude the law. Just as our individual consciences are shocked by heinous, atrocious or cruel murders, the collective conscience requires the most severe penalty for those who flout our system of law enforcement. The aggravating factors in N.C.G.S. §§ 15A-2000(e)(8) and (e)(4) reflect the General Assembly's recognition of this common concern.

Murders were perpetrated in the course of a felony or otherwise violent conduct in these cases: *State v. Vereen*, 312 N.C. 499, 324 S.E. 2d 250, *cert. denied*, 471 U.S. 1094, 85 L.Ed. 2d 526; *State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591, *cert. denied*, 469 U.S. 1230, 84 L.Ed. 2d 369; *State v. Williams*, 305 N.C. 656, 292 S.E. 243, *cert. denied, Smith v. North Carolina*, 459 U.S. 1056, 74 L.Ed. 2d 622, *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031; and *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761, *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456. Multiple aggravating circumstances were found in all except *Williams*.

In *Williams* the jury found only the "course of violent conduct" aggravating circumstance, (e)(11), and seven mitigating circumstances. The defendant had consumed alcohol and a panoply of drugs before killing a gas station attendant during a robbery. Although the gravamen of the murder in *Williams* does not appear to be as extreme as that in cases in which the "heinous, atrocious or cruel" aggravating factor was upheld on review, the motives and the method of murder are in no way similar to those here. With the exception of an alcohol- or drug-induced bravado insufficient to impair judgment or behavior and thus insufficient to support the mitigating circumstance in N.C.G.S. § 15A-2000 (f)(6), these murders have little in common.

The exhaustive process of proportionality review has revealed no case in our pool sufficiently similar to that here that

the sentences can be meaningfully compared. A juxtaposition to "death-affirmed" cases has proved similarly unenlightening. This case stands apart from the others in the pool. Our comparison nonetheless leads to the conclusion that we cannot hold as a matter of law that the death sentence was disproportionate in this case. *See State v. Robbins*, 319 N.C. 465, 356 S.E. 2d 279 (1987).

Among our statutory duties is that requiring a comparison of this case with other cases in the pool that are "roughly similar" regarding the crime and the defendant. N.C.G.S. § 15A-2000(d)(2); *State v. Lawson*, 310 N.C. at 648, 314 S.E. 2d at 503, *cert. denied*, 471 U.S. 1120, 86 L.Ed. 2d 267. The nature of the crime and the character of the defendant in every instance distinguish this case in some way from others in the pool. Nevertheless, in fulfilling our statutory duty to determine proportionality by "considering both the crime and the defendant," N.C.G.S. § 15A-2000(d)(2), the following considerations inform our decision that the penalty imposed here was not disproportionate:

The crime was committed by lying in wait outside the victim's home. The sanctity of the home is a revered tenet of Anglo-American jurisprudence. *See, e.g., Segura v. United States*, 468 U.S. 796, 810, 82 L.Ed. 2d 599, 612 (1984) ("The sanctity of the home is not to be disputed."). The law recognizes the special status of the home, giving one the right to defend it. "A man's house, however humble, is his castle, and his castle he is entitled to protect against invasion . . . ." *State v. Gray*, 162 N.C. 608, 613, 77 S.E. 833, 835 (1913), quoting I Wharton's Criminal Law, sec. 503 (9th ed.), and citing 1 J. Bishop, *New Criminal Law*, sec. 858 and 1 Hale, *Pleas of the Crown*, sec. 458. And the law has consistently acknowledged the expectation of and right to privacy within the home. *See, e.g., Segura v. United States*, 468 U.S. at 820, 82 L.Ed. 2d at 619 (Stevens, J., dissenting) ("Nowhere are expectations of privacy greater than in the home."). This crime shocks the conscience, not only because a life was senselessly taken, but because it was taken by the surreptitious invasion of an especially private place, one in which a person has a right to feel secure. *Cf. State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (defendant laid in wait for victim in the vestibule of a nightclub).

The murder was committed after defendant had lain in wait under the victim's window and paused for the victim to position

himself in the most opportune place for annihilation. The victim, unaware of the threat, had no opportunity to defend himself. *See State v. Wiseman*, 178 N.C. at 790, 101 S.E. at 631 ("taking the victim unawares without opportunity to defend himself"). Unlike the victim felled in a face-to-face confrontation, this victim had no chance to fight for his life.

The crime was as calculated and deliberate as a murder can be. In the lengthy, purposeful plotting, and in the execution of his crime, the defendant displayed a cold callousness and obliviousness to the value of human life. He had demonstrated these qualities before: his criminal record was replete with evidence of his dangerousness and propensity to act violently towards others, including the discharge of a shotgun into an occupied building.

In addition, defendant displayed absolutely no remorse or contrition for his act. *Cf. Bondurant*, 309 N.C. at 694, 309 S.E. 2d at 182-83 (defendant's expression of remorse and concern for the victim's life immediately following the shooting a significant factor in Court's vacating death sentence as disproportionate). His behavior after the murder was marked by self-congratulatory bragging and laughter. There was evidence before the jury that defendant admitted he had "killed two others besides," and although there was no evidence in the record that this was indeed so, the statement is a telling indicator of defendant's disregard for the sanctity of human life.

The only evidence in the record with any tendency to diminish defendant's moral culpability is that the victim had mistreated defendant and that defendant had been drinking. However, the jury expressly refused to find extenuating circumstances between defendant and victim as a mitigating factor, N.C.G.S. § 15A-2000 (f)(9) (1983), or that defendant's capacity to appreciate the criminality of his conduct or to conform that conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6) (1983). Viewed in light of the evidence regarding the nature of the crime and the character of the defendant, we find the evidence diminishing culpability minuscule and insufficient to warrant a holding of disproportionality.

Even if, as one member of this Court has suggested, "[t]he death penalty, if we are to have it at all, should be reserved for first degree murders which are the products of the meanness of

mature, calculating, fully responsible adults," *State v. Rook*, 304 N.C. 201, 247, 283 S.E. 2d 732, 759, *cert. denied*, 455 U.S. 1038, 72 L.Ed. 2d 155 (1981) (Exum, J., now C.J., dissenting in part), surely this is such a murder. "If we are to have a death penalty—and our legislature has dictated that we shall—" *State v. Stokes*, 319 N.C. 1, 29, 352 S.E. 2d 653, 669 (1987) (Mitchell, J., dissenting), surely a case such as this is one in which the jury may recommend it. N.C.G.S. § 15A-2000(b) (1983).

We find no error in the guilt or sentencing phases of defendant's trial. In comparing this case to similar cases in which the death penalty was imposed, and in considering both the crime and the defendant, we cannot hold as a matter of law that the death sentence was disproportionate or excessive. We thus decline to set aside the penalty imposed.

No error.

STATE OF NORTH CAROLINA v. BERNARDINO ZUNIGA

No. 156A85

(Filed 7 July 1987)

1. Criminal Law § 161— contentions about nontestimonial identification order—no exceptions, assignments of error, arguments—not before court

In a prosecution for first degree murder and rape, defendant's argument that a nontestimonial identification order violated the federal constitution was not properly before the court where defendant did not except to the trial court's finding that the basis of defendant's motion to dismiss was the failure to fully comply with the requirements of N.C.G.S. Chapter 15A; the issue of whether the taking of samples was in violation of the article governing execution of warrants was not properly before the court because it was not raised at the suppression hearing or assigned as error; and the assignment of error concerning the execution of the nontestimonial identification order was deemed abandoned because defendant made no argument indicating the way in which the taking of the samples constituted a substantial violation of any of the provisions of Art. 14 of N.C.G.S. Chapter 15A.

2. Criminal Law § 178— prior ruling—search lawful—law of the case

In a prosecution for murder and rape where defendant was detained in Tennessee as a result of a request from the Alexander County Sheriff's Department and several items were seized from defendant at that time, the N. C. Supreme Court's original ruling that the search was lawful remained the

law of the case where the defendant did not persuade the Court that the prior determination was made under a misapprehension of the facts.

3. Constitutional Law § 66— defendant not present at hearing on motion for change of venue—no prejudice

In a prosecution for rape and murder, any error in allowing defendant's motion for a change of venue in his absence was harmless beyond a reasonable doubt. Sixth Amendment to the U. S. Constitution.

4. Constitutional Law § 31— denial of funds for private investigator—no error

The trial court did not err in a prosecution for rape and murder by denying defendant's motion for funds to hire a private investigator where defendant argues that he was in special need of an investigator because his primary language was Spanish, but defendant was not to conduct witness interviews himself and there was no language handicap borne by defense counsel. Moreover, defendant's motion at trial was for funds to hire an investigator to interview the State's witness who conducted the serological test, not for funds to conduct an independent serological examination. N.C.G.S. § 7A-450(b).

5. Constitutional Law § 31— denial of funds to hire jury selection expert—no error

The trial court did not err in a prosecution for rape and murder by denying defendant's motion for funds to hire a jury selection expert where the affidavit submitted by the proposed expert revealed that his expertise lies in the area of small group social psychology and there was nothing to suggest that the expert would be of any particular assistance in excluding biased persons from the jury in a group *voir dire*.

6. Jury § 6.4— death case—no particularized questioning into opposition to death penalty—no error

The trial court did not err in a prosecution for first degree rape and murder by removing potential jurors opposed to the death penalty without a particularized questioning into the precise nature of the juror's opposition to the death penalty.

7. Jury § 6.2— jury selection—prosecutor's question—no gross impropriety

In a prosecution for first degree rape and murder, there was no gross impropriety requiring the trial judge to intervene in the absence of objection where the prosecutor asked many of the potential jurors if they would be able to recommend death "for what defendant did to this little girl."

8. Criminal Law § 50.1— testimony as to source of bloodstains on victim's shirt—erroneously admitted—no prejudice

There was no prejudice in a prosecution for first degree rape and murder from the erroneous admission of opinion testimony by a forensic pathologist that bloodstains on the front of the victim's shirt could have been caused by someone wiping a knife blade on the shirt. N.C.G.S. § 8C-1, Rule 702.

9. Criminal Law § 51— SBI fracture match expert—testimony properly admitted

The trial court did not abuse its discretion in a prosecution for first degree rape and murder by admitting the testimony of an SBI "fracture

match" expert regarding pieces of torn newspaper, despite the fact that there is no recognized scientific or technical field of fracture match comparisons, where there was evidence to support the trial judge's conclusions that the agent was an expert in the field.

10. Criminal Law § 102.6— rape and murder—prosecutor's argument on emotion—no error

The trial court did not err by not intervening *ex mero motu* in a prosecution for first degree rape and murder where the prosecutor argued at the closing of the guilt phase that there was emotion in the case and that the victim was a "little child of God." One defense counsel argued that this was an emotional case and that he wanted the jury to be emotional, and the prosecutor agreed with defendant's other counsel, who had urged the jury not to convict out of emotion.

11. Criminal Law § 102.6— rape and murder—prosecutor's argument on deterrence—not grossly improper

The prosecutor's argument in a rape and murder trial that "we can't let this murder go unavenged" was not grossly improper.

12. Criminal Law § 102.6— rape and murder—prosecutor's argument on admissibility of evidence—no error

There was no error in a prosecution for rape and murder where the State argued that "if there is anything wrong with [the evidence], it would never have gotten to where you could look at it anyway." The purpose of the argument appears to have been to rebut any contention by the defendant that there was a change in the condition of the physical evidence.

13. Criminal Law § 102.7— rape and murder—prosecutor's argument on credibility of witness—no error

There was nothing improper in a prosecutor's argument in a prosecution for rape and murder concerning the credibility of a witness.

14. Criminal Law § 102.6— rape and murder—prosecutor's argument that defendant enjoyed killing his victim—no error

The trial judge did not err by not intervening *ex mero motu* in a prosecution for rape and murder where the prosecutor seemed to suggest that defendant enjoyed killing his victim where defendant did not object to that portion of the argument or make it the subject of an assignment of error; moreover, it was not too speculative for the jury to infer that defendant committed both acts with intent to gratify his desire.

15. Criminal Law § 102.6— rape and murder—prosecutor's argument—not improper

A prosecutor's argument was not improper in a prosecution for rape and murder where a fair reading of the argument was that the prosecutor was anticipating a defense argument rather than apologizing for the weakness of the State's case.

16. Criminal Law § 102.9— rape and murder—prosecutor's argument that defendant would commit another crime if acquitted—no prejudice

In a prosecution for rape and murder, any impropriety in the prosecutor's apparent argument that defendant would commit another crime if acquitted was cured by the court's subsequent instructions on the law.

17. Homicide § 18.1— premeditation and deliberation—evidence sufficient

There was sufficient evidence in a prosecution for rape and murder from which the jury could have found premeditation and deliberation in the testimony of the medical examiner that the killing was accomplished by a person stabbing the victim through the neck, partially removing the knife, and then plunging it home again. Given the manner of the killing, the age of the victim, her prior relationship with defendant, the disparity in their sizes, and the fact that hair was torn from the victim's scalp, the jury was entitled to believe that defendant premeditated and deliberated for some period of time before killing the victim.

18. Rape and Allied Offenses § 5— rape of seven-year-old girl—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a charge of first degree rape where the evidence showed that the victim had been penetrated by a human penis, that she was seven years old when the intercourse occurred, and that defendant was twenty-seven years old. The evidence of blood on the victim's legs and on defendant's shorts was sufficient to permit the jury to infer that the victim was alive when she was raped; moreover, the question of whether forcible rape may be committed against a corpse was not before the court because there is no requirement that the rape of a child be assaultive in character.

19. Homicide § 30— first degree rape and murder—failure to submit second degree murder—no error

The trial court did not err in a prosecution for first degree rape and murder by not instructing the jury on second degree murder as a lesser-included offense where the evidence compelled the conclusion that defendant premeditated and deliberated the killing and defendant argued that he was not the person who stabbed the victim, not that it was not a premeditated and deliberated act.

20. Homicide § 25.2— first degree murder—instruction on premeditation and deliberation—no error

Where the defendant in a first degree murder prosecution argued that there was insufficient evidence to support the trial judge's instructions on premeditation and deliberation but did not specify in his brief which of the factors in the judge's instruction was not supported or in what manner the instruction was erroneous, the assignment of error was overruled.

21. Homicide § 25.1— instruction on merger rule—no prejudicial error

The trial court did not err in a first degree rape and murder prosecution in its instruction on the merger principle; even if the instruction was erroneous, it was not plain error and the instruction was not objected to at trial.

22. Criminal Law § 135.9— death sentence—two nonstatutory mitigating factors not submitted—no error

There was no prejudicial error in the sentencing phase of a prosecution for first degree murder from the trial court's failure to submit the mitigating factors that defendant had no history of violence or violent acts and that he was raped while in prison. The fact that defendant was raped while in prison does not have mitigating value as to the crime charged, and, while defendant's history of nonviolence may have had mitigating value, there was no prejudice because the mitigating value that defendant argues he was erroneously denied was found in other factors already submitted to the jury; moreover, the jury found seven of the twelve mitigating factors presented and nonetheless returned a recommendation of death.

23. Criminal Law § 135.7— death instructions—no error

The trial court did not err in the sentencing phase of a first degree murder prosecution when, after sustaining the State's objection to defendant's argument that each individual should stand firm in their convictions regardless of what the community expected, the court told the jury "you will listen to each element." Defendant did not request at the trial that the court instruct the jury that community pressure is not an element of the sentencing consideration; defendant continued to argue without objection that each juror must individually agree with the verdict; and the trial judge correctly instructed the jury that it was its duty to determine the sentencing recommendation based solely upon the existence of mitigating and aggravating factors which must be based upon evidence presented in the courtroom.

24. Criminal Law § 102.12— murder prosecution—sentencing phase—prosecutor's argument—no error

In the sentencing phase of a prosecution for first degree murder, there is no prejudicial error in a prosecution argument which defendant contended improperly urged the jury to consider an aggravating factor that was not submitted by the judge where the prosecutor was attempting to explain to the jury why the factor was no longer proper for its consideration, defendant did not object at trial, and the court instructed the jury that there was only one aggravating factor to be considered.

25. Criminal Law § 102.12— sentencing phase of capital trial—prosecutor's scriptural references—no error

The trial court did not abuse its discretion by not intervening *ex mero motu* in the sentencing phase of a first degree murder prosecution where the prosecutor made scriptural references during his argument on the death penalty.

26. Criminal Law § 102.12— death sentence—prosecutor's argument on deterrence—no error

There was no error in the sentencing phase of a prosecution for first degree murder where the prosecutor argued that "justice is making sure that Bernardino Zuniga is not ever going to do this again." The argument was not that the death penalty would have a deterrent effect on crime, but rather that the execution of Bernardino Zuniga would foreclose further commission of crimes by him.

27. Criminal Law § 135.7— sentencing phase of first degree murder prosecution—failure to give proposed instructions—no error

The trial judge in the sentencing phase of a first degree murder prosecution did not err by failing to give defendant's proposed instructions on the nature of mitigation; the life sentence as the norm for first degree murders; and the meaning of the age mitigating factor. The instruction given on mitigation has already been approved; the instruction that the life sentence is the norm would encourage the jury not to give individualized consideration to the sentence; and there was no evidence to entitle defendant to the submission of the age mitigating factor.

28. Criminal Law § 135.10— death sentence—not based on passion or prejudice

Defendant in a first degree murder prosecution failed to show that the jury recommended death based on passion or prejudice where there was plenary evidence to support the aggravating factor that the killing was accomplished during the rape of the victim, and, while the prosecutor did make several references to the age of the victim, each juror said on *voir dire* that he or she would not be influenced by the age of the victim.

29. Criminal Law § 135.10— death sentence—one aggravating factor—not disproportionate

The death sentence was not disproportionate to the crime where the only aggravating factor was that the murder was committed while defendant was engaged in the commission of first degree rape; the case was similar to other cases of murder and sexual assault and it is not unusual for the jury to recommend death in a case of rape and murder; and, while the brutality of the killing was not submitted and the age of the victim could not be submitted as an aggravating factor for the murder, the jury could still have considered the brutality of the rape and the age of the victim in giving greater weight to the aggravating factor that the killing was accomplished during the commission of the rape.

DEFENDANT appeals as of right pursuant to N.C.G.S. § 7A-27(a) from a sentence of death for first-degree murder and a life sentence for first-degree rape. Defendant was tried on these charges before the *Honorable Donald L. Smith* and a jury at the 11 February 1985 Criminal Session of Superior Court, DAVIDSON County, and was convicted. The sentencing hearing was held before the jury and the *Honorable Hamilton H. Hobgood*, retired Superior Court Judge called in as emergency judge to preside on 18 February 1985. Heard in the Supreme Court on 15 April 1987.

Lacy H. Thornburg, Attorney General, by Joan H. Byers and William N. Farrell, Jr., Special Deputy Attorneys General, for the State.

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

MEYER, Justice.

Seven-year-old April Lee Sweet was killed sometime during the day of 13 July 1982. It appears that the last person other than her assailant to see April alive was her grandfather, Calvin Johnson. At a little before 10:00 a.m., Johnson and his wife left April alone in their house and went to work in his tobacco fields. He drove his pickup truck toward the field, following a tractor driven by his son Victor, and upon which his daughter Linda was seated. Johnson saw a taxicab heading along the road toward his house. He testified at trial that there was a Mexican male in the passenger's seat of the taxicab—a man whom he recognized as Richard Lopez, a former employee. He also testified at trial that defendant was the same man known to him as Richard Lopez. Johnson testified that defendant had visited in his house on at least two occasions and that on at least one occasion, April had tried to talk to defendant. Johnson also testified that his wife may have given defendant a photograph of April. Linda Johnson also testified that she had seen defendant in the taxicab that morning.

When Johnson returned home at about 12:15 p.m., he did not find his granddaughter. After searching for some time for April, Johnson called the Alexander County Sheriff's Department. Johnson was interviewed by Sheriff Thomas E. Bebber. Johnson told the sheriff about the sighting that morning of the man he knew as Richard Lopez. At that point, the sheriff notified his department to be on the lookout for a Mexican male named Richard Lopez.

At about 2:00 p.m., the Alexander County dispatcher called Captain Larry Elder with information that a Mexican male was standing at the cab stand in Hiddenite. Captain Elder approached the defendant, told him that he was investigating a missing person report, and asked defendant to accompany him to Taylorsville to be viewed by the taxi driver, Bill Call. Defendant agreed and got into the back seat of Elder's car. At that time, he was carrying a bag of what appeared to Elder to be clothing.

Defendant was viewed by both Bill Call and Ralph Bishop, Call's employer. Both told Elder that defendant was not the man whom Bill Call took to the Johnson home that morning. At trial, Call testified that he had not been able to identify defendant because all Mexicans looked alike to him. After defendant was

released, he was taken to Statesville, where he left on a bus headed for Arkansas.

April's body was found by a search party sometime after 5:00 p.m. She was lying on her back, nude from the waist down. Her shorts and panties had been removed and were lying nearby. Dr. John Butts, from the Medical Examiner's Office in Chapel Hill, testified without objection that April had been stabbed through her neck and that in his opinion she had been penetrated by a penis, resulting in tearing of the "birth canal." Samples were taken from April's body. Debris, including newspaper, was collected from the immediate area for examination.

At about 8:00 p.m., Johnny Mitchell, another cab driver in Taylorsville, told Agent Lester of the SBI that he had taken a Mexican male to Statesville that afternoon to catch a bus for Arkansas. At about 10:12 p.m., Lester sought authorization from his superior to detain defendant at Knoxville, Tennessee, an intermediate stop. At about 10:20 p.m., SBI Agent Melton and Captain Elder found a pair of tan pants stuffed under the mat on the floor of the back seat of Captain Elder's car. The pants were bloodstained. Captain Elder testified at trial that nobody but defendant had been in the back seat of his car that afternoon or evening. At 10:42 p.m. Agent Lester sent this message to the Knoxville Police Department:

> July 13, 1982, Knoxville, P.D. Investigating rape and murder of seven year old white female. The suspect is a Mexican male. Subject possibly is going by the name of Richard. Murder occurred this date. Last name is possibly Lopez. Subject caught bus in Statesville, North Carolina today and bought ticket for Pine Bluff, Arkansas with a stop in your city at 10:45 p.m., this date. Need assistance in holding for investigation purposes and to interview suspect. Will leave immediately upon contact. Contact if suspect is on bus. Victim was stabbed with a knife, and suspect is approximately 5 foot, 9, [] 155 pounds, wearing blue jeans, a blue or gray shirt, and possibl[y] a baseball hat. If you need any further contact, we will furnish. Alexander County Sheriff's Department, Taylorsville, North Carolina.

The bus carrying defendant arrived at Knoxville just before 11:00 p.m. Detective Moyer of the Knoxville Police Department

met the bus and detained defendant, the sole Mexican male on board. After defendant was taken into custody, Detective Moyer notified Agent Lester. Agent Lester set out for Knoxville by car, along with two other officers and Calvin Johnson.

At the police station in Knoxville, officers took hair and fingernail scrapings from the defendant. As defendant took down his trousers for a pubic hair sample, Detective Moyer noticed that defendant pulled both trousers and underpants down simultaneously. Later, having become suspicious, Detective Moyer asked to see defendant's undershorts. The shorts had blood on the front. This blood was later found to be consistent with that of the victim. Among the personal effects seized from defendant was a small photograph of April Sweet.

When the party from North Carolina arrived, Calvin Johnson identified defendant as the person he had seen in the taxicab near his house. Defendant, with the assistance of an interpreter, waived his objection to extradiction, but invoked his fifth amendment right to silence. He was transported to North Carolina, where he was formally charged with first-degree murder and rape.

Defendant makes numerous assignments of error in all stages of the prosecution against him. For the sake of clarity, these errors will be discussed in four groupings: errors at the pretrial stage of the prosecution, errors in jury selection, errors during the guilt/innocence phase of the trial, and errors during the sentencing hearing.

I. PRETRIAL

[1] On 19 July 1982, the State sought a nontestimonial identification order to obtain samples of blood, hair, saliva, and handwriting from the defendant, as well as to examine the defendant's genitalia. The State moved under N.C.G.S. § 15A-274 for a waiver of the 72-hour prior service rule on the grounds that the victim's hair could be changed or any wounds on the defendant's genitalia could heal before the examination could be carried out. The 72-hour rule was waived, and the defendant was served with the nontestimonial identification order approximately thirty minutes before the examination was conducted. There was no return of

service of the order as required under N.C.G.S. § 15A-280. The State never sought a search warrant.

Defendant made a timely motion to suppress the evidence collected from the nontestimonial identification order. His contention at the suppression hearing was that the evidence was the result of an unlawful search and seizure and that it was collected in violation of N.C.G.S. § 15A-280 (return required within ninety days). The trial judge found that the sole basis of the defendant's motion to suppress was that the requirements of Chapter 15A were not complied with. He then denied the defendant's motion to suppress, holding that the requirements of the nontestimonial identification order do not apply to persons already in custody. Defendant argues that this was error.

It appears from the record that while the defendant alleged in his motion to suppress that the taking of the samples violated not only N.C.G.S. § 15A-280 but also the federal constitution, the judge made the following finding:

> (4) That the basis for the defendant's motion to suppress was the failure to fully comply with the requirements of Chapter 15A of the General Statutes of the State of North Carolina.

As no exception to this finding appears in the record, the defendant has failed to properly preserve his constitutional argument, and this argument is not properly before us.[1]

Defendant argues in his brief that the taking of the samples was in substantial violation of Article 10 of Chapter 15A, the article governing the execution of warrants. Because the defendant did not raise this argument at the suppression hearing, or assign as error the failure of the State to procure a warrant for the examination of the defendant, this issue is not properly before us.

1. Defendant makes an elaborate argument that the taking of these samples violates both the state and federal constitutions. Although this issue is not properly before us, we note that the federal constitution requires a warrant for the taking of blood samples. *State v. Welch*, 316 N.C. 578, 342 S.E. 2d 789 (1986). However, we also said in *Welch* that an officer's good faith reliance on a nontestimonial identification order would not trigger the exclusionary requirements of either the fourth amendment to the federal constitution or our state statutory exclusionary rule. Moreover, nothing in *Welch* requires a warrant for nonintrusive searches and seizures, such as the taking of hair, saliva, and handwriting samples or the examination of the defendant's genitalia.

Defendant's sole argument at trial was that the taking of the samples violated Article 14 of Chapter 15A of our General Statutes, the article governing the execution of nontestimonial identification orders. Defendant has made no argument to this Court, however, indicating in what way the taking of the samples in this case constituted a substantial violation of any of the provisions of Article 14. This assignment of error is deemed abandoned. N.C.R. App. P. 28.

[2] Defendant next argues that on the night of the murder, the Alexander County Sheriff's Department instituted a Police Information Network message to Knoxville, Tennessee, requesting that defendant be detained. Several items were seized from the defendant at that time, including the photograph of April Sweet and defendant's bloodstained undershorts. On 17 August 1983, the trial court allowed defendant's motion to suppress this evidence on the ground that the warrantless search was unreasonable. The State appealed this decision, and this Court reversed the trial court, *State v. Zuniga*, 312 N.C. 251, 322 S.E. 2d 140 (1984), holding that since there was probable cause to support the arrest of defendant, the search was a lawful one incident to that arrest.

The State correctly points out that our previous holding that the evidence seized in Tennessee was lawfully seized is the "law of the case" in this matter. *State v. Williams*, 224 N.C. 183, 29 S.E. 2d 744, *aff'd*, 325 U.S. 226, 89 L.Ed. 2d 1577, *reh'g denied*, 325 U.S. 895, 89 L.Ed. 2d 2006 (1944). Therefore, unless there was additional evidence brought forward in the defendant's subsequent trial, or a new theory of exclusion brought to our attention, this issue has already been decided. *State v. Stone*, 226 N.C. 97, 36 S.E. 2d 704 (1946).

In reaching our conclusion that there was sufficient probable cause to arrest defendant in Tennessee, we made the following observation:

> Thus, while a reviewing court must, of necessity[,] view the action of the law enforcement officer in retrospect, our role is not to import to the officer what in our judgment, as legal technicians, might have been a prudent course of action; but rather our role is to determine whether the officer has acted as a man of reasonable caution who, in good faith and based upon practical consideration of everyday life, believed

> the suspect committed the crime for which he was later charged.

State v. Zuniga, 312 N.C. at 262, 322 S.E. 2d at 147.

Defendant argues that our previous decision in this case was based upon a misapprehension of the facts and that the evidence in defendant's trial prevents our prior decision from controlling. In our former opinion we said:

> In reaching this conclusion we have attached particular significance to the fact that the murder occurred in a small, rural community; that defendant's presence near the Johnson home was noted by the victim's grandfather and the taxi driver; that he was identified; that suspicion almost immediately narrowed to the defendant; and finally, that defendant fled within hours of the crime.

Id. (footnote omitted). Specifically, defendant argues that there was no identification by the taxicab driver that defendant was the Mexican male seen by Johnson on that morning. While this may be true, it does not change the fact that defendant was identified by Calvin Johnson and Linda Mae Johnson as having been that man. Moreover, the taxicab driver did testify that he took a Mexican male to the Johnson home. Defendant next argues that our characterization of the defendant's conduct as flight was incorrect; that because defendant had not been charged, his leaving town to go to Arkansas is not probative of his guilt. While we agree that formal charges had not been leveled against defendant when he left North Carolina, it was surely clear to him that he was being investigated for a crime. His subsequent flight was some evidence of a guilty mind. Finally, defendant argues that Taylorsville is not the "small, rural community" that we characterized in our previous opinion. There was testimony that there were at most two hundred Mexicans in the county at the time of the crime, and only one or two taxicabs in Taylorsville.[2] The testimony of Calvin Johnson and Linda Johnson that they took notice of the cab suggests that it was a noteworthy sight, either because of the nationality of the passenger, the fact that the cab

2. We note that Taylorsville had an estimated population of 1,087 in July 1982 and that, at the same time, the estimated population of Alexander County was 25,932. *N.C. Municipal Population*, Office of State Budget and Management (1983).

was approaching the Johnson house, or both. We find nothing in defendant's brief to persuade us that we made our prior determination under a misapprehension of the facts. Because we have already determined that there was probable cause to arrest the defendant in Tennessee, the trial judge correctly determined that he was bound by our decision as the law of the case. *State v. Jackson*, 317 N.C. 1, 343 S.E. 2d 814 (1986).

[3] Defendant moved, through counsel, for a change of venue from Alexander County. A hearing was held on defendant's change of venue motion on 20 September 1982. The defendant was not present. The court entered an order changing venue from Alexander County to Davidson County. Defendant argues that despite the ruling in his favor, he was denied his sixth amendment rights under the federal constitution by not being present at the change of venue hearing.

Defendant argues that he had a right to be present at all critical stages of the proceedings against him. *Rushen v. Spain*, 464 U.S. 114, 78 L.Ed. 2d 267 (1983). Moreover, defendant argues that in a capital case, this right cannot be waived, *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241 (1985), and that conducting the hearing in his absence was thus error per se. Defendant also argues that he was prejudiced by this error as a matter of law and is therefore entitled to a new trial. *Gerstein v. Pugh*, 420 U.S. 103, 43 L.Ed. 2d 54 (1975).[3]

Assuming, *arguendo*, that it was error for the trial court to have conducted the change of venue hearing out of defendant's presence, we conclude that any such error was harmless.

In *Braswell* we said:

> "Every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable

3. Defendant cites *McKasskle v. Wiggins*, 465 U.S. 168, 79 L.Ed. 2d 122, *reh'g denied*, 465 U.S. 1112, 80 L.Ed. 2d 148 (1984), to support this argument. There, the United States Supreme Court held that a defendant's right to self-representation is not amenable to harmless error analysis. This case is not authority for the proposition that the denial of a defendant's right to be present may never be harmless.

> doubt." *State v. Taylor*, 280 N.C. 273, 280, 185 S.E. 2d 677, 682 (1972). The right to be present at all critical stages of the prosecution is subject to harmless error analysis. *Rushen v. Spain*, [464] U.S. [114], 78 L.Ed. 2d 267, 272 n.2 (1984). We believe that denial of a defendant's right to confront the witnesses against him is subject to the same harmless error analysis. That is particularly true when the alleged denial consists of the voir dire examination, in the presence of defendant's counsel, of a witness for the State who substantially repeats his voir dire testimony at trial. It is difficult to imagine any way in which defendant was prejudiced by his failure to attend the hearing. After examining the record and assuming error *arguendo* we conclude that any error which may have resulted from defendant's failure to attend the hearing is harmless beyond a reasonable doubt.

State v. Braswell, 312 N.C. at 560, 324 S.E. 2d at 247. We concluded in *Braswell* that the right to be present at all stages of the trial is subject to harmless error analysis. *Id. See also Rushen v. Spain*, 464 U.S. 114, 78 L.Ed. 2d 267 (harmless error analysis applies to ex parte communication between juror and trial judge).

Turning to the case at bar, we note that the purpose of the change of venue hearing was to determine whether the defendant would be prejudiced by being tried in Alexander County, where the alleged crimes had been committed. Defendant apparently believed that his interest would be better protected by being tried elsewhere. We are satisfied that any error in allowing the defendant's motion in his absence was harmless beyond a reasonable doubt.

Defendant moved for an interpreter on 10 November 1982. This motion was allowed on 15 December 1982. It appears that when the defendant filed his record on appeal and brief, there was nothing in the record to indicate that the defendant's motion for interpreter had been allowed. From the State's addendum to the record, filed 1 August 1986, it is apparent that a court-appointed interpreter was in fact provided to defendant. This assignment of error is therefore overruled.

[4] Prior to trial, defendant made a motion for funds to hire a private investigator. The defendant argued at the time that an investigator was necessary in order to interview witnesses in the

case, particularly those witnesses who would testify for the State regarding the results of their examination of the physical evidence. Defendant now argues that the denial of this motion was error.

N.C.G.S. § 7A-450(b) entitles defendants to the assistance of experts under certain circumstances:

> (b) Whenever a person, under the standards and procedures set out in this Subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation. The professional relationship of counsel so provided to the indigent person he represents is the same as if counsel had been privately retained by the indigent person.

N.C.G.S. § 7A-450(b) (1986). We have said, however, that the burden is on the defendant to show a reasonable likelihood that he will be deprived of a fundamentally fair trial without such assistance. *State v. Oliver*, 309 N.C. 326, 336, 307 S.E. 2d 304, 312 (1983). Several decisions of the United States Supreme Court have approved this analysis. *See Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed. 2d 53 (1985); *Caldwell v. Mississippi*, 472 U.S. 320, 86 L.Ed. 2d 231 (1985).

Defendant concedes that we have addressed this issue on numerous occasions and have upheld the trial court's denial of funds for an investigator where the investigator was intended merely to interview witnesses in the case. *See, e.g., 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. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981). He argues, however, that his request for an investigator did not fall under the rule of these cases. He argues that because his primary language is Spanish, he was in special need of an investigator. While this argument might have some merit if the defendant himself was to conduct witness interviews, we are aware of no language handicap borne by defense counsel.[4] This assignment of error is overruled.

4. Defendant makes an additional argument in his brief before this Court: that because he requested an investigator to conduct an independent serological test, he made the necessary showing of particularized need. However, the record shows

[5] Defendant also moved before trial for funds to hire a jury selection expert. The motion alleged only that the expert would assist counsel in selecting the jury and that such an expert is necessary in capital cases. Although defendant argues in his brief that the purpose of the expert would have been to help counsel deal with prejudice allegedly faced by defendant, the affidavit submitted by the proposed expert reveals that his expertise lies in the area of small group social psychology, that is, in the effects of group membership on individuals. Apparently, defendant was concerned that individual jurors favoring acquittal or opposing the death sentence would be pressured by the majority to convict or recommend death. The affidavit concluded with the suggestion that a fair trial would require individual rather than group voir dire.[5] There is nothing to suggest that the expert would be of any particular assistance in excluding biased persons from the jury in a group voir dire. In fact, the expert testified in his affidavit that he would have trouble discerning bias against Mexicans in a group voir dire. We see no prejudice to the defendant from the denial of his motion. No effort was made to restrict the defendant's questioning of potential jurors concerning their biases against Mexicans. *Cf. Turner v. Murray*, 476 U.S. 1, 90 L.Ed. 2d 27 (1986) (error to restrict defendant's questioning into racial bias of potential jurors). He has made no particularized showing of how the lack of a jury selection expert denied him a fundamentally fair trial. *State v. Artis*, 316 N.C. 507, 342 S.E. 2d 847 (1986). *See also Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed. 2d 53.

II. JURY SELECTION

[6] Defendant next assigns error in the "death qualification" of the jury. During the voir dire, whenever a potential juror said that he or she had moral or religious reservations about recommending the death penalty, the prosecutor would challenge that juror for cause. The trial judge would then ask that juror the following question:

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that the request before the trial judge was for funds to hire an investigator to interview the State employees who conducted the serological test, not for funds to conduct an independent serological examination. No such request was before the trial court and is not a proper concern for us here.

5. The defendant did not assign as error the denial of his request for individual voir dire.

> COURT: All right; now, ma'm [sic], if you should be selected as juror for the trial of this case and if after you have heard the evidence and the arguments of counsel and the law and we have reached the punishment phase, if we had all that to occur and if after all that, you were convinced in your own mind beyond a reasonable doubt, that the appropriate punishment under the evidence and the law was a sentence of death, could you return with a verdict that would require the Court to impose that that [sic] sentence?

If the answer to that question was "no," the judge would ask a second question:

> COURT: I take it, ma'm [sic], you could not return a recommendation as I have explained that, a recommendation that the death penalty be imposed no matter what the evidence or the facts were, is that correct?

If the answer to that question was "yes," the challenge for cause would be allowed. In each instance, the defendant moved to rehabilitate the challenged juror. In each instance, the motion was denied. Defendant assigns the denial of his motion to rehabilitate as error.

Defendant's argument is not with the concept of "death qualification," as set out in *Wainwright v. Witt*, 469 U.S. 412, 83 L.Ed. 2d 841 (1985). Rather, defendant argues that the process of removing potential jurors without a particularized questioning into the precise nature of that juror's opposition to the death penalty deprived him of his sixth amendment and fourteenth amendment rights under the federal constitution.

In *Wainwright v. Witt*, the United States Supreme Court set out the standard for excusing potential jurors from sitting on capital cases:

> That standard 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. at 424, 83 L.Ed. 2d at 851-52 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L.Ed. 2d 581, 589 (1980)).

The trial judge's questions in the present case correctly followed the *Witt* standard in determining that the prospective juror could not follow the law. We have approved of this type of questioning in other cases. *See, e.g., State v. Johnson*, 317 N.C. 343, 346 S.E. 2d 596 (1986); *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983).

Recognizing that we have already decided that defendants are not entitled to engage in attempts to rehabilitate, *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981), defendant nonetheless argues that the recent United States Supreme Court decision in *Turner v. Murray*, 476 U.S. 1, 90 L.Ed. 2d 27, requires a reconsideration of this decision. We disagree.

In *Murray*, the United States Supreme Court held that it was error for the trial judge to restrict a defendant's inquiry into the racial prejudices of potential jurors. We find nothing in that case to suggest that defendant has a right to inquire into the precise nature of a potential juror's views on the death penalty. This assignment of error is overruled.

[7] Defendant's next assignment of error relates to the phrasing of the prosecutor's question regarding the ability of the juror to recommend the death penalty. In many instances, the juror was asked whether, if the juror found that any aggravating factors outweighed any mitigating factors, he or she would be able to recommend death "for what [defendant] did to this little girl."

Defendant argues that the prosecutor's question suggests that the issue of guilt had already been decided against defendant and that the prosecutor's question was so grossly improper as to have required the judge to intervene. *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144; *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979); *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), *death sentence vacated*, 428 U.S. 902, 49 L.Ed. 2d 1206 (1976). We do not agree. Jury selection is within the sound discretion of the judge. *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985). A fair reading of the prosecutor's question is whether the juror would consider the death penalty if he first determined that any aggravating factor found outweighed any mitigating factors found and that defendant was guilty. Even assuming, *arguendo*, that the question was improper, we find no gross impropriety requiring the trial judge to intervene in the absence of an objection.

III. GUILT/INNOCENCE PHASE

[8] Defendant complains of the admission into evidence of certain opinion testimony by Dr. John Butts, a forensic pathologist with the Medical Examiner's Office in Chapel Hill. Dr. Butts testified as to the nature of the wounds inflicted on April and the condition of the body as he found it. He testified that, in his opinion, the victim died from loss of blood, this having been caused by a stab wound through the neck, severing the internal jugular vein. Dr. Butts also testified over defense objection that, in his opinion, certain bloodstains on April's shirt could have been made by someone wiping a knife blade off on it.

Defendant argues that Dr. Butts was in no better position than the jury to determine the cause of the bloodstains. *See State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). We agree.

The rule governing the admissibility of expert testimony is set out in Rule 702 of the Rules of Evidence:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C.G.S. § 8C-1, Rule 702 (1986). While Dr. Butts was properly qualified as a forensic pathologist to testify to the nature of the wounds inflicted on April and to the cause of her death, he was not qualified as an expert on the pattern that a knife blade makes when it is wiped on a shirt. This is a matter of common sense, best left to the jury.

While we agree with defendant that the trial judge erred in admitting the testimony of Dr. Butts regarding the cause of the bloodstain, defendant has made no showing as to how he was prejudiced by this evidence. This assignment of error is overruled.

[9] SBI Special Agent Worsham testified as a "fracture match" expert that a piece of newspaper found under the body of the victim had once been joined with a piece of newspaper found some one hundred fifty to two hundred feet from the victim's body. This second piece of newspaper had on it the number of the post office box rented to defendant. Defendant contends that there is

no recognized scientific or technical field of fracture match comparisons; that this term refers only to the common-sense principle that it is sometimes possible to tell that two pieces of paper, particularly paper upon which there is printing, were at one time joined. Defendant concludes that Agent Worsham's testimony was an improper invasion of the province of the jury.

In *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984), we considered whether a physical anthropologist could testify that a certain footprint matched the footprint of the defendant. Rejecting defendant's argument that footprint analysis is not a proper subject for expert testimony, we said:

> It is not necessary that an expert be experienced with the identical subject area in a particular case or that the expert be a specialist, licensed, or even engaged in a specific profession. Furthermore, the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony.

Id. at 140, 322 S.E. 2d at 376 (citations omitted). We went on to quote from *State v. King*:

> "Whether the witness has the requisite skill to qualify him as an expert is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial judge. . . .
>
> "A finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it."

Id. (quoting with approval from *State v. King*, 287 N.C. 645, 658, 215 S.E. 2d 540, 548-49, *death sentence vacated*, 428 U.S. 903, 49 L.Ed. 2d 1209 (1976)). *See also State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985).

In the present case, Agent Worsham testified that in his nine years of experience as a forensic chemist, he had made many fracture match comparisons of hair and other fibrous material, that he had testified in more than one hundred cases where fracture matching was involved, and that he had participated in in-house training on fracture match comparisons. His testimony that the two pieces of paper were at one time joined was therefore based

upon his training and experience in forensics. Since there is evidence to support the trial judge's conclusion that Agent Worsham is an expert in fracture match comparisons, we find no abuse of discretion in the admission of his testimony. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370.

[10] Defendant makes several assignments of error regarding the prosecutor's argument at the close of the guilt phase of the trial. His first contention in this regard is that the prosecutor urged the jury to convict out of passion or prejudice. Defendant notes that the prosecutor argued that there is emotion in the case and referred to the victim as a "little child of God." From this, the defendant concludes that the prosecutor incited the jury to disobey the mandate of the court to follow the law. He argues that this conduct entitles him to a new trial, in spite of the fact that he did not object at trial, because the trial judge did not intervene *ex mero motu*. We do not agree.

Prosecutors are granted wide latitude in the scope of their argument. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). A prosecutor's argument is not improper where it is consistent with the record and does not travel into the fields of conjecture or personal opinion. *State v. Craig & Anthony*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 464 U.S. 908, 78 L.Ed. 2d 247 (1983). The control of the prosecutor's closing argument is within the discretion of the trial judge. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). Only where the prosecutor's argument affects the right of the defendant to a fair trial will the trial judge be required to intervene where no objection has been made. *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983). We cannot conclude that the trial judge erred in not intervening *ex mero motu* in these instances. We note that the defendant himself argued through one of his counsel that this was an emotional case and that he wanted the jury to be emotional. We note also that the prosecutor agreed with defendant's other counsel, who had urged the jury not to convict out of emotion. This assignment of error is overruled.

[11] Defendant argues that the prosecutor misled the jury during his argument. First, defendant claims that the prosecutor misrepresented the jury's role in a criminal case. The prosecutor made the following argument:

> I've been doing this for fifteen years, and it's hard. You just can't dwell on things like this or it will drive you crazy. It's awful what one human being can do to another one and I see it all the time and you've seen it this week. We cannot allow it to happen and go unpunished.
>
> . . . .
>
> We can't let this murder go unavenged.

Defendant argues that this argument invites the jury to convict out of a desire to deter others from committing similar crimes, an argument we have held improper. *See, e.g., State v. Scott*, 314 N.C. 309, 333 S.E. 2d 296 (1985).

We have upheld arguments where the prosecutor urged the jury to take seriously its duty "to bring criminals to justice in our system." *State v. Britt*, 291 N.C. 528, 538-39, 231 S.E. 2d 644, 652 (1977). We have also allowed prosecutors to argue that the jury should consider the State's evidence and reasonable inferences therefrom and convict the defendant. *See, e.g., State v. Mason*, 317 N.C. 283, 345 S.E. 2d 195 (1986). We conclude that the prosecutor's argument in this case was likewise not grossly improper. This assignment of error is overruled.

[12] Defendant next argues that the prosecutor impermissibly urged the jury to disregard its responsibility by making the following argument:

> [B]ecause when we started putting on this evidence each and every item under the Rules of Evidence in this State has to be identified and marked and who did you hand it to and who did you get it from and what condition was it in when you got it from him and what condition was it in when you gave it to them [sic] and he is going to get up here and tell you, "Well, this wasn't that way and that wasn't this way."
>
> Now, let me put all that to rest by saying this, if this wasn't this way and that wasn't that way, that fellow up there (indicating) would never have let it into evidence. So, you need not worry about any of that. If there's anything wrong with it, it would have never gotten to where you could look at it any way.

Defendant contends that the sense of this argument is that because the evidence was admitted, the jurors should believe it to be true. We disagree. The purpose of this argument appears to have been to rebut any contention by the defendant that there was a change in the condition of the physical evidence in the case.

> This Court has stated that a two-pronged test must be satisfied before real evidence is properly received into evidence. The item offered must be identified as being the same object involved in the incident and it must be shown that the object has undergone no material change. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 970, *reh'g denied*, 448 U.S. 918 (1980). The trial court possesses and must exercise sound discretion in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition. *Id.* A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered. *See State v. Kistle*, 59 N.C. App. 724, 297 S.E. 2d 626 (1982), *review denied*, 307 N.C. 471, 298 S.E. 2d 694 (1983). Further, any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility. *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976). *See also State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983).

State v. Campbell, 311 N.C. 386, 388-89, 317 S.E. 2d 391, 392 (1984).

Perhaps, by arguing that the jury should not concern itself with the technical requirements for the admission of real evidence, the prosecutor was urging the jury to concentrate not on the admissibility of the evidence, but rather on the weight it should be given. As defendant notes, it is impermissible for the prosecutor to argue that the jury shares its responsibility with the judge. *See, e.g., State v. Jones*, 296 N.C. 495, 251 S.E. 2d 425 (1979); *State v. White*, 286 N.C. 395, 211 S.E. 2d 445 (1975). Here, however, the prosecutor argued the opposite: that the judge determines admissibility, and the jury credibility. *Queen City Coach Co. v. Lee*, 218 N.C. 320, 11 S.E. 2d 341 (1940). This assignment of error is overruled.

[13] Defendant's next assignment of error is that the prosecutor interjected his personal opinions and beliefs into the argument by commenting on the credibility of the witness Bill Call. Mr. Call testified that he took a Mexican male to the Johnson home. On that day, he told police that defendant was not that man. At trial, however, he testified only that he could not identify the defendant as that man. Defendant complains of the following argument by the prosecutor:

> I submit to you that those witnesses who testified on behalf of the State were telling you the truth and, yes, that includes the taxi driver, Mr. Call. He told you they all look alike to him, doesn't make any difference to him. The truth of the matter is, he didn't want to get involved. He didn't want to see anything. What he did see and what he tells you and what they expect you to believe is that a Mexican was taken to the front door of Calvin Johnson's and Mr. Call can say he was on the front porch going up to the front door when he was backing out.

We find nothing improper in this argument. There was ample testimony that defendant was in the area of the Johnson home on the morning in question. While Call testified that he could not identify the defendant as the man in his cab, he did testify that some Mexican male got a ride with him to the Johnson home. There was ample opportunity for the defendant to bring out on cross-examination the discrepancies between the testimony by Call and the other witnesses, as well as the discrepancy between Call's testimony and his own earlier statement. This assignment of error is overruled.

[14] Defendant next complains that a particular portion of the prosecutor's argument tends to suggest that the defendant enjoyed killing his victim. Defendant did not object to this portion of the argument or make it the subject of an exception or assignment of error. Moreover, the evidence is clear that the defendant raped his victim and that the killing was accomplished as a part of the same violent transaction. It is not too speculative for the jury to infer that the defendant committed both acts with an intent to satisfy his desire. We overrule this assignment of error.

[15] Defendant argues that the prosecutor "testified" to the jury concerning evidence not within the record:

> I want to say to you now, you have seen everything the State has. If there had been any fingerprints, we would've showed you fingerprints. If there had been any fibers, we would've showed you fibers. If there had been any fingernail scrapings, we would have showed you fingernail scrapings. What you have before you is the evidence in the case of *State vs. Bernardino Zuniga.*

Defendant argues that this amounted to a prosecutorial apology for the weakness of the State's case. We disagree. A fair reading of the argument is that the prosecutor was anticipating a defense argument that there was insufficient evidence to put the defendant at the crime scene. Seen in this light, the argument was not improper.

[16] Defendant next complains of the following argument by the prosecutor:

> [I]f you find him not guilty, of course, that speaks for itself, common sense tells you what that means, he's not guilty, we give him his knife back and let him go out and kill another little child.

Where a defendant does not object at trial to an allegedly improper jury argument, it is only reversible error for the trial judge not to intervene *ex mero motu* where the argument is so grossly improper as to be a denial of due process. *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983); *Darden v. Wainwright*, 477 U.S. 168, 91 L.Ed. 2d 144, *reh'g denied*, --- U.S. ---, 92 L.Ed. 2d 774 (1986). We agree that, taken out of context, this argument appears to be an improper suggestion that defendant, if acquitted, would commit a crime. Assuming, *arguendo*, that this argument was improper, our inquiry becomes whether the failure of the trial judge to intervene denied defendant a fair trial. We are not persuaded that the jury rendered a guilty verdict based upon a fear of defendant's future conduct rather than upon the overwhelming evidence of his guilt. The trial judge correctly instructed the jury on the legal standard it was to apply in determining guilt and upon the effect of the failure of the State to carry its burden of proving guilt beyond a reasonable doubt. We conclude that any impropriety in the prosecutor's argument or error in the trial judge's failure to intervene was cured by the subsequent instructions on the law.

[17] At the end of the State's evidence, defendant moved to dismiss the charge of first-degree murder. This motion was renewed at the close of all evidence. Defendant argues that there was insufficient evidence to support the jury's finding that the defendant killed April Sweet with specific intent, after premeditation and deliberation.

> 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.* . . . [W]hile 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).

State v. Reese, 319 N.C. 110, 138-39, 353 S.E. 2d 352, 368 (1987).

Defendant correctly notes that in order to convict him of premeditated and deliberate murder, the jury must have found beyond a reasonable doubt that defendant not only intended the killing, but formed that intent after premeditation and deliberation. *State v. Rogers*, 316 N.C. 203, 341 S.E. 2d 713 (1986); *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808 (1985), *cert. denied*, 476 U.S. 1165, 90 L.Ed. 2d 733 (1986). While the intentional use of a deadly weapon may, in and of itself, give rise to a presumption that a killing was malicious, *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144, this is insufficient to sustain a finding of premeditation or deliberation, *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370; *State v. Lang*, 309 N.C. 512, 308 S.E. 2d 317 (1983). Defendant argues that he was convicted of premeditated and deliberate murder upon insufficient evidence, and therefore the State was unconstitutionally relieved of its burden of proving every element of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed. 2d 560, *reh'g denied*, 444 U.S. 890, 62 L.Ed. 2d 126 (1979).

In *State v. Myers*, 309 N.C. 78, 305 S.E. 2d 506 (1983), we considered the problem presented by proving premeditation and deliberation in the absence of direct evidence. We had previously held that circumstantial evidence may be used to show premeditation and deliberation. *See, e.g., State v. Corn*, 303 N.C. 293, 278 S.E. 2d 221 (1981); *State v. Walker*, 173 N.C. 780, 92 S.E. 327 (1919). In *Myers*, we set out some of the circumstances that may be used by a jury to infer premeditation and deliberation:

> Among the circumstances which may be considered as tending to show premeditation and deliberation are: (1) the want of provocation on the part of the victim, (2) the defendant's conduct and statements before and after the killing, (3) threats made against the victim by the defendant, (4) ill will or previous difficulty between the parties, (5) evidence that the killing was done in a brutal manner.

Myers, 309 N.C. at 84, 305 S.E. 2d at 510.

The State argues that there was sufficient evidence from which the jury could properly have inferred premeditation and deliberation. We agree. Dr. Butts testified that the killing was accomplished by a person stabbing April through the neck, partially removing the knife, and then plunging it home again. Given the manner of the killing, the age of the victim, her prior relationship with the defendant, the disparity in their sizes, and the fact that hair was torn from the victim's scalp, the jury was entitled to believe that the defendant premeditated and deliberated, for some period of time, the killing of April Sweet.

[18] Defendant next argues that the trial court erred in denying his motion to dismiss the charge of first-degree rape. We disagree. Defendant was indicted for the first-degree rape of April Sweet under the theory that she was twelve years old or less and defendant was more than four years older. At trial, the evidence showed that April had been penetrated by a human penis, that she was seven years old when the intercourse occurred, and that defendant was twenty-seven years old. Defendant's motion to dismiss the charge of first-degree rape was denied. The trial judge instructed the jury that it would convict if it found that the defendant engaged in sexual intercourse with April Sweet, that she was twelve years old or less when the intercourse occurred, and that defendant was at least twelve years old

and at least four years older than April when the intercourse took place. The jury returned a verdict of guilty of first-degree rape.

Defendant's contention is that the evidence was insufficient to show that April was alive when she was penetrated. Defendant argues that such a showing is necessary in order to convict defendant of first-degree rape. *See Commonwealth v. Sudler*, 496 Pa. 295, 436 A. 2d 1376 (1981). Defendant reasons that it is the assaultive nature of the rape, rather than the fact of intercourse, that is "[t]he essence of the crime [of rape]." *State v. Barefoot*, 241 N.C. 650, 86 S.E. 2d 424 (1955).

While it may be true that the "essence" of forcible rape is the assault, there is no requirement that the rape of a child be assaultive in character. It is well established that even consensual intercourse with a child less than twelve years old, where the defendant is four years or more older, is first-degree rape. *State v. Temple*, 269 N.C. 57, 152 S.E. 2d 206 (1967). Thus, we are not faced here with the question of whether a forcible rape may be committed against a corpse. *See State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Moreover, the evidence of the blood on the victim's legs and on defendant's shorts was sufficient to permit the jury to have inferred that the victim was alive at the time she was raped. This assignment of error is overruled.

[19] Defendant next assigns as error the failure of the trial judge to instruct on second-degree murder. He contends that because the evidence of premeditation and deliberation was "equivocal," he was entitled to an instruction on second-degree murder as a lesser included offense of first-degree murder. *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983). We disagree.

A plea of not guilty to first-degree murder does not, by itself, entitle a defendant to an instruction on second-degree murder. *State v. Williams*, 314 N.C. 337, 333 S.E. 2d 708 (1985). Only where defendant has brought forth evidence to negate the element of premeditation and deliberation, or where the evidence is equivocal as to premeditation and deliberation, is defendant entitled to an instruction on second-degree murder.[6] *Id. See also*

6. The State argues that because the defendant could also have been convicted of first-degree murder under the felony murder rule, any error in not submitting

State v. Strickland, 307 N.C. 274, 298 S.E. 2d 645 (1983); *Beck v. Alabama*, 447 U.S. 625, 65 L.Ed. 2d 392 (1980).

We find that the evidence in this case compels the conclusion that the defendant premeditated and deliberated the killing. There is no suggestion that the seven-year-old victim provoked the stabbing or that the stabbing was otherwise the product of a suddenly aroused passion. *See State v. Fields*, 315 N.C. 191, 337 S.E. 2d 518 (1985). Rather, the evidence shows a stabbing in April's neck leaving two exit wounds; a stabbing that could have been the result of a sawing motion intended to sever one of the major blood vessels in the neck. Defendant argued that he was not the person who stabbed April, not that the stabbing was not a premeditated and deliberate act. Having generally denied his culpability and having brought forward or referred to no evidence to negate the strong inference that the killing was premeditated and deliberate, defendant was not entitled to an instruction on second-degree murder. *State v. Williams*, 314 N.C. 337, 333 S.E. 2d 708.

[20] Defendant next argues that the trial judge erred in the following instructions on premeditation and deliberation:

> Fourth, the State must prove to you, beyond a reasonable doubt, the defendant acted out of premeditation, that is he formed the intent to kill her over some period of time, however short, before he stabbed her, if he did.
>
> Fifth, that the defendant acted with deliberation. Which means that he acted while in a cool state of mind. This does not mean that there must be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of any suddenly aroused pas-

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second-degree murder was harmless beyond a reasonable doubt. *State v. Wall*, 304 N.C. 609, 286 S.E. 2d 68 (1982). The trial judge instructed the jury that it would consider felony murder only if it found defendant not guilty of premeditated and deliberate murder. Therefore, while the evidence may have supported a conviction of felony murder, the jury did not render a verdict on this theory. Moreover, the rape was the sole aggravating factor submitted to the jury during the sentencing hearing. That factor could not have been submitted unless the jury found that the defendant premeditated and deliberated the killing. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177 (1983); *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981). If defendant had been entitled to an instruction on second-degree murder, we could not say that the erroneous refusal to so instruct was harmless beyond a reasonable doubt.

> sion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried out. Now, again, neither premeditation or deliberation are susceptible of direct proof. They may be proved by proof of circumstances from which they may be inferred. Such as the lack of provocation by a victim, the conduct of the defendant before, during or after a killing, use of excessive force, the brutal or vicious circumstances of the killing, if any, and the manner in which or the means by which a killing is done.

Defendant argues that there was insufficient evidence to support the instructions. While we have held that each factor utilized by the jury to infer premeditation and deliberation must be supported by competent evidence, *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975), the defendant does not specify in his brief which of the factors in the judge's instructions is not supported or in what other manner this instruction is erroneous. We overrule this assignment of error.

[21] Defendant next assigns as error the judge's instruction on the effect of a verdict of guilty of felony murder. The judge instructed on the elements of premeditated and deliberate murder. He then instructed that if the jury found the defendant not guilty of that offense, it would consider whether defendant was guilty of first-degree murder under the felony murder rule. After setting out the elements of this offense, the judge added:

> Now, if you find that he is guilty of that offense, that is first degree committed during a rape, you would not consider the rape charge. The reason for that very simply is in that event, the murder and rape merge into one case, but if you do not find him guilty of that offense, you would, of course, find him not guilty.

Defendant argues that the jury wanted to make sure that the defendant was punished for the rape, as well as for the killing, and that the jury mistakenly believed that if it did not find the defendant guilty of premeditated and deliberate murder, the rape would go unpunished. The defendant argues that the jury was encouraged by this instruction to return a result-oriented verdict. *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976).

We see no error in the judge's instructions. It is a correct statement of the merger principle. *See State v. Silhan*, 302 N.C.

223, 275 S.E. 2d 450 (1981). We note that, elsewhere in his instructions, the judge instructed that the jury could find defendant guilty of rape, notwithstanding a verdict of not guilty of murder.

Even if the instruction was erroneous, it was not plain error. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). Because this instruction was not objected to at trial, the proper test is whether the alleged error had a probable impact on the verdict. *State v. Sams*, 317 N.C. 230, 345 S.E. 2d 179 (1986). The jury returned a verdict of guilty on the theory of premeditated and deliberate murder. We have already held that there was sufficient evidence to support that verdict. There is nothing to suggest that the verdict was in fact based upon anything other than the evidence. This assignment of error is overruled.

IV. SENTENCING

The trial judge submitted to the jury one aggravating factor (i.e., "Was this murder committed while Bernardina [sic] Zuniga was engaged in the commission of the felony of first degree rape?") and the following twelve mitigating factors:

> 1. That the defendant, Bernardino Zuniga, has no significant history of prior criminal activity?
>
> . . . .
>
> 2. That the age of the defendant[,] Bernardino Zuniga, at the time of this murder is a mitigating circumstance?
>
> . . . .
>
> 3. That the defendant, Bernardino Zuniga, has been a good worker at various times prior to July 13, 1982?
>
> . . . .
>
> 4. That the defendant, Bernardino Zuniga, has suffered severe medical problems in the form of Pulmonary Tuberculosis of the left lung with secondary pleurisy, granaloma [sic] adjacent to dorsal spine with radicular pain into the 8th intercostal nerve, actue [sic] bilateral pneumonia and emaciation secondary to Tuberculosis with chronic malnutrition, and which resulted in the defendant's hospitalization for an extended period of time?

. . . .

5. That the defendant, Bernardino Zuniga, has not been a disciplinary problem and has cooperated with prison personnel in Central Prison?

. . . .

6. That the defendant, Bernardino Zuniga, cooperated with Lieutenant Larry Elder of the Alexander County Sheriff's Department on July 13, 1982?

. . . .

7. That the defendant, Bernardino Zuniga[,] cooperated with the officers of the Alexander County Sheriff's Department and with the officers of the State Bureau of Investigation in the obtaining of evidence from him on July 19, 1982?

. . . .

8. That the defendant, Bernardino Zuniga, waived extradition to the State of North Carolina and accompanied officers back to North Carolina?

. . . .

9. That after his arrest in Knoxville, Tennessee, the defendant, Bernardino Zuniga, cooperated with officers of the Knoxville, Tennessee Police Department on July 13, 1982 and July 14, 1982?

. . . .

10. That the defendant, Bernardino Zuniga, has no prior conviction of sexual offense?

. . . .

11. That since the arrest of the defendant, Bernardino Zuniga, he has shown no tendencies of violence against others?

. . . .

12. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value?

[22] Defendant assigns as error the failure of the trial judge to submit two additional nonstatutory mitigating factors: (1) that the defendant had no history of violence or violent acts and (2) that the defendant was raped while in prison.

Defendant argues that he was entitled to have the jury consider any factor that may have mitigating value. *Skipper v. South Carolina*, 476 U.S. 1, 90 L.Ed. 2d 1 (1986). While this is the general rule, it is not reversible error per se for the trial judge to withhold an instruction on a proffered mitigating factor. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982). In *Pinch*, we said:

> The sum of the matter is this—a defendant demonstrates reversible error in the trial court's omission or restriction of a statutory or timely requested mitigating circumstance in a capital case only if he affirmatively establishes three things: (1) that the particular factor was one which the jury could have reasonably deemed to have mitigating value (this is presumed to be so when the factor is listed in G.S. 15A-2000(f)); (2) that there was sufficient evidence of the existence of the factor; and (3) that, considering the case as a whole, the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant.

Pinch, 306 N.C. at 27, 292 S.E. 2d at 223-24.

Applying these principles to the mitigating circumstances requested by the defendant, we find first that a defendant's history of nonviolence may have mitigating value. The first part of the *Pinch* test is therefore met as to this factor. However, the fact that defendant was raped while in prison subsequent to the crime charged does not have mitigating value as to that crime. Thus, the trial judge properly refused to submit as a mitigating factor that the defendant had been raped in prison.

The second part of the *Pinch* test requires an examination of the sufficiency of the evidence to support the factor proffered. As to the defendant's alleged history of nonviolence, defendant argues that he was entitled to have the jury consider this factor because his criminal record showed only that he had been convicted twice of illegal entry into this country. Because this prof-

fered factor fails on the third prong of the *Pinch* test, however, we need not decide whether defendant presented sufficient evidence of this mitigating circumstance.

The third prong of the *Pinch* test is a consideration of any prejudice borne by defendant due to a mitigating factor not being submitted to the jury. The jury declined to find that the defendant had no significant history of prior criminal activity, found that the defendant had no prior conviction of sexual offense, and found that defendant had shown no violent tendencies since his arrest. It appears that the jury was cognizant of the defendant's past and that he had at least some tendency for nonviolence when it weighed the mitigating circumstances and the aggravating factor. Therefore, the mitigating value that the defendant argues he was erroneously denied was found in the factors already submitted to the jury. The jury found seven of twelve mitigating factors presented and nonetheless returned a recommendation of death. We cannot say on this record that the jury probably would have reached a different result if the additional mitigating circumstances were submitted. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203.

[23] Defendant next argues that the trial judge erred in the following ruling made during the defendant's closing argument at the sentencing hearing:

> It's a unanimous decision, all twelve of you must make that decision and if you are not totally convinced, and I'm talking individually, you should have the courage in your convictions to stand firm, regardless of pressure, what you think the community expects—
>
> MR. ZIMMERMAN: OBJECT, it's the duty of the jury to reason together.
>
> COURT: SUSTAINED, you will listen to each element. Proceed.

(Emphasis added.)

Defendant does not argue that the judge's ruling sustaining the objection is error. Rather, defendant argues that the underlined language left the jury with the erroneous impression that community expectation is a proper "element" for its considera-

tion. Defendant did not request at trial that the court instruct the jury that community pressure is not an element of the sentencing consideration. Moreover, defendant continued to argue, without objection, that each juror must individually agree with the verdict. Finally, the trial judge correctly instructed the jury in his charge that it was its duty to determine the sentencing recommendation based solely upon the existence of mitigating and aggravating factors, which in turn must be based upon the evidence presented in the courtroom. Defendant has failed to demonstrate error in this regard.

[24] Defendant next complains of the following argument by the prosecutor:

> The Court, in its infinite wisdom has seen fit not to submit cruel, heinous and atrocious. As Old Judge Olive said, hanging up there on the wall, the Court is presumed to know what the law is, and the State agrees with that.

Defendant contends that this argument improperly urged the jury to apply an aggravating factor that was not submitted to it by the judge. We note first that the prosecutor had forecast to the jury that the State would rely on this factor in sentencing. It appears therefore that the prosecutor was attempting to explain to the jury why the factor was no longer proper for its consideration. Even assuming that this was an improper attempt to put before the jury a factor that the trial court had found not to be supported by the evidence, we do not agree that it constituted reversible error. *See State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981). Because the defendant did not object at trial, the proper test is whether the argument was so improper as to have required the trial judge to intervene *ex mero motu*. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). We cannot conclude that this passing reference to the aggravating factor rose to the level of gross impropriety. Moreover, in light of the trial court's instructions that there was only one aggravating factor to be considered by the jury, it appears that the defendant was not prejudiced by this comment.

[25] Defendant next complains of the following argument by the district attorney:

> You are not killing him. The law sentences him to die. The law does and there's nowhere in this Bible right here (in-

dicating), not any place in this Bible is there any condemnation of the death penalty.

"Romans 13, let every soul be subject of a higher power for there is no power but of God. The powers that be are ordained of God. Whosoever resisteth the power, resisteth the ordinance of God and they that resist shall receive to themselves damnation.

For rulers are not a terror to good works, but to evil. Wilt thou then not be afraid of the power. Do that which is good, and thou shalt have praise of the same. For he is the minister of God to thee for good. But if thou do that which is evil, be afraid, for he beareth not the sword in vain, for he is the minister of God, and revenger to execute wrath upon him that doeth evil."

And, I say that comes after the phrase, "Vengeance is mine sayeth the Lord."

Defendant argues that a similar argument was disapproved by a federal court. *See Miller v. North Carolina*, 583 F. 2d 701 (4th Cir. 1978). Defendant does not specify what right under either state or federal law was allegedly infringed by this argument. While we have also disapproved of this argument, *State v. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984), we are not persuaded that defendant was prejudiced in this case by this reference to the scriptures. Defense counsel also made references to the scriptures in his arguments. We cannot say that the trial judge abused his discretion in not intervening *ex mero motu* when the prosecutor did so. This assignment of error is overruled.

[26] Defendant next takes exception to the following argument:

You heard about a little snaggled [sic] tooth seven year old girl . . . . Justice is making sure that Bernardino Zuniga is not ever going to do this again.

. . . .

We talked the other day about emotions and about this case. Yes sir, there's emotion. Just like common sense, by grannies, it's a little girl and that's what makes it so bad. It wouldn't make any difference in alot [sic] of ways if she'd been grown, it's a violation of the law just the same, but your

heart goes out to a child, as it should. You just say to yourself, "What am I going to do with this punishment. How am I going to be satisfied in my mind that he won't ever do it again?"

. . . .

Think about what she asked him. Reckon she said, "Please don't hurt me."

Reckon she begged a little bit. . . . Then it's almost a farce for us to have to sit here in this courtroom.

Defendant argues that the prosecutor appealed to the jury to sentence defendant to death as a deterrent to his killing again. In *State v. Kirkley*, 308 N.C. 196, 215, 302 S.E. 2d 144, 155, the prosecutor argued, "I'm asking you to impose the death penalty as a deterrent, to set a standard of conduct." We held the argument improper, although not so improper as to have required the judge to intervene *ex mero motu*.

Kirkley stands for the proposition that neither the defendant nor the State can introduce evidence or argue the effect, if any, of the death penalty on the commission of crimes by others. The argument complained of here, however, was not that the death penalty would have a general deterrent effect on crime, but rather that the execution of Bernardino Zuniga would foreclose further commission of crimes by him. We have upheld arguments invoking specific deterrence. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752. *See also Darden v. Wainwright*, 477 U.S. 168, 180 n.10, 91 L.Ed. 2d 144, 157 n.10 ("that's the only way I know that he is not going to get out on the public"). This assignment of error is overruled.

Defendant next argues that the prosecutor's sentencing phase closing argument, taken as a whole, denied defendant a fundamentally fair sentencing determination in violation of his eighth amendment rights. *Caldwell v. Mississippi*, 472 U.S. 320, 86 L.Ed. 2d 231. We have carefully reviewed the argument of the district attorney and defendant's contention with regard thereto and find that the final argument was not so improper as to suggest that it caused the jury to act out of passion or prejudice.

[27] Defendant assigns as error the refusal of the trial judge to give the following instructions during the penalty phase of his trial:

> "The Defendant has been previously convicted of one count of premeditated and deliberated murder. Premeditated and deliberated murder is the most aggravated of the criminal offenses defined by our law. In spite of that, death is not the appropriate penalty for all cases of conviction for this offense. It is only in the particularly aggravated cases of conviction for premeditated and deliberated murder that death may be imposed as the punishment. For the typical case of conviction for premeditated and deliberated murder, the appropriate penalty is imprisonment of the Defendant for the balance of his natural life.
>
> "Of course there is no 'typical case' of premeditated and deliberated murder. Each case involves a peculiar set of facts which relate to the nature of the offense. Each Defendant has a peculiar set of facts which make up his background and character. But when weighing any aggravated circumstance you may find and when determining whether such aggravating circumstance is sufficient, in light of the mitigating circumstances, to call for the imposition of the death penalty, it is important that you keep in mind that the proper sentence for the norm of cases of premeditated and deliberated murder is imprisonment for life."
>
> . . . .
>
> "Some of the matters you will be called upon to decide in the course of your deliberations and in your answers to the questions on the Issues and Recommendation Form are objective and others are subjective. With respect to the objective matters, you are called upon to decide whether certain facts have been proven to exist much as you would be called upon to decide facts in an ordinary civil or criminal case. Among these objective questions are whether the State has proven beyond a reasonable doubt that the aggravating circumstance submitted to you exists and whether the Defendant has proven by a preponderance of the evidence that the mitigating circumstances submitted to you exist. Among the subjective questions are (1) whether some of the mitigating

circumstances, those which I will instruct you are non-statutory mitigating circumstances, have mitigating value, (2) how you weigh the mitigating factors against the aggravating factors, and (3) whether any aggravating factor you find, considered in light of the mitigating factors you find, is sufficiently substantial to call for the punishment of death."

. . . .

"There are two categories of mitigating circumstances: Those mitigating circumstances which our legislature has determined to be, as a matter of law, in mitigation of punishment in every case if proven and those which may be mitigating circumstances in individual cases.

"As to those mitigating circumstances that our legislature has determined are by law in mitigation of punishment, those circumstances are referred to as statutory mitigating circumstances. I instruct you that as to the statutory mitigating circumstances you must consider these factors in the Defendant's favor in mitigating against the death penalty and give them weight in your determination of whether the mitigating circumstances outweigh the aggravating circumstance. This is true even though you may disagree with the legislature that these factors should be considered in the Defendant's favor in mitigating against the death penalty.

"The other group of mitigating circumstances are referred to as non-statutory mitigating circumstances. As to these mitigating circumstances, you must first determine whether that circumstance has been proven by the Defendant. Second, you must determine whether it has mitigating value and should be considered in the Defendant's favor in mitigating against the death penalty. If you find both that the factor has been proven and that it has mitigating value, then you must give it weight in your determination of whether the mitigating circumstances outweigh the aggravating circumstance."

. . . .

"The mitigating effect of the age of the Defendant is for you to determine from all the facts and circumstances which

you find from the evidence. In determining whether this factor exists in this case, you are instructed that 'age' as it is used under the law is not restricted to chronological age. 'Age' includes the Defendant's mental or emotional age, his maturity or his lack of maturity at the time of the crime."

Defendant argues that because each of these instructions would have put before the jury considerations that would have improved his chances for a life sentence rather than the death penalty, the instructions had mitigating value and were his right under *Skipper v. South Carolina*, 476 U.S. 1, 90 L.Ed. 2d 1.

Defendant's proposed instructions concern (1) the nature of mitigation, (2) the life sentence as the norm for first-degree murders, and (3) the meaning of the "age" mitigating factor. We have examined the requested instructions and concluded that defendant was not prejudiced by the refusal of Judge Hobgood to give them.

The instruction on the nature of mitigation given by Judge Hobgood has already been approved by this Court. *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983). We have not been persuaded to withdraw our approval in this case.

The instruction that the life sentence is the norm in first-degree murder cases would encourage the jury not to give the individualized consideration to the sentence that the constitution requires.[7] *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944 (1976). Moreover, we find that the trial judge's instructions adequately apprised the jury that if it did not find that the aggravating factor outweighed the mitigating factors, it would return a recommendation of life imprisonment. This assignment of error is overruled.

By requesting an instruction that the "age" mitigating circumstance may include mental as well as chronological age, the defendant was apparently arguing that the defendant's mental age was below his chronological age of twenty-seven years.

7. The State cites *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972), a case where we disapproved of such an instruction. *Taylor* was a case decided before the enactment of the Capital Sentencing Act and does not control our decision in this case.

However, we find no evidence in the record to support such an instruction and thus nothing which would entitle defendant to the submission of this factor.

Defendant argues that the jury's recommendation of the death penalty was made out of passion or prejudice or, alternatively, that the sentence is disproportionate to the crime for which he stands convicted. We have reviewed the sentence in this case according to the statutory requirements found in N.C.G.S. § 15A-2000(d) and find that there was sufficient evidence before the jury to support its sentencing recommendation. We therefore affirm the entry of the death sentence against defendant.

[28] Defendant contends that the jury was persuaded by the prosecutor to recommend the death penalty because the victim was very young. The prosecutor may not argue an aggravating factor not supported by the evidence or not included in the statutory list of aggravating factors found in N.C.G.S. § 15A-2000(e).[8] *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982). Likewise, a jury may not base its sentencing recommendation on an improper aggravating factor. *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). Where there is evidence to support the aggravating factors relied upon by the State, however, the jury's balancing of aggravation and mitigation will not be disturbed unless it appears that the jury acted out of passion or prejudice or made its sentence arbitrarily. *See State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983).

In this case, there was plenary evidence to support the jury's finding of the aggravating factor that the killing was accomplished during the commission of the rape of April Sweet. While the prosecutor did make several references to the age of April Sweet, each juror said on voir dire that he or she would not be influenced by the age of the victim. Defendant has failed to show that the jury made its recommendation based upon passion or

8. The Fair Sentencing Act does contain an aggravating factor that allows the judge to sentence a defendant to a sentence beyond the presumptive where the victim is very young, very old, or infirm. N.C.G.S. § 15A-1340.4(a)(1) (1986). No comparable aggravating factor is contained in the Capital Sentencing Act.

prejudice, rather than upon the finding of an aggravating factor that outweighs the factors in mitigation.

[29] Defendant argues that the death sentence is disproportionate in this case. We have reviewed the sentence in this case in light of the cases in the proportionality pool and conclude that the death penalty is not disproportionate to the crime of which the defendant stands convicted.

In *State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493 (1984), *cert. denied*, 471 U.S. 1120, 86 L.Ed. 2d 267 (1985), we described the process of proportionality review:

> 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.

Id. at 648, 314 S.E. 2d at 503. The only aggravating factor submitted to the jury was, "Was this murder committed while Bernardina [sic] Zuniga was engaged in the commission of the felony of first degree rape?" Defendant argues that we have never affirmed a death penalty where only the single aggravating factor of an accompanying felony was submitted to the jury. While this may be true, a single aggravating factor may outweigh a number of mitigating factors and may be sufficient to support a death sentence. *See State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 166 (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. Noland*, 312 N.C. 1, 320 S.E. 2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L.Ed. 2d 369 (1985).

We think that this case is similar to other cases of murder and sexual assault. Of the cases in the proportionality pool involv-

ing both a rape and other sexual assault and a homicide, five have carried the death penalty[9] and three have carried a life sentence.[10] It is not, therefore, unusual for the jury to recommend death in a case of rape and murder.

Defendant notes that the "especially heinous, atrocious, or cruel" factor, N.C.G.S. § 15A-2000(e) (1986), was not submitted to the jury in his case and that most affirmed death penalty cases have involved this factor. He argues that the brutality of this crime cannot be used to compare this crime to other crimes in the pool where the especially heinous, atrocious, or cruel factor was found by the jury. We disagree.

While the brutality of the *killing* was not submitted to the jury during its sentencing deliberations, the jury could still have considered the brutality of the *rape* as giving greater weight to the sole aggravating factor properly under its consideration. Likewise, the jury could properly have found that the age of the victim of the rape gave added weight to the factor submitted.[11] Thus, while the age of the victim could not be submitted as an aggravating factor for the murder, the age of the victim may properly be considered in weighing the aggravating factor that the killing was accomplished during the commission of a rape. Given

9. *State v. Vereen*, 312 N.C. 499, 324 S.E. 2d 250, *cert. denied*, 471 U.S. 1094, 85 L.Ed. 2d 526 (1985); *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. 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. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177 (1983).

10. *State v. Fincher*, 309 N.C. 1, 305 S.E. 2d 685 (1983); *State v. Clark*, 300 N.C. 116, 265 S.E. 2d 204 (1980); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1979).

11. Our criminal law has long reflected the societal belief that child-victims should be afforded special protection. *See, e.g.*, N.C.G.S. § 14-41 (1986) (abduction of children); N.C.G.S. §§ 14-190.7, -190.8 (1986) (dissemination of obscene materials to minors); N.C.G.S. § 14-190.18 (1986) (promoting prostitution of a minor); N.C.G.S. § 14-318.2 (1986) (child abuse); N.C.G.S. § 14-322 (1986) (abandonment and nonsupport). Our statutes also reflect the societal belief that the rape of a child is more egregious than the rape of an adult. *See* N.C.G.S. § 14-27 (1986).

We note finally that in two cases, murderers of children have been sentenced to death. *See 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. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025, 68 L.Ed. 2d 220 (1981).

the savagery of the attack on this defenseless child, the enormous suffering that she apparently suffered, and the relative significance of the mitigating factors brought forth by the defendant, we cannot say that the death penalty recommendation in this case was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. We hold therefore that the sentence in this case is not disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

We hold that the defendant received a trial and sentencing hearing free of prejudicial error, that the jury did not sentence out of passion or prejudice, and that the sentence is not disproportionate.

No error.

STATE OF NORTH CAROLINA v. NORRIS AUSTIN

No. 297A86

(Filed 7 July 1987)

1. **Criminal Law §§ 73.3; 169.5— hearsay—state of mind of victim—no prejudicial error**

There was no prejudicial error in a murder prosecution from the admission of testimony that the victim had told State's witnesses that she was going to move out of the house she shared with defendant where, assuming arguendo that the evidence was erroneously admitted, there was substantial evidence from which defendant's guilt could be inferred and it could not be said that there was a reasonable possibility that, without the testimony, the resulting trial would have been different. N.C.G.S. § 15A-1443(a).

2. **Searches and Seizures § 15— search of house—standing to challenge**

The trial court in a murder prosecution erred by ruling that defendant lacked standing to object to the search of the house in which he lived with the victims on the ground that defendant was not married to the woman with whom he lived and to whom the house was rented. Defendant had a reasonable expectation of privacy in the premises sufficient to confer standing; however, because his consent to the search was valid, evidence seized in the house was admissible.

3. **Searches and Seizures § 14— search of house—consent voluntary**

The trial court's ruling in a murder prosecution that defendant's consent to a search of his premises was valid was upheld, even though the trial judge's

reasoning for denying defendant's motion to suppress was invalid, where the totality of the circumstances indicated that defendant's consent was voluntary.

4. **Criminal Law § 102.6— reading from appellate opinion on amnesia—not prejudicial error**

Although the trial court erred in a murder prosecution by allowing the District Attorney to read from a Supreme Court opinion a quotation regarding amnesia, the error was not prejudicial because the evidence of defendant's guilt was overwhelming. N.C.G.S. § 15A-1443(a).

5. **Homicide § 18.1— murder—premeditated and deliberated—rapid firing rifle—evidence sufficient**

The trial court did not err in a murder prosecution by instructing the jury on premeditation and deliberation where the three victims suffered multiple wounds from a .22 caliber semi-automatic rifle which can be fired as rapidly as the trigger is pulled and which is capable of firing up to fifteen rounds within seconds. Even though the rifle was capable of being fired rapidly, the trigger must have been consciously pulled for each shot and some amount of time for thought and deliberation must have elapsed between each pull of the trigger, however brief; moreover, three people in two different rooms were killed.

6. **Criminal Law § 6— insanity caused by intoxication—evidence insufficient**

The trial court in a murder prosecution did not err by instructing the jury that voluntary intoxication would not support a defense of insanity where there was no evidence tending to show that defendant was suffering from any chronic or permanent insanity in consequence of his excessive ingestion of alcohol.

APPEAL by defendant from judgments sentencing defendant to consecutive terms of life imprisonment for each of three convictions of murder in the first degree, said judgments imposed by *Ferrell, J.*, at the 13 January 1986 session of Superior Court, BURKE County. Heard in the Supreme Court 16 April 1987.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the state.

Lawrence D. McMahon, Jr. and Sam J. Ervin, IV for defendant.

MARTIN, Justice.

The state's evidence at trial tended to show the following: In April 1985 defendant and Mary Sue "Susie" Blankenship White were living together in a house on Jenkins Road in Burke County with Susie's two daughters, Sheila Renee, aged nineteen, who was mentally handicapped, and Christy, aged fourteen. They had lived

together as a family for about eight years. Defendant had received total disability from Social Security because of some serious injuries he had sustained in a car accident some ten years previously. He was also a chronic alcoholic. Although he had quit drinking for about eight months because of some medications he was taking, he had resumed drinking after he had been bitten by a dog about a week prior to the events in question.

On Friday night, 5 April 1985, Susie's mother, Elizabeth Blankenship Murphy, who lived in a trailer directly behind Susie's house, was visiting at her daughter's house. Defendant was in the bedroom and the door was shut, and Mrs. Murphy and Susie were in the living room. Susie said, "Momma, I have lost sleep, I can't take this much longer." She continued, "If I can make it until the 3rd of next month, I'm going to see if I can't get me one of those FHA homes." Susie went on to explain to her mother that she could not get any rest or sleep because of defendant's drinking. Susie made similar statements to her brother's wife, Carol Blankenship, while they were conversing at Susie's kitchen table the following day. This conversation was interrupted, however, when defendant entered the kitchen and sat down at the table. Susie quickly changed the subject. Defendant asked Carol if she were doing okay. When she said yes, he replied, "Well, that's good, because if you wasn't, I was going to shoot you." He laughed and they began talking about something else. Carol testified that he appeared to be "[a]bout half way" drunk, which was normal for him. She also said that "[h]e wasn't himself that day, he just acted like he had something on his mind." Testimony at trial established that defendant thereafter became increasingly more withdrawn, preoccupied, and morose.

Sometime between 12:30 and 1:00 p.m. on Easter Sunday, Jim and Carol Blankenship went over to Susie's house to use the telephone. They knocked several times on the door leading into the carport, but no one answered. Jim walked around to the master bedroom window, knocked loudly with his fist, and then rapped on it several times with his pocketknife. Through the window he could see the defendant lying on the bed. Defendant stirred and grunted and Jim saw his arm "flop over." Thinking that defendant was coming to let them in, Jim returned to the carport and talked to his wife and his mother, Mrs. Murphy, who had seen them out the window and had walked over. When de-

fendant still did not come to the door, Jim returned to the bedroom window and again knocked on it loudly with his knife. He heard defendant's voice call out, "Is that you, Jim?" Jim replied, "Yeah, I need to use the telephone. Would you get up and let me in? The drain has come out of Carol's side." Defendant responded, "Go away and leave me alone." Jim returned to the carport and told the women what defendant had said. Mrs. Murphy then went around to the bedroom window and called out for defendant and Susie. Getting no answer, she walked around to the children's bedroom window and called their names. Thinking that perhaps defendant and Susie were in bed and didn't want to be bothered, Jim and Carol went to use Carol's mother's phone to call the doctor, and Mrs. Murphy went home. At trial, Jim testified that he believed that defendant "was either asleep or drunk, one thing."

Sheila and Christy White had planned to have Easter dinner with their grandparents, Albert and Opal White, after church on that Easter Sunday at about 1:15 p.m. Albert and Opal got home from church and waited for their granddaughters to arrive. When the girls failed to show up, Opal called her former daughter-in-law's house to find out what had happened. When no one answered, Opal hung up, waited about five minutes, and at 2:10 p.m. dialed again. This time defendant answered. When Opal told him that the girls were supposed to be there for lunch and asked him where they were, defendant said, "They're in the bedroom, I'll tell them." Opal was going to ask to speak to Christy, but defendant hung up. Opal turned to her husband and said, "Norris is drunk." She then dialed back, but no one answered. Opal and Albert discussed what had just transpired, decided something was wrong, and decided to drive up to Susie's house. Albert peered into the porch window and a large picture window, saw nothing unusual, and got back in his car and drove around to Mrs. Murphy's trailer. Meanwhile, defendant had telephoned his brother at about 3:00 p.m. and said that he wanted to be taken to get some more beer. Bill and his wife, Reba, left their house and went to pick up defendant. When Mrs. Murphy, Albert, and Opal saw Bill and Reba drive up the driveway, Albert got back in his car and returned to Susie's house. By the time he arrived, defendant had come out to his brother's car. Reba Austin testified that defendant's clothing was "all in a mess," but that she wouldn't say

he was drunk, "[h]e looked like somebody who was just getting over a real bad hangover." Both she and her husband also testified that defendant had defecated in his clothing, which was also wet with urine. When Albert asked defendant where Susie and the children were, defendant responded that they had gone off with Jim. Albert got in his car and began backing out of the driveway. However, when he saw defendant get into Bill's car and drive off, he pulled back up and went into the house. He walked through the kitchen, turned, looked into the bathroom, and saw Sheila, still dressed in her nightclothes, slumped over the bathtub, her legs out of the tub and her head, shoulders, and arms in it. Thinking that she was washing her hair but then noticing that there was no water in the tub, Albert picked Sheila up and laid her flat on her back. The tub was full of blood and blood was on Sheila's face and clothes. After he had laid Sheila down, Albert looked into a bedroom and saw Susie, dressed in a nightgown, lying "flat on the floor on her face," between the two beds. A "whole pond of blood" was under her face, Albert testified, and he touched her and she was stiff. Albert then turned and saw Christy in one of the beds, lying on her right side. A pool of blood was under her body and she also was stiff. Albert left the house and returned to Mrs. Murphy's trailer. He told Mrs. Murphy and his wife, "Well, he's killed them all," and said, "[s]omebody call the law." They then went over to Susie's house to wait for the ambulance and the sheriff's department personnel. This time both Albert and Opal went in the house. Around 3:49 p.m., sheriff's department personnel arrived to clear and secure the crime scene, and Sergeant Max Quarles and Detective Robin Dale went into the house to check on the location of the bodies and to interview Mr. White.

Shortly thereafter, at about 4:00, Bill Austin returned with defendant. Defendant was put in Quarles' patrol car and transported to the Burke County Jail, where he gave his consent to search the residence. A .22 semiautomatic Remington Speedmaster rifle was found under the covers of the bed in the master bedroom. The safety was off. Numerous shell casings, several bullets, a full cartridge, and an unspent cartridge were found on the bedroom floor. The details of defendant's initial detention and arrest, the obtaining of his consent, and the search of the Jenkins Road house will be discussed later in this opinion on the issue of his motion to suppress.

Dr. Dorwyn Wayne Croom, Burke County Medical Examiner, examined the bodies of Susie, Sheila, and Christy White at the scene of the killings at 5:00 p.m. on 7 April. Upon visual examination, he observed gunshot wounds to the back, left buttock, right leg, and head of Christy, two gunshot wounds to the left side of Sheila, and four gunshot wounds to Susie's back. Dr. Croom also performed the autopsies on the bodies the following day. He determined that there were a total of nine gunshot wounds on the body of Christy. In Dr. Croom's opinion, the gunshot wounds to the head and back caused death. Autopsy of Sheila confirmed that she had suffered two gunshot wounds. Dr. Croom determined that Sheila White died as a result of a gunshot wound to the chest. Four gunshot wounds had been inflicted on the mid- and left side of the back of Susie White. Dr. Croom stated that death was caused by gunshot wounds to the back. In examining these wounds, Dr. Croom did not observe the presence of any gunpowder or stippling. All of the bullets recovered were turned over to the SBI at the time of autopsies as evidence. From other tests he performed on the bodies, he estimated the time of the victims' deaths to have been sometime between midnight and noon on Easter Sunday.

SBI fingerprint identification and comparison expert Johnny Leonard testified that three right palmprints, a right middle fingerprint, and a right thumbprint lifted from the .22-caliber rifle found in the bed matched the known inked impressions of defendant's corresponding fingerprints and palmprints. SBI agent Jim Evans, a firearms and toolmarks identification expert, testified that the casings and all of the bullets which were collected at the autopsy and at the scene of the killings had similar class characteristics with the exception of one which had no class characteristics that could be identified. He testified that bullets fired from the .22 rifle found in the bed would be expected to have these class characteristics and some of the same microscopic imperfections, but he was unable to gain sufficient information in order to give his opinion that no other gun could have fired those bullets.

The defendant offered several witnesses in his behalf at trial. Morganton pharmacist Dan Rhodes testified as to all the prescriptions which had been filled at his store for defendant from 13 November 1984 through 27 March 1985. Among these medications were Rufen (ibuprofen, an anti-inflammatory agent for arthritis

and minor aches and pains), Clindex (librax, for control of irritable bowel syndrome), Aldactone (spironolactone, a diuretic), Halcion .5 mg. (sleeping pills), Tessalon (cough suppressant), and Lasix (a diuretic). The Physician's Desk Reference, defendant's family doctor, Dr. James Croft, and Dr. Croom indicated that Halcion and Librax should not be taken in combination with alcohol, as together they would produce increased sedation, drowsiness, or lack of coordination. Dr. Croft testified that he treated defendant intermittently from 13 June 1983 until 27 March 1985 for cirrhosis of the liver and that he had prescribed all the medications introduced into evidence as defendant's exhibits. He said that defendant was by admission an alcoholic.

A. L. Hullett, chief jailer at the Burke County Sheriff's Department, testified that when he saw defendant at the jail at approximately 8:00 a.m. on 8 April 1985, defendant "looked as if he had a rough night. He was disheveled . . . he just looked like he may have been hung over." Although defendant was in a one-person cell, Hullett said, defendant "did ask me if I'd keep other people out of his cell, that they were walking through the cell." Defendant also reportedly hallucinated that people had come through his cell and threatened to rape his family; that jail personnel had "turned water in on him, had flooded him out"; and that he had seen animals. Consequently, on 16 April, defendant was sent by court order to Dorothea Dix Hospital for evaluation and medical attention.

Defendant testified in his own behalf at trial. He said, "I loved [Susie and the kids] to death, ain't nobody loved them as much as me. Ain't no way I could have done this." He said that he did not drink a drop of alcohol for eight months prior to 30 March 1985. However, on that day, while he and Christy were out jogging together, he was bitten by a dog. The emergency room experience made him nervous, he said, and he bought a twelve-pack of beer. He testified that he drank six or seven of the beers, that he remembered going into the workshop with the remaining beers, and that the next thing he remembered was that he was in jail and that warrants were being read to him. On cross-examination defendant denied remembering that he fell in the bathroom at home on Wednesday, 3 April, and injured his eye, or that Mrs. Murphy spent the night at the house on Wednesday, Thursday and Friday; denied any recollection of telling anyone

that he was in the house on the day of the killings and that he knew who did it but that it was not him; denied remembering that he pawned a tiller in Morganton on 4 April; denied any remembrance of a conversation he had with his brother on 7 April in which defendant several times offered his brother all his tools, his guns, and his car—basically everything defendant owned—and in which defendant said, "I won't be here tomorrow." He said that he recalled being in Dorothea Dix but did not recall going there and that he remembered attempting to escape when he returned from Dix and was being taken back into the jail. He also admitted that he was not forced against his will to resume drinking and that from fifteen years experience with alcohol, he knew what it did to him.

The state's rebuttal witness, Dr. Patricio Lara, an expert in forensic psychiatry practicing at Dix Hospital, testified that upon defendant's admission to Dix, he was placed on a detoxification routine with vitamins and tranquilizers. Dr. Lara said he had insufficient data about defendant's condition at the time of the offenses to enable him to form an opinion as to whether defendant was able to know right from wrong or understand the full nature and quality of his actions. He said that defendant's condition at the time of discharge was "clear with no evidence of psychosis." On cross-examination Dr. Lara admitted that it is possible that an alcoholic who has been on a seven-day binge could develop amnesia and could be rendered unable or lack the mental capacity to know what he was doing. Also on rebuttal Max Quarles testified as to the details of defendant's escape attempt.

[1] By his first assignments of error defendant challenges the admission of testimony by state's witnesses Carol Jeane (Blankenship) Danner and Elizabeth Murphy as to the statements made by Susie White to the effect that if she could make it to the third of the next month, she was going to get an FHA home and move out. Although defendant concedes that Susie's extrajudicial statements fall within the "state of mind" exception to the hearsay rule, N.C.R. Evid. 803(3), he points out that the state of mind exception may not be used to prove past facts or memories. Moreover, he says, although the state of mind of a defendant may be relevant as to the existence of premeditation and deliberation and specific intent to kill, the state of mind of a victim is not relevant except insofar as it may bear on the state of mind of the defend-

ant. Such testimony of the state of mind of the victim, used to show the state of mind of the defendant, is relevant only if it can be demonstrated that defendant knew the victim's state of mind. Here, the witnesses' testimony was irrelevant and inadmissible because there was no evidence that defendant ever heard such remarks, which were made in a hushed tone and which ended as soon as defendant entered the room. N.C.R. Evid. 402. He also argues that even though evidence tending to establish motive is relevant to a determination of premeditation and deliberation, *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983), the evidence complained of here was insufficient for that purpose, as there was no evidence that the victim's intention was ever communicated to the defendant. *State v. Vestal*, 278 N.C. 561, 596-97, 180 S.E. 2d 755, 778 (1971).

Assuming arguendo that it was error to admit the testimony of these witnesses, particularly that of Mrs. Danner, we do not find that such error was prejudicial. The evidence taken in the light most favorable to the state indicated that defendant, a chronic alcoholic, had been drinking steadily from 30 March until 7 April. He began exhibiting unusual behavior on about 4 April, on which day he told Elizabeth Murphy to plant a garden in a bucket of dirt and got "crazy drunk" and became angry with Christy. After Carol's visit on 6 April, defendant continued drinking, appeared to have something on his mind, and said very little. Defendant was seen outside his house between 10:30 and 11:00 p.m. that night, and he appeared to be drunk. Mrs. Murphy heard rifle shots coming from the direction of the house between 1:00 and 2:00 a.m. in the early morning of 7 April. Medical testimony established the time of the victims' deaths as between midnight and noon on Sunday, 7 April. The bedroom lights in Susie White's house were seen on at late hours, which was unusual, and also unusual was the fact that the light in the bathroom, in which Sheila's body was found, also burned all night. At noon, the curtains in the children's bedroom, in which the bodies of Susie and Christy White were found, were still closed, which also was out of the ordinary. After Bill Austin had taken defendant on the first beer run, defendant repeatedly told Bill he wanted him to have all his "stuff." Defendant declined to go in the house and get Susie so that Bill could ask her if this was okay with her. Defendant also refused to let Jim and Carol Blankenship come in the house to use

the telephone, even though Carol had just had surgery and a drain in her side had come out. Instead, he lay on the bed and told Jim to go away. When Opal White finally reached defendant on the telephone at about 2:10 p.m. and said that her grandchildren had failed to come for lunch, defendant stated that they were in the bedroom and that he would tell them. Defendant did not answer the phone when she called back. A .22-caliber Remington Speedmaster semiautomatic rifle was found in the bed which defendant and Susie had shared and in which defendant had been lying earlier in the day when Jim had gone to the window. Five of defendant's fingerprints were found on the weapon. The cartridges found in the house were determined to have been fired from this same rifle, and all of the bullets recovered from the bodies had the same class characteristics as the bullets test-fired by this gun. All of these facts taken together, particularly the fact that defendant remained in the house for numerous hours with three dead persons who had been killed with bullets fired from a gun found in the defendant's bed and on which defendant's fingerprints were found, is substantial evidence from which defendant's guilt can be inferred. Regardless of whether defendant overheard any of the conversation between Susie White and her mother or between Susie and her sister-in-law, we cannot say that there is a reasonable possibility that without this testimony the result at trial would have been different. N.C.G.S. § 15A-1443(a) (1977). Accordingly these assignments of error are overruled.

Defendant contends by his next assignments of error that the trial court erred in denying defendant's motion to suppress the evidence seized during the search of the Jenkins Road house on 7 April 1985. Following a suppression hearing, the trial court concluded that defendant had no standing to contest the search of the residence and the seizure of the evidence or, alternatively, that defendant was not so intoxicated that he was unable to give his consent to the search. Defendant argues that these conclusions of law were erroneous.

Testimony at trial established that defendant and Susie White were not married. Defendant, Susie, Sheila, and Christy had originally lived together in a trailer beginning in about 1979 or 1980. The Jenkins Road house into which they had later moved and in which they were living on 7 April 1985 was owned by one Champ Clark. Although for some months Reba Austin, who man-

aged the trailer park in which the house was located, had issued rent receipts to defendant and Susie White jointly, more recently it was Susie White who had rented the house.

The evidence at trial further showed that after the bodies had been discovered and officers had arrived on the scene, Bill and Reba Austin and defendant drove up the driveway of the Jenkins Road house. A crowd had gathered on the property and when the Austins' car arrived, a woman in the crowd shouted, "there's the s.o.b. that killed them." When Quarles heard the hostile statements from the crowd which had gathered, he decided to put defendant in his patrol car, in "[d]etention. Not under arrest." Quarles testified, "The reason he was removed from the scene to the Burke County Sheriff's Department is because of the crowd on the scene. Some of them were pretty disturbed over what had happened, and for his safety we removed him." Quarles approached the Austins' car, opened the rear door, and asked defendant to get out of the car. When defendant did not move, Quarles went to the other side of the car, opened the door, and took hold of defendant's right arm. Bill Austin commented that defendant had a bad leg or foot, and both Quarles and Bill helped defendant out. Quarles testified that at this time defendant "smelled like beer to me." Opal White testified that she saw defendant get out of Bill's car and walk and that "[h]e appeared all right." The deputy then asked defendant to get in the backseat of the patrol car. Defendant replied that he was not going unless he could take his beer. Quarles said "all right, bring your beer and come on," and defendant got in the backseat of Quarles' squad car. The rear door of the squad car was designed to lock automatically when closed. About twenty minutes later, after Quarles had helped clear the area, defendant was taken to the Burke County Sheriff's office. Quarles read defendant his rights when they arrived at the jail at around 4:30. Quarles asked defendant if he understood what had just been explained to him, and defendant stated that he did. He also said that he did not think he needed a lawyer. When asked what he noticed about the way the defendant was walking, Burke County magistrate Frank Canon replied, "He just walked slowly." Quarles testified that defendant was neither staggering nor stumbling as he walked. Defendant was taken into the automatically-locked lobby of the jail where he was given a seat and asked to wait until the detectives got in to talk to him.

About forty-five minutes later Quarles got a phone call from the chief detective, Captain Whisnant, who requested that he ask the defendant for his consent to search the residence for a murder weapon. Up to that time, only a walk-through and visual sweep of the house had been made. Quarles then asked the two jailers on duty, neither of whom was wearing a gun, and the magistrate to witness the conversation he was about to have with the defendant. Quarles testified that he "explained very carefully to the defendant what we were—what the situation was, that three bodies had been found in his residence, apparently shot, and our detectives were on the scene, and would like permission to search the residence for a murder weapon. And I explained to him that it was strictly up to him, it would be voluntary, if he didn't want to grant permission, that was his privilege." Defendant then replied, "okay, go ahead." Canon's testimony substantially corroborated the testimony of Quarles. He recalled that Quarles told defendant what had been found, that Quarles asked defendant if he remembered the rights read to him earlier, that defendant responded that he did and that defendant said, "yes, go ahead and search the house, I didn't kill nobody, but I know who did." When asked what he noticed or observed when Quarles was asking questions of defendant, Canon responded, "He answered the questions. Didn't have no trouble." Quarles also testified that no promises or threats were made to get defendant to give his consent to search, and when asked if any type of coercion of the defendant was used, Quarles responded, "No sir. In fact, I was very polite." Quarles then relayed the consent to Detective Whisnant. He also said that defendant had not been told he was under arrest.

After having been advised that defendant's consent to search the Jenkins Road house had been obtained, Burke County officers waited for SBI agent Robert Melton to arrive on the scene at about 5:20 p.m. Accompanied by Detective Robin Dale, Melton then conducted a search of the house. Towards the end of the search, while Melton was in the hall foyer, Dale went into the master bedroom and was looking at shell casings which were visible on the floor. Dale placed his hand on the bed to steady himself and got down on his knees to survey the floor, and touched something in the bed which felt to him like a rifle. Dale asked Melton to come into the bedroom. Melton pulled back the covers and found a .22-caliber Remington semiautomatic rifle underneath the

covers. The rifle was photographed and seized as evidence. Melton also seized some .22-caliber cartridge casings which were in plain view, several bullets, and some items of clothing. Bullet fragments were seized from the mattresses in Christy and Sheila's bedroom. Melton also observed powder burns and holes in a mattress.

Following the voir dire hearing on defendant's motion to suppress the rifle, the court concluded that "the seizure of the weapon, the Remington .22 automatic, was not the fruit of an impermissible intrusion into a constitutionally protected place with respect to Norris Austin," and denied defendant's motion to suppress. We find no error in the trial court's ruling.

[2] Defendant first argues that the trial court's findings of fact and conclusions of law with respect to the standing issue erroneously focus on defendant's apparent lack of financial contribution to the rental of the residence, evidently holding that one may not have a legitimate expectation of privacy in premises which one has not himself rented and on which one "is living in a manner not acceptable to conventional morality."

In its findings of fact as to the issue of standing, among other things the court found that

> 11. Mr. Austin and Mrs. White were not married although Mr. Austin had lived at the White premises for some five or six years. . . . With respect to the premises, Mrs. Billy Austin was responsible for the renting of the property where Mary Sue White and the defendant Austin lived. And her testimony was that it was Mary Sue White who rented the property. And the Court is not aware of any work of [sic] any gainful employment that the defendant Austin engaged in after his disability payments ceased.

From this the court concluded that there had been no showing that defendant had any standing to contest the search of the residence. The court said:

> And the status of this defendant as the common-law, at most, companion of Mrs. White as having standing to assert the Fourth Amendment privilege is inconsistent with the law of North Carolina which gives priority to the rights of a tenant in possession. Moreover, particularly in North Carolina,

where no lawful status is given to such an extramarital relationship. The defendant in this case was in the area of a friend to Mrs. White, and friends seldom have standing to object to a search of premises not their own. Furthermore, the defendant had demonstrated to this Court no expectancy of privacy in the home of somebody and her two daughters other than a tenancy at will. The will being the one who rented the house.

The trial court ruled that defendant had no standing to assert the fourth amendment claim. However, in so doing, the trial court apparently overlooked or considered insignificant the testimony that joint rent receipts had in the past been issued to defendant and Susie and that defendant had resided there for five or six years, keeping all of his clothes there, eating and sleeping there, working in the yard, planting a garden, and receiving his mail there. Several witnesses testified that defendant, Susie, and the girls lived there as a family. We hold from our review of the totality of all the circumstances that defendant had a reasonable expectation of privacy in the premises sufficient to confer standing upon him. *Rakas v. Illinois*, 439 U.S. 128, 58 L.Ed. 2d 387 (1978). The fact that defendant and Susie were not married is not fatal to his standing to urge the fourth amendment claim. Accordingly, the trial court's ruling to the contrary was error.

[3] We turn now to the alternative basis for the trial court's decision with respect to the motion to suppress and to defendant's claim that the trial judge applied an incorrect legal standard in making his conclusions of law as to the issue of consent. After making its findings of fact on this matter, the trial court concluded as a matter of law the following:

14. Notwithstanding the insufficiency of the proof required from the defendant with respect to standing, the Court has considered whether or not there was consent, for where a person consents to a search the consent dispenses with the necessity for a searchwarrant [sic].

15. The presentation of evidence of intoxication standing alone is not sufficient to invalidate consent, unless the intoxication amounts to a mania as to lead the user to be unconscious of the meaning of his words. Nothing in this record supports the conclusion that this defendant was in a state of

> mania or was unconscious to the meaning of his words. To the contrary, the evidence discloses the opposite.

Defendant contends that this "mania standard" for determining the voluntariness of an intoxicated defendant's consent, *State v. Logner*, 266 N.C. 238, 145 S.E. 2d 867 (1966), is not the proper standard because the appellate courts of this state have not applied this test when intoxication is the only factor possibly affecting voluntariness. *See State v. Baker*, 312 N.C. 34, 320 S.E. 2d 670 (1984) (intoxication and physical threats); *State v. Moore*, 64 N.C. App. 686, 308 S.E. 2d 358 (1983) (intoxication by drugs and lack of sleep). Moreover, defendant challenges the voluntariness of his consent on two grounds: his alleged intoxication; and his low intelligence, which has been held relevant to a determination of voluntariness, *State v. Fincher*, 309 N.C. 1, 305 S.E. 2d 685 (1983). He insists that as the trial court's single conclusion of law as to consent encompassed only the issue of intoxication as the sole factor affecting voluntariness, an improper legal standard was applied.

Assuming arguendo that the trial court's reasoning for denying defendant's motion to suppress was incorrect, we are not required on this basis alone to determine that the ruling was erroneous. *State v. Gardner*, 316 N.C. 605, 342 S.E. 2d 872 (1986). A correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned. The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable. *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E. 2d 867, 869 (1957). The crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence.

The evidence at the voir dire hearing on defendant's motion to suppress indicates that defendant needed assistance in getting out of his brother's car and into Quarles' squad car. However, both Quarles and defendant's brother testified that this was because defendant had a bad leg, not because defendant was too intoxicated to walk. Opal White testified that he walked normally. Quarles did not affirmatively lock defendant inside the sheriff's car; rather, the door was designed so that it locked automatically when closed. Moreover, Quarles testified that this action was for the protection of the defendant from the hostile crowd and that defendant was in detention, not under arrest. Defendant asked for

and was allowed to take a can of beer into the car. When defendant arrived at the jail, he said that he understood his constitutional rights which were read to him from a printed card. He neither staggered nor stumbled as he walked into the jail. Neither of the jailers was wearing a gun. Upon receiving the call from officer Whisnant, Quarles said that he explained to defendant in detail that three bodies had been found in the house and that officers at the scene were requesting permission to search the house. Both Quarles and Canon agreed that defendant thereupon said for them to "go ahead." Defendant was not subjected to prolonged questioning, nor is there any indication that he was threatened or offered any promises or inducements in exchange for his consent to search. Dr. Lara, forensic psychiatrist at Dorothea Dix, testified that testing and assessment of defendant "revealed no symptoms or behavior . . . suggestive of a chronic brain damage," and no evidence of organic impairment. Defendant was determined to be in the borderline range of mental ability, with an IQ of 77. There was no history of skull fracture and "no documentation of any period of meaningful unconsciousness." Included in the doctor's report to the court was the statement that at 3:00 p.m. on 7 April 1985 when defendant returned home, he "was described to have appeared intoxicated but to have been fairly clear at the time he was interviewed a few hours later." The doctor further explained that "[c]onditions related to alcohol influence may change remarkably within a span of three or four hours." There is no evidence that his "low intelligence" affected the voluntariness of defendant's consent. He stated several times that he understood his rights that were explained to him and that he remembered them.

From the totality of the circumstances we hold that defendant's consent was voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed. 2d 854 (1973). Defendant, advised of his rights, knowingly, freely, and voluntarily waived them. *State v. Fincher*, 309 N.C. 1, 305 S.E. 2d 685. Therefore, defendant's consent to the search of the premises was valid, and there was no error in the trial court's ruling on defendant's motion to suppress the seized evidence.

[4] Defendant next complains that the trial court committed prejudicial error in permitting the prosecutor to read a passage pertaining to amnesia from an opinion of this Court, *State v. Cad-*

dell, 287 N.C. 266, 215 S.E. 2d 348 (1975). In his closing argument, the prosecutor, over defendant's objection, was allowed to read the following excerpt:

> "Amnesia, loss of memory, may lead to crimes entirely unknown to the culprit at a later date. That is rare. More frequently, the accused, remembering full well what he has done, alleges amnesia in false defense. He is a malingerer. To prove his innocence or guilt may be most difficult. . . . Failure to remember later, when accused, is in itself no proof of the mental condition when crime was performed."

287 N.C. at 286, 215 S.E. 2d at 361 (quoting R. Gray, *Attorneys' Textbook of Medicine* § 96.01 (3d ed. 1949)). Although defendant acknowledges that this Court in *State v. Noland*, 312 N.C. 1, 302 S.E. 2d 642 (1984), found that the prosecutor's paraphrasing of this very same passage from *Caddell* to the jury did not amount to an impropriety so extreme as to require the trial judge to intervene ex mero motu, he argues that his theory of inadmissibility is sufficiently different from that propounded in *Noland* to warrant consideration. Whereas defense counsel in *Noland* argued that the reading of the passage was irrelevant, defendant argues that the reading here amounted to a violation of the rule prohibiting counsel from traveling outside the record in his argument to the jury. *E.g., State v. Locklear*, 294 N.C. 210, 241 S.E. 2d 65 (1978); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). Unlike *Noland*, here the passage was read over defendant's objection. We hold here that allowing the reading of this passage to the jury was erroneous, but we further hold that the error was not prejudicial to defendant.

As the Court noted in *State v. Gardner*, 316 N.C. 605, 342 S.E. 2d 872, "simply because a statement is made in a reported decision does not always give counsel the right to read it to the jury in his closing argument under N.C.G.S. § 84-14." 316 N.C. at 611, 342 S.E. 2d at 876. Because declarations or opinions of experts in a publication are not under oath and cannot be classified as evidence, and because reading of material, such as decisions of this Court, may tend to prejudice a party upon the facts, this Court has placed limitations upon the reading of reported decisions and other books and printed matter to the jury in closing argument. *See, e.g., Gardner; State v. McMorris*, 290 N.C. 286, 225

S.E. 2d 553 (1976); *Wilcox v. Motors Co.*, 269 N.C. 473, 153 S.E. 2d 76 (1967); *Conn v. R.R.*, 201 N.C. 157, 159 S.E. 331 (1931). It has been held permissible, for example, for counsel to read an excerpt from the reported decisions of an appellate court, *Brown v. Vestal*, 231 N.C. 56, 55 S.E. 2d 797 (1949), including the facts necessary to explain the legal principle under discussion, *Wilcox v. Motors Co.*, 269 N.C. 473, 153 S.E. 2d 76; *Cashwell v. Bottling Works*, 174 N.C. 324, 93 S.E. 901 (1917). However, although counsel may properly read statements of law and their attendant facts found in the original opinion to the jury, counsel may not read matters which are not law but rather constitute mere dicta and therefore are not within the scope of N.C.G.S. § 84-14, *Gardner*, 316 N.C. 605, 611, 342 S.E. 2d 872, 876, nor may counsel "read to the jury decisions discussing principles of law which are irrelevant to the case and have no application to the facts in evidence." *State v. Crisp*, 244 N.C. 407, 412-13, 94 S.E. 2d 401, 406 (1956).

It is true that *Noland* speaks only to the relevancy of the passage and does not decide the issue of traveling outside the record, while *Gardner* emphasizes the impropriety of allowing counsel to circumvent the rules by quoting secondary material from an appellate reporter rather than from the original source. In other words, *Gardner* condemns the practice of permitting a party to do by indirection what he could not do directly, which is precisely what occurred in the instant case. Thus, the quoting of the passage from *Caddell* was improper and the trial court's failure to sustain defendant's objection to the reading was error. However, defendant has failed to show that he was prejudiced. Dr. Croft testified that it was possible for a person who took Halcion while drinking alcohol heavily to develop an antigrade amnesia, or amnesia from a certain point on, but that it was "not very probable." However, there is no evidence that defendant consumed any Halcion tablets prior to the murders, although a prescription for one hundred tablets was filled for defendant on 27 March 1985. Dr. Croft also testified that a person who drank alcohol incessantly for several days could or might by the ingestion of that amount of alcohol alone develop antigrade amnesia "to a degree." However, on cross-examination, he testified that although amnesia might cause people not to remember something after it took place, that does not mean they were not aware of what they were doing while they were doing it. Dr. Lara testified

only that it was possible that an alcoholic who had been on a seven-day drinking binge could develop amnesia. He also said that he detected no evidence of chronic brain damage or organic impairment and that there was "no documentation of any period of meaningful unconsciousness." The testimony from both of these medical experts was merely generalized testimony concerning the possibility of amnesia developing from alcohol use or alcohol and drug use. Neither Dr. Croft nor Dr. Lara offered any opinion as to whether defendant himself did or could have suffered from any amnesia. Indeed, Dr. Lara testified that "to verify [a patient's] accurate recall and how much of their so-called amnesia is true or false, it would not be possible to verify beyond doubt on a retrospective basis when we're seeing the patient some time after the incident." Nor did Dr. Lara have sufficient data on which to base an opinion as to whether defendant knew right from wrong or was able to understand the nature or quality of his actions at the time of the killings. Defendant's self-serving testimony was that he could not remember anything from 30 March until sometime after he was arrested and in jail. The question of defendant's credibility with respect to the amnesia claim, then, was a matter for the jury to determine. Moreover, as discussed earlier in this opinion, the evidence of defendant's guilt presented by the state was convincing. In view of such overwhelming evidence, we hold that there is no reasonable possibility that the trial court's ruling affected the verdicts returned by the jury. N.C.G.S. § 15A-1443(a).

[5] Next, defendant argues that the trial court committed prejudicial error in its instructions on premeditation and deliberation. The trial court instructed the jury as follows:

> Neither premeditation or deliberation are usually susceptible of direct proof. They may be proved from circumstances from which they may be inferred such as the conduct of the defendant before, during and after the killing; the use of grossly excessive force; the infliction of lethal wounds after the victim is felled; brutal or vicious circumstances of the killing; the manner in which or the means by which the killing was done.

These same instructions were later repeated upon a request by the jury. Although defendant concedes that the instructions are

in general a correct statement of the law, *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673 (1986), he argues that they are inapplicable to the instant case, and an instruction which does not arise from some reasonable view of the evidence presented is erroneous. *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975). The evidence indicates that the three victims suffered multiple wounds which were inflicted from a .22-caliber semiautomatic rifle which can be fired as quickly as the trigger is pulled and is capable of firing up to fifteen rounds within seconds. The crux of defendant's argument seems to be that the ability to fire so rapidly negates the inference of premeditation based solely upon the number of wounds; he contends that the evidence does not support the inference that the victims had already been felled before the lethal wounds were inflicted and that the sheer number of wounds is not determinative of the issue of premeditation and deliberation. We do not agree with defendant's contention.

The evidence indicated that in order to fire the weapon with which the victims were killed, the trigger must be consciously pulled for each shot. Even though the rifle is capable of being fired rapidly, some amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger. There is no evidence as to how much time passed between the shots. The fact that there was no evidence adduced at trial concerning either the sequence of the shootings or the sequence of the wounds is not relevant to a determination of this issue; the premise of the "felled victim" theory of premeditation and deliberation is that when numerous wounds are inflicted, the defendant has the opportunity to premeditate and deliberate from one shot to the next. Moreover, not just one but three persons in two different rooms were killed by this defendant. Susie White was shot four times in the middle and left side of her back; Sheila was shot twice in the left side; and Christy was shot nine times, sustaining entrance wounds to the head, left shoulder, back, left buttock, and leg. We have repeatedly held that the nature and number of the victims' wounds are circumstances from which premeditation and deliberation can be inferred. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982). We find that the evidence as to premeditation and deliberation was sufficient, and we hold that there was no error in the trial court's instructions.

[6] Last, the defendant claims that the trial court committed prejudicial error in its instructions on insanity. He claims that the instruction that voluntary intoxication would not support a defense of insanity was erroneous. Defendant contends that insanity resulting from long-term consumption of alcohol is a defense and relies upon *State v. Potts*, 100 N.C. 457, 6 S.E. 657 (1888). In the case sub judice, the trial court instructed as follows:

> Voluntary intoxication or a voluntary drugged condition, or both combined, cannot under the law of itself support a defense of insanity. That is to say, that if the defendant's defect of reason so as to be incapable of knowing the nature and quality of his acts, if any, or capability of distinguishing between right and wrong in relation to his act, if any, was produced or resulted solely from his voluntary ingestion of alcohol or drugs, or both, then he would not be eligible to rely upon the defense of insanity.
>
> However, this does not mean that a person voluntarily intoxicated by alcohol or drugs, or both, could not employ the defense of insanity. For though intoxicated, if by reason of some disease or deficiency of the mind not produced by the voluntary ingestion of alcohol or drugs, or both, he otherwise has satisfied you of the elements of insanity about which I have instructed you, then he would be eligible to rely upon the defense of insanity.

Defendant argues that there was sufficient evidence in the record to justify the submission of an insanity issue and that defendant was a long-term alcoholic, and thus "it was certainly within the realm of reasonable possibility that the jury could have concluded that Mr. Austin was insane and that his insanity resulted from long-continued abuse of alcohol."

Potts contains the obiter dictum that the law recognized chronic insanity and when produced by alcohol it assumes a permanent form. The statement has not been subsequently cited by this Court. Defendant's reliance upon this statement in *Potts* is misguided. Moreover, here there is no evidence that defendant is insane by whatever cause or reason.

It is well settled that voluntary intoxication is not a legal excuse for crime. *State v. Bunn*, 283 N.C. 444, 196 S.E. 2d 777 (1973);

State v. Propst, 274 N.C. 62, 161 S.E. 2d 560 (1968). As in *Bunn*, in the instant case the record is devoid of evidence that defendant, if he was intoxicated at the time of the killings, was involuntarily drunk or that he had become chronically or permanently insane as a result of his excessive use of alcohol. Defendant had abstained from drinking for about eight months prior to the murders; he had resumed drinking only about a week before the killings. Defendant had an IQ of 77 and had no organic brain damage. The only evidence tending to show that defendant experienced hallucinations, delusions, or delirium tremens was the testimony relating to his actions and statements several days after the killings while he was incarcerated in the Burke County Jail. In short, there was no evidence tending to show that defendant was suffering any chronic or permanent insanity in consequence of his excessive ingestion of alcohol. The trial court is required to instruct only upon matters arising upon the evidence at trial. *State v. Medley*, 295 N.C. 75, 243 S.E. 2d 374 (1978); *State v. Williams*, 280 N.C. 132, 184 S.E. 2d 875 (1971); *State v. Barker*, 270 N.C. 222, 154 S.E. 2d 104 (1967); *State v. Duncan*, 264 N.C. 123, 141 S.E. 2d 23 (1965). Accordingly, there was no error in the trial court's instructions. This assignment of error is overruled.

We hold that defendant received a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. ERNEST RICHARD COFIELD

No. 789A85

(Filed 7 July 1987)

1. **Constitutional Law § 60; Grand Jury § 3.3— selection of grand jury foreman—racial discrimination—violation of N. C. Constitution**

Racial discrimination in the selection of grand jury foremen violates Art. I, §§ 19 and 26 of the North Carolina Constitution irrespective of whether there was discrimination in selection of the grand jury itself.

2. **Constitutional Law § 60; Grand Jury § 3.3— selection of grand jury foreman—racial discrimination—indictment vitiated and judgment arrested**

If racial discrimination in the selection of the foreman of the grand jury which indicted the defendant can be demonstrated, defendant's indictment will

be vitiated and the judgment against him arrested irrespective of whether the foreman's duties were merely ministerial and whether the alleged discrimination affected the outcome of the grand jury proceedings.

3. **Constitutional Law § 60; Grand Jury § 3.3— selection of grand jury foreman—racial discrimination—violation of equal protection**

Discrimination in the selection of a grand jury foreman violates the equal protection provisions of the fourteenth amendment to the United States Constitution when the defendant bringing the equal protection claim is a member of the allegedly excluded class without regard to whether the foreman's duties are merely ministerial and whether the alleged discrimination affected the outcome of the grand jury proceedings.

4. **Constitutional Law § 60; Grand Jury § 3.3— selection of grand jury foreman—racial discrimination—prima facie showing**

A black defendant may make out a prima facie case of racial discrimination in the selection of the grand jury foreman by showing either (1) that the selection procedure itself was not racially neutral, or (2) that for a substantial period in the past relatively few blacks have served in the position of foreman even though a substantial number have been selected to serve as members of grand juries.

5. **Constitutional Law § 60; Grand Jury § 3.3— selection of grand jury foreman—racial discrimination—prima facie showing**

A black defendant made a prima facie showing of racial discrimination in the selection of the grand jury that indicted him where he presented evidence that sixty-one percent of the population of the county is black, that the racial composition of grand juries during the preceding eighteen years reflected the racial composition of the county as a whole, and that during such time thirty-three persons had been appointed as grand jury foremen but only one appointee was black. However, the State may rebut defendant's prima facie case by offering evidence that the process used in selecting the grand jury foreman in these proceedings was in fact racially neutral.

Justice MEYER concurring in result.

Justice MITCHELL concurring in result.

Justice WHICHARD joins in this concurring opinion.

Justice WEBB dissenting,

DEFENDANT appeals from the decision of a divided panel of the North Carolina Court of Appeals, 77 N.C. App. 699, 336 S.E. 2d 439 (1985) (*Hedrick, C.J.*, and *Parker, J.*, with *Becton, J.*, concurring in part and dissenting in part). The Court of Appeals found no error in defendant's trial before *Allsbrook, J.*, and a jury at the 30 July 1984 Criminal Session of NORTHAMPTON County Superior Court, but remanded for resentencing on defendant's

convictions of second degree rape and felonious breaking and entering. Heard in the Supreme Court on 11 March 1987.

Lacy H. Thornburg, Attorney General, by Joan H. Byers, Special Deputy Attorney General, and John H. Watters, Assistant Attorney General, for the state.

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant.

EXUM, Chief Justice.

The questions presented are: (1) whether racial discrimination in selection of the grand jury foreman involved in this case would vitiate defendant's indictment and conviction, and (2) whether defendant has made out a prima facie case of such discrimination in the proceedings against him. We answer both questions affirmatively, reverse the Court of Appeals, and remand the case for a hearing so the state may have an opportunity to rebut defendant's prima facie case.

I.

The state's evidence at trial tended to show that on 25 June 1984 defendant forced his way into the victim's home and dragged her into a bedroom, where he raped her and then choked her until she lost consciousness. Defendant's evidence tended to establish an alibi.

Defendant moved before trial to dismiss his indictment, claiming that racial discrimination in the selection of grand jury foremen in Northampton County violated his rights under the state and federal constitutions. Defendant's evidence at a hearing on his motion included 1980 census figures showing that approximately sixty-one percent of the population of Northampton County is black. He also introduced a report prepared by Mr. R. J. White, Northampton County's Clerk of Superior Court, listing all who had served as grand jury foreman since 1960 by name, race, and sex.[1] This report showed that only one black person had served as grand jury foreman in the period from 1960 until the trial. The black foreman served two six-month terms beginning in July 1979. The Clerk of Court, who had occupied that position

1. The Clerk's report was designated Defendant's Exhibit No. 1.

since 1966, testified that in his opinion the racial composition of grand juries since 1968 generally reflected that of the county.

Mr. White further testified that he and other court officials advised the presiding judge on selection of grand jury foremen. He could not recall whether a judge ever had consulted any black person during this process, but he denied knowledge of any presiding judge's refusal to consider a person because of his race.

Judge Allsbrook, without making specific findings, denied defendant's motion to dismiss the indictment. Defendant was then tried, convicted, and sentenced to consecutive terms of thirty years for second degree rape and three years for felonious breaking and entering.

In his appeal to the Court of Appeals, defendant contended that the trial court erred in failing to dismiss the indictment against him because the racially discriminatory process of selecting grand jury foremen in Northampton County violated his right to equal protection of the law under the North Carolina and United States Constitutions. A majority of the Court of Appeals' panel rejected defendant's argument, holding that "the evidence of discrimination in the record is [insufficient] to require us to reverse a conviction." *State v. Cofield*, 77 N.C. App. at 701, 336 S.E. 2d at 440. The Court of Appeals' majority opinion acknowledged the uncontradicted evidence showing that sixty-one percent of Northampton County is black, as well as evidence indicating that during the preceding eighteen years only one black person had served as grand jury foreman. *Id.* at 702, 336 S.E. 2d at 440. The court held, however, that because the record in the instant case did not reflect the total number of persons who served as grand jury foremen over the relevant time period, it was impossible to calculate whether defendant had established a statistical case of discrimination.[2] *Id.*, 336 S.E. 2d at 441.

Judge Becton, believing defendant had made out a prima facie case of discrimination, dissented.

2. Defendant's Exhibit No. 1 was not made part of the record on appeal to the North Carolina Court of Appeals, but on motion of defendant was added by this Court as an addendum to the record on 18 February 1986. This exhibit contains the information found lacking by the Court of Appeals.

II.

In North Carolina, one member of each impaneled grand jury is chosen by the presiding superior court judge to serve as foreman. N.C.G.S. § 15A-622(e) (1983). Defendant argues that he was denied equal protection of the law as guaranteed by the state and federal constitutions because of racial discrimination in selection of the foreman of the grand jury that indicted him. He does not complain of racial discrimination in selection of the grand jury as a whole. Thus, the initial question we face is whether racial discrimination in the selection of a grand jury foreman from a panel of grand jurors selected in a nondiscriminatory manner infringes upon any constitutional right. For the following reasons we conclude that such discrimination violates Article I, sections 19 and 26 of the North Carolina Constitution. These provisions, individually and together, constitute adequate and independent state grounds for our decision in this case. *See Michigan v. Long*, 463 U.S. 1032, 77 L.Ed. 2d 1201 (1983). Defendant's claims under the federal constitution will, however, be discussed in Part III of this opinion.

A.

[1] This Court has long recognized the wrong inherent in jury proceedings tainted by racial discrimination. Eighty-five years ago, in a case decided under the fourteenth amendment to the United States Constitution, we said:

> It is incomprehensible that while all white persons entitled to jury trials have only white jurors selected by the authorities to pass upon their conduct and their rights, and the negro has no such privilege, the negro can be said to have equal protection with the white man. How can the forcing of a negro to submit to a criminal trial by a jury drawn from a list from which has been excluded the whole of his race purely and simply because of color, although possessed of the requisite qualifications prescribed by the law, be defended? Is not such a proceeding a denial to him of equal legal protection[?] There can be but one answer, and that is that it is an unlawful discrimination.

State v. Peoples, 131 N.C. 784, 790, 42 S.E. 814, 816 (1902).

Since these words were penned, we have made it clear that purposeful exclusion of citizens from grand jury service on the basis of race violates not only the federal constitution, but the equal protection guarantees of our state constitution as well. *See, e.g., State v. Covington*, 258 N.C. 495, 128 S.E. 2d 822 (1963); *State v. Perry*, 248 N.C. 334, 103 S.E. 2d 404 (1958); *see also* North Carolina Advisory Committee, Equal Protection of the Laws in North Carolina 59 (1962). *Covington* and *Perry*, of course, were decided at a time when the state constitution's guarantee of equal protection was merely implicit in the document. *See S. S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E. 2d 382 (1971). In 1970, North Carolina's commitment to equal protection was made explicit. Article I, section 19 of the state constitution now provides that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin."

Article I, section 26 of the North Carolina Constitution is even more pertinent to the question presented in this case. Adopted in 1970 in conjunction with the equal protection language quoted above, this provision states that "[n]o person shall be excluded from jury service on account of sex, race, color, religion, or national origin."

Article I, section 26 does more than protect individuals from unequal treatment.[3] The people of North Carolina have declared in this provision that they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice. They have recognized that the judicial system of a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction. It must also be *perceived* to operate evenhandedly. Racial discrimination in the selection of grand and petit jurors deprives both an aggrieved defendant and other members of his race of the perception that he has received equal treatment at the bar of justice. Such discrimination thereby undermines the judicial process. *Cf. State v. Mettrick*, 305 N.C. 383, 385, 289 S.E. 2d 354, 356 (1982) ("the ap-

3. We note that Article I, section 26 was adopted at the same time as the equal protection language found in Article I, section 19, yet was not considered redundant.

pearance of a fair trial before an impartial jury is as important as the fact of such a trial").

Exclusion of a racial group from jury service, moreover, entangles the courts in a web of prejudice and stigmatization. To single out blacks and deny them the opportunity to participate as jurors in the administration of justice—even though they are fully qualified—is to put the courts' imprimatur on attitudes that historically have prevented blacks from enjoying equal protection of the law.

Discrimination in the selection of grand jury foremen is no less wrong, and no less contrary to the letter and spirit of our constitution, than discrimination in the selection of jurors generally. This is so even if there was no discrimination in the impaneling of the grand jury from which the foreman was selected. The foreman, by his very title, is distinguished from other members of the grand jury. As the titular head of the grand jury, the foreman is first among equals, both in the eyes of his fellow jurors and in the eyes of the public. Because the foreman is thus set apart, it is as important to ensure racial neutrality in the selection of this officer as it is to avoid racial discrimination in the selection of grand and petit jurors generally. We conclude, therefore, that racial discrimination in the selection of grand jury foremen violates Article I, sections 19 and 26 of the North Carolina Constitution, irrespective of whether there was discrimination in selection of the grand jury itself.

B.

[2] We turn now to the appropriate remedy for violations of these constitutional guarantees. The state argues that defendant's indictment need not be vitiated, nor the judgment against him arrested, because the duties of the foreman are essentially clerical and ministerial in nature and without substantive effect on the outcome. It argues further that the grand jury foreman's position is not so significant that discrimination in the process by which he is selected undermines the integrity of the indictment.[4]

4. These arguments, which appear to have been inspired by the United States Supreme Court's decision in *Hobby v. United States*, 486 U.S. 339, 82 L.Ed. 2d 260 (1984), will also be discussed in Part III of this opinion.

We do not address the question of whether the foreman's duties are merely ministerial and without substantive effect on the proceedings. No such determination is necessary to our decision under the state constitution. The effect of racial discrimination on the outcome of the proceedings is immaterial. Our state constitutional guarantees against racial discrimination in jury service are intended to protect values other than the reliability of the outcome of the proceedings. Central to these protections, as we have already noted, is the perception of evenhandedness in the administration of justice. Article I, section 26 in particular is intended to protect the integrity of the judicial system, not just the reliability of the conviction obtained in a particular case. The question, therefore, is not whether discrimination in the foreman selection process affected the outcome of the grand jury proceedings; rather, the question is whether there was racial discrimination in the selection of this officer at all. This Court has repeatedly stated that racially motivated exclusion of blacks from a grand jury will, by itself, vitiate any indictment returned by that grand jury against a black defendant. *See, e.g., State v. Cornell*, 281 N.C. 20, 187 S.E. 2d 768 (1972); *State v. Ray*, 274 N.C. 556, 164 S.E. 2d 457 (1968); *State v. Wright*, 274 N.C. 380, 163 S.E. 2d 897 (1968); *State v. Yoes*, 271 N.C. 616, 157 S.E. 2d 386 (1967); *State v. Lowry*, 263 N.C. 536, 139 S.E. 2d 870, *cert. denied and appeal dismissed*, 382 U.S. 22, 15 L.Ed. 2d 16 (1965); *State v. Wilson*, 262 N.C. 419, 137 S.E. 2d 109 (1964); *State v. Covington*, 258 N.C. 495, 128 S.E. 2d 822; *State v. Perry*, 248 N.C. 334, 103 S.E. 2d 404. When the state has failed to rebut a defendant's prima facie showing of discrimination against members of his race in the grand jury selection process, we have quashed the indictment without reference to whether the discrimination had any effect on the outcome of the grand jury proceedings. *State v. Lowry*, 263 N.C. 536, 139 S.E. 2d 870; *State v. Wilson*, 262 N.C. 419, 137 S.E. 2d 109.

The rule should be no different when there is discrimination in selection of the grand jury foreman. The integrity of the judicial system is at stake in this situation, just as it is when the entire grand jury is selected in a discriminatory manner. Thus, if racial discrimination in the selection of the foreman can be demonstrated in this case, the proceedings against defendant were fatally flawed.

III.

[3] As stated above, our decision in this case can stand on the North Carolina Constitution alone, and we need not reach the federal question presented. We are persuaded, however, that defendant's equal protection challenge to the foreman selection process in Northampton County has merit under the fourteenth amendment to the United States Constitution.

The leading case in this area is *Rose v. Mitchell*, 443 U.S. 545, 61 L.Ed. 2d 739 (1979). In *Rose*, two black defendants brought an equal protection challenge to the selection of a state grand jury foreman in Tennessee. This challenge ultimately was rejected because defendants failed to make out a prima facie case of discrimination, but the Court's opinion in *Rose* clearly indicated that such discrimination is a matter cognizable under the equal protection clause of the fourteenth amendment.

The Court began its analysis by noting that " 'a criminal conviction of a Negro cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment of a grand jury from which Negroes were excluded by reason of their race.' " *Id.* at 551, 61 L.Ed. 2d at 746 (citing *Alexander v. Louisiana*, 405 U.S. 625, 31 L.Ed. 2d 536 (1972); *Bush v. Kentucky*, 107 U.S. 110, 27 L.Ed. 354 (1883); and *Neal v. Delaware*, 103 U.S. 370, 26 L.Ed. 567 (1881)). Concerns similar to those we expressed in Part II of this opinion were voiced in *Rose*:

> Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice. As this Court repeatedly has emphasized, such discrimination "not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and representative government." *Smith v. Texas*, 311 U.S. 128, 130, 85 L.Ed. 84, 61 S.Ct. 164 (1940) (footnote omitted). The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been ex-

> cluded. It is to society as a whole. "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States*, 329 U.S. 187, 195, 91 L.Ed. 181, 67 S.Ct. 261 (1946).

Id. at 555-56, 61 L.Ed. 2d at 749. Justice Blackmun, writing for the majority,[5] said in dicta that the Court "assume[d] without deciding that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire." *Id.* at 551-52 n.4, 61 L.Ed. 2d at 747 n.4.

Following *Rose*, courts in at least two federal circuits have held that discrimination in the selection of a grand jury foreman violates the equal protection provisions of the federal Constitution. *See, e.g., United States v. Cross*, 708 F. 2d 631 (11th Cir. 1983); *Guice v. Fortenberry*, 661 F. 2d 496 (5th Cir. 1981). We agree, but limit our holding to cases such as this one, where the defendant bringing the equal protection claim is a member of the allegedly excluded class. As the Eleventh Circuit Court of Appeals has said, "the thrust and spirit of the language in *Rose*, which detailed the costs to defendants and to society of discrimination in the administration of justice, suggests to us that the Supreme Court still believes in the importance of providing a viable remedy" for discrimination in the selection of grand jury foremen. *United States v. Cross*, 708 F. 2d at 635.

We are aware that the New Jersey Supreme Court recently reached a different conclusion in *State v. Ramseur*, No. A-2-84 (N.J. 5 March 1987). Defendant Ramseur brought a federal equal protection challenge to his indictment, claiming that the foreman of the New Jersey grand jury that indicted him had been selected in a racially discriminatory manner. The court, relying on *Hobby v. United States*, 468 U.S. 339, 82 L.Ed. 2d 260 (1984), rejected this claim on the grounds that "the duties of the grand jury foreman in this state . . . are not constitutionally significant." *State v. Ramseur*, No. A-2-84, slip. op. at 134 (N.J. 5 March 1987). Our

5. This portion of Justice Blackmun's opinion was joined by Justices Brennan, Marshall, White and Stevens.

Court of Appeals, in *State v. Gary*, 78 N.C. App. 29, 337 S.E. 2d 70 (1985), *disc. rev. denied*, 316 N.C. 197, 341 S.E. 2d 586 (1986), made a similar analysis and—relying on *Hobby*—concluded that racial discrimination in the selection of a North Carolina grand jury foreman did not entitle a black defendant to relief under the Equal Protection Clause of the Fourteenth Amendment.[6]

We believe, for the following reasons, that the *Hobby* decision was misinterpreted and misapplied by the New Jersey Supreme Court in *Ramseur* and by our Court of Appeals in *Gary*. For the same reasons we find that *Hobby* is inapposite here. To the extent that *Gary* is inconsistent with our holding today, it may no longer be considered authoritative.

Defendant in the case we decide today, like defendants Ramseur and Gary, is black. He alleges that members of his race have been unlawfully excluded from service as grand jury foremen in Northampton County. He claims, in essence, a violation of his right to *equal protection* in the selection of grand jury foremen. The defendant in *Hobby*—a white male—argued that systematic exclusion of blacks and women from the position of grand jury foreman in the federal system had deprived him of fundamentally fair proceedings in violation of his right to *due process*. *Hobby v. United States*, 468 U.S. at 347, 82 L.Ed. 2d at 268. Rejecting this claim, the Supreme Court noted that the duties of a federal grand jury foreman are essentially clerical in nature; therefore, discrimination in the selection of this officer from a properly constituted grand jury did not affect the fairness of proceedings against "a white male bringing a claim under the Due Process Clause." *Id.* at 350, 82 L.Ed. 2d at 269.

The Court carefully pointed out, however, that this type of analysis might not be appropriate in the context of an equal protection challenge. *Id.* at 346-47, 82 L.Ed. 2d at 267-68; *see also* W. LaFave & J. Israel, Criminal Procedure § 15.3 at 41-42 (Supp. 1986). Defendant Hobby was a white male. He was not a member "of the class allegedly excluded from service as grand jury foreman," and he had not "suffered the injuries of stigmatization and prejudice associated with racial discrimination." *Hobby v. United States*, 468 U.S. at 347, 82 L.Ed. 2d at 267. Thus, the Court ex-

6. The defendant in *Gary* did not raise the state constitutional issue.

plicitly distinguished Hobby's situation from that of a black defendant who brings an equal protection challenge to state grand jury proceedings. In light of this crucial distinction, we hold that where defendant is a member of the class allegedly discriminated against, his federal equal protection challenge to the foreman selection process should be evaluated without reference to whether the foreman's duties are merely ministerial, and without inquiry into whether the alleged discrimination affected the outcome of the grand jury proceedings. *See Guice v. Fortenberry*, 661 F. 2d 496 (5th Cir. 1981).

We therefore find that defendant's rights under the Equal Protection Clause of the Fourteenth Amendment are coextensive with his separate and independent equal protection rights under Article I, sections 19 and 26 of the North Carolina Constitution. If defendant can make a sufficient showing of racial discrimination in the foreman selection process, the proceedings against him were fatally flawed.

IV.

[4] Finally, we consider whether defendant succeeded in making a prima facie showing of racial discrimination in selection of the foreman who presided over the grand jury that indicted him. We see no justification for employing a standard here that is different from the one we used to determine the issue with respect to selection of grand jury members generally. The test for jurors was set out in *State v. Foddrell*, 291 N.C. 546, 554, 231 S.E. 2d 618, 624 (1977):

> To establish a prima facie case of systematic racial exclusion, "defendants are generally required to produce not only statistical evidence establishing that blacks were underrepresented on the jury but also evidence that the selection procedure itself was not racially neutral, or that for a substantial period in the past relatively few Negroes have served on the juries of the county notwithstanding a substantial Negro population therein, or both. . . ."

Applying this test to the selection of a grand jury foreman, we conclude that a black defendant may make out a prima facie case of racial discrimination in the foreman's selection by showing either (1) that the selection procedure itself was not racially

neutral, or (2) that for a substantial period in the past relatively few blacks have served in the position of foreman even though a substantial number have been selected to serve as members of grand juries.

[5] Here defendant produced evidence sufficient to satisfy the second of these tests. Defendant's evidence indicated that the racial composition of Northampton County is approximately sixty-one percent black and thirty-nine percent white. Superior Court Clerk White testified that the racial composition of Northampton County grand juries since 1968 generally had reflected the racial composition of the county as a whole. White also testified that a grand jury foreman is either appointed or reappointed every six months, and during his eighteen years as clerk only one black person had been appointed grand jury foreman. White's records showed that although fifty appointments have been made and thirty-three persons have been appointed foreman since 1960, only one appointee was black. We think this is enough evidence to make out a prima facie case of racial discrimination in the selection of the foreman of the grand jury that indicted defendant.

Although defendant's evidence is enough to make out a prima facie case of such discrimination, the state may rebut defendant's prima facie case on remand by offering evidence that the process used in selecting the grand jury foreman in these proceedings was in fact racially neutral.

We therefore remand this case to the superior court in order to afford the state an opportunity to rebut defendant's prima facie showing. The inquiry will relate only to selection of the foreman of the grand jury that indicted this defendant. *State v. Wright*, 274 N.C. 380, 163 S.E. 2d 897. If the state fails to rebut defendant's prima facie showing, the verdict and judgments against defendant must be set aside. Defendant, however, is not entitled to his discharge. The state has the power to reindict him and may decide to do so. *State v. Lowry*, 263 N.C. 536, 139 S.E. 2d 870; *State v. Wilson*, 262 N.C. 419, 137 S.E. 2d 109.

The decision of the Court of Appeals is reversed and the case is remanded to that court for further remand to the Superior Court of Northampton County for the conduct of additional proceedings not inconsistent with this opinion.

Reversed and remanded.

Justice MEYER concurring in result.

I concur in section III of the majority opinion insofar as it holds that the equal protection guarantees of the fourteenth amendment of the United States Constitution prohibit racial discrimination in the selection of a grand jury foreman and thus a remand of this case for findings is dictated. The United States Constitution dictates the minimum equal protection rights of individuals in the sense that an individual's equal protection rights may be greater under a state constitution, but his rights under the federal constitution may not be diminished thereby. Thus, I find it unnecessary and unwise to proceed to any analysis of rights under the state constitution.

Justice MITCHELL concurring in result.

Article I, section 26 of the Constitution of North Carolina commands that: "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." In my view, it is clear beyond any doubt that this section of our Constitution was intended as an absolute guarantee that all citizens of this State would participate fully in the honor and obligation of jury service in all its forms; as petit jurors, grand jurors, and as foremen of the grand jury. This section of our Constitution was not enacted by the people of this State in a theoretical or abstract sense, such as by representatives in a constitutional convention. It was enacted by a direct vote of the entire people of North Carolina—the body politic—who were to be governed by its terms.

I do not believe that the people of North Carolina enacted this section of our Constitution for the benefit of criminal defendants who could show that they had been harmed by violations of its terms. Nor do I believe that the people intended that, in order to raise questions concerning alleged violations of this section, a person must be a member of any cognizable racial or ethnic group. Instead, the intent of the people of North Carolina was to guarantee *absolutely unto themselves* that in *all* cases *their* system of justice would be free of both the reality and the appearance of racism, sexism and other forms of discrimination in these twilight years of the Twentieth Century.

I completely agree with the argument that the duties of the grand jury foreman in North Carolina are only clerical in nature and do not affect the grand jury's decision as to whether to return a true bill of indictment in any case. However, this fact is totally irrelevant to the issue before us. The people of North Carolina having guaranteed *unto themselves* a judicial system free of both the appearance and reality of racism, this Court may not frustrate their will by affirming any conviction obtained upon a bill of indictment rendered by a grand jury whose foreman was selected on the basis of race. The people of this State, *as is their inalienable right*, have adopted an absolute prohibition in this regard, and we must apply it as such.

The defendant in the present case has made a *prima facie* showing—although only a *prima facie* showing—of discrimination against blacks in the selection of the foreman of the grand jury which indicted him. If he is able to establish upon the remand of this case that such discrimination in fact occurred, the indictment against him must be quashed without regard to whether discrimination had any actual effect on the grand jury's decision to return a true bill. Accordingly, I concur in the result reached by the majority.

The Court should decide the issue before it on the basis of article I, section 26 of the Constitution of North Carolina and go no further. This Court's construction of the Constitution of North Carolina is final and is binding, even upon the Supreme Court of the United States. *Lea Co. v. N.C. Board of Transportation*, 308 N.C. 603, 304 S.E. 2d 164 (1983). *See Missouri v. Hunter*, 459 U.S. 359, 74 L.Ed. 2d 535 (1983). Having decided this case on an adequate and independent State ground, the Court is most unwise from any standpoint—practicality, judicial restraint or disciplined legal scholarship—to address questions concerning the Constitution of the United States. *See generally, Reed v. Madison County*, 213 N.C. 145, 195 S.E. 620 (1938) and cases cited therein. To do so amounts to rendering an entirely unnecessary advisory opinion on questions which need not and should not be reached or decided. *Id.* Accordingly, I express no opinion here on matters involving the Constitution of the United States—matters as to which this Court cannot speak with finality. Further, I express no opinion with regard to any provision of the Constitution of North Carolina, other than article I, section 26.

Justice WHICHARD joins in this concurring opinion.

Justice WEBB dissenting.

I dissent. The majority has held that if the defendant can prove that there was discrimination in the selection of the foreman of the grand jury which indicted him there must be a new trial, even though the method of selecting the foreman had no impact on the outcome of the grand jury proceedings. I disagree with this conclusion. I agree that the "constitutional guarantee against racial discrimination in jury service is intended to protect values other than the reliability of the outcome of the proceedings." I believe these values can easily be protected without awarding a new trial in this case.

There is nothing that makes me believe that the superior court judges of this state, who select grand jury foremen, desire in any way to deprive any group of its constitutional rights. If a minority has not been properly considered for service as grand jury foremen in the past this defect may be cured by calling it to the attention of the superior court judges. They will insure that the problem is solved. If they do not we can take whatever action is necessary to do so. There is no need for the drastic remedy mandated in this case.

I can understand that the "racially motivated exclusion of blacks from a grand jury will, by itself, vitiate any indictment returned by that grand jury against a black defendant." In such a case we can assume that the grand jury could be disposed to give a different brand of justice to blacks. That is not so in this case. We cannot assume that if a grand jury is selected in a racially neutral manner it will discriminate against blacks if its foreman is not so selected.

I vote to affirm the Court of Appeals.

STATE OF NORTH CAROLINA v. PERRIE DYON SIMPSON

No. 142A85

(Filed 7 July 1987)

1. **Criminal Law § 75.1— delay in setting bond—subsequent confession—admissible**

The trial court in a murder prosecution did not err by ruling that defendant's confession was admissible and entering judgment on his guilty pleas where defendant was arrested in Guilford County on an unrelated Guilford County warrant shortly after 9:00 p.m.; taken to the Reidsville Police Department at approximately 9:30 p.m.; taken before a magistrate in Reidsville shortly after 11:15 p.m.; the magistrate advised defendant that bond would not be set because no letter of transmittal recommending the amount of bond or a court date accompanied the Guilford County warrant; and defendant was taken to the Greensboro Police Department at about 1:30 p.m., where he confessed after questioning. Even assuming that the Reidsville magistrate denied bail in violation of N.C.G.S. § 15A-511(e), any deviation from lawful conduct does not appear to have been willful or extreme, suppression of defendant's confession would not significantly tend to deter future violations, and nothing in the record indicates that the officer's reliance on the magistrate's ruling or the ruling itself was not in good faith.

2. **Arrest and Bail § 9— murder—setting of bail delayed—no constitutional violation**

The temporary denial of reasonable bail to defendant in a murder prosecution did not violate the Eighth Amendment to the U.S. Constitution or Art. I, § 27 of the North Carolina Constitution where, although the magistrate may have erred by referring defendant's case to another judicial officer for the setting of bail rather than setting reasonable bail himself, the error did not make defendant's temporary further confinement an unreasonable seizure or "wrongful confinement" in any constitutional sense.

3. **Criminal Law § 75.2— confession—not the product of fear**

The confession of defendant in a murder prosecution was not the product of fear and therefore inadmissible where defendant was repeatedly given *Miranda* warnings; was alert, responsive, and appeared to understand his rights on each occasion; repeatedly waived those rights; there was evidence that defendant was not deceived about the nature of the crimes under investigation; he was provided food and drink and allowed to attempt to communicate with his father; two officers went to search for defendant's father when he could not be reached by telephone; the evidence did not indicate that the officers even informed defendant that they had found his fingerprints at the scene of the crime; the twenty-one-year-old defendant was not a juvenile; and the record did not indicate that defendant was interrogated for an unusually long time. An officer's comparison of the polygraph test which defendant had agreed to take to a snake who would bite a person who lied and the officer's advice to defendant not to take the test if he was lying did not amount to a threat or coercion.

4. Criminal Law § 102— capital case—sentencing phase—only one defense counsel permitted to argue

The trial court erred in the sentencing phase of a murder prosecution by refusing to allow more than one of defendant's attorneys to participate in the final argument to the jury.

Justice MARTIN dissenting in part.

Justice MEYER joins in the dissenting opinion.

APPEAL by the defendant from judgments sentencing him to death and to imprisonment for consecutive terms of forty years and three years entered on 12 March 1985 by *Rousseau, J.*, in Superior Court, ROCKINGHAM County. Heard in the Supreme Court on 10 February 1987.

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

Ann B. Petersen for the defendant appellant.

MITCHELL, Justice.

The defendant Perrie Dyon Simpson, pled guilty to one count of first degree murder, one count of robbery with a dangerous weapon and one count of conspiracy to commit murder. After his guilty pleas were entered, a jury was empaneled in accord with the requirements of N.C.G.S. § 15A-2000(a) for purposes of determining the defendant's punishment for first degree murder. After hearing evidence in the sentencing proceeding, the jury recommended that the defendant be sentenced to death. On 12 March 1985, judgments and commitments were entered sentencing the defendant to death for the offense of first degree murder, imprisonment for forty years for the offense of robbery with a dangerous weapon and imprisonment for three years for conspiracy to commit murder. The defendant appealed the judgment and sentence of death for first degree murder to this Court as a matter of right. His motion to bypass the Court of Appeals on the appeal of the judgments for robbery with a dangerous weapon and conspiracy to commit murder was allowed by this Court on 6 February 1986.

The defendant contends *inter alia* on appeal that the trial court erred by holding that his confession was admissible in the cases against him, because it was the product of his being held

unlawfully in custody and because it was involuntary. We conclude that the defendant's confession was properly received in evidence and reject this contention. As a result we hold that there was no error in the trial or judgments against the defendant for robbery with a dangerous weapon and conspiracy to commit murder. We also hold that the conviction of the defendant for first degree murder was without error.

The defendant also contends that the trial court erred during the sentencing proceeding in the first degree murder case by allowing only one of his counsel to participate in the defendant's final argument to the jury. We find this contention to be meritorious. Accordingly, we remand the first degree murder case to the Superior Court, Rockingham County for a new sentencing proceeding and resentencing according to law as prescribed in capital cases.

A complete review of the evidence introduced at trial is unnecessary to an understanding of those issues we deem it necessary to reach and decide. Some of the evidence for the State tended to show that Reverend Jean Ernest Darter, a ninety-two-year-old retired Baptist minister, was found dead in his home on the evening of 28 August 1984. He had been tied to a bedpost at the foot of his bed by a belt which was wrapped around his neck. Both of his arms had been slashed open. His head was bloated and his face was covered with blood. There were numerous cuts and bruises on his head, and his left cheek bore an imprint that matched the bottom of a broken Tab bottle lying on the bed. Blood and fragments of glass were in the victim's eyes. A bloody razor blade lay near his right hand. Certain items were missing from the home.

Expert medical testimony tended to show that any of three major areas of trauma suffered by the victim could have been life threatening, but that the victim's death was due to ligature strangulation caused by the belt around his neck. The victim's death by strangulation occurred over a period of five or six minutes or longer, depending upon the amount of force used during the process of strangulation. The victim would have lost consciousness within three to five minutes after his breathing was stopped by strangulation.

Fingerprints were found in the Darter home on a hall telephone, in the bedroom and in the kitchen. Some of the fingerprints found matched those of the defendant, Perrie Dyon Simpson. Others matched the fingerprints of the defendant's girlfriend, Stephanie Eury.

On 21 September 1984, the defendant was arrested on a warrant for an assault in Greensboro which was unrelated to the crimes for which the defendant stands convicted. After advising the defendant of his rights, the arresting officers briefly questioned him about the unrelated assault. They then began to discuss the Darter murder with him. The defendant initially denied any knowledge of the Darter murder. The officers temporarily ended questioning of the defendant after he agreed to take a polygraph test. Upon having the polygraph procedures explained to him and being told that the machine would reveal any lying on his part, the defendant said that the machine would show that he was lying and that there was something that he needed to tell the officers.

Shortly thereafter, the defendant was again advised of his rights. He then gave a statement in the nature of a confession indicating that he and Stephanie Eury had gone to Reverend Darter's home on 26 August 1984 at Stephanie's suggestion on the pretext that they were travelers who needed help. Reverend Darter gave them food and money at that time and allowed them to use the telephone in his home. After leaving the Darter home, the defendant and Stephanie Eury decided to go back and rob Darter.

The defendant said that, on the evening of Monday, 27 August 1984, he and Stephanie Eury left the Eury home and began to plan the robbery and murder of Darter. The defendant stated that: "Stephanie said if we go in there and rob the man we can't let him live and I said that is the truth." They then went to the Darter home and, after making sure that no one could see them, knocked on the door. Reverend Darter let them in. When Darter attempted to call the police to help Simpson and Eury, the defendant Simpson pulled Darter away from the telephone. He told Eury to cut the phone cord, which she did. Eury ran to the living room and pulled the drapes, while the defendant held Darter down on the bed in the bedroom. Eury began to ransack the residence for valuables to steal. When she brought food to the bed-

room to show to the defendant, he told her to look for money. He continued to hold Darter on the bed and told Darter, "I want some money or else." Simpson stated that Reverend Darter said that he had no money and to go ahead and kill him, he was going to Heaven. Simpson stated that: "The preacher was smiling as he told me to kill him because he was going to Heaven and this made me mad."

The defendant Simpson stated that he called to Eury to check the bedroom for money. He grabbed a belt from the footboard of the bed and looped it around Reverend Darter's neck. He held the belt tightly around the victim's neck with his right hand while he went through items on the bed with his left hand and "told the preacher that he better tell me where some more money was but the preacher could not talk as he was choking." The belt around the victim's neck broke, and Simpson grabbed a thicker leather belt from the footboard and looped it around the victim's neck, pulling it tight.

The defendant stated that he called to Eury "to bring me something in the bedroom to kill this preacher with." When the items Eury brought the defendant to kill the victim with proved unsatisfactory, he had her hold the belt and pull it tighter around the victim's neck, while he went to the kitchen "and looked around for some device to beat the old preacher and finish him off." Having found a full sixteen ounce soft drink bottle, Simpson returned to the bedroom. He and Eury then pulled together to tighten the belt around the victim's neck. Simpson then hit the victim in the face with the soft drink bottle three times, at which point it broke.

The defendant stated that he tied the end of the belt to the footboard of the bed and went to the bathroom of the home and got a razor blade. During this time Eury continued to search the house and gather up more items. Simpson cut both of the victim's arms, while Eury gathered up items to be stolen and put them in a grocery bag and a plastic laundry basket. They then cut off the lights in the home and left with the items they had stolen.

After the defendant confessed, warrants were issued charging him with first degree murder, robbery with a dangerous weapon, and conspiracy to commit murder. Additional facts are discussed where pertinent at later points in this opinion.

[1] By his first assignment of error, the defendant contends the trial court erred by entering judgment as to each of the three charges against him, because his confession was inadmissible as evidence. Although the defendant pled guilty to each of the charges before us on this appeal, the question of the admissibility of his confession as evidence supporting his convictions for each of those charges is properly before us for review. N.C.G.S. § 15A-979(b) (1983).

The trial court conducted a pretrial *voir dire* hearing on the defendant's motion to suppress his confession. At the conclusion of that hearing, the trial court made findings and conclusions based upon competent evidence of record. These included *inter alia* that: Jean Ernest Darter was killed in his home on 26 August 1984. Officers of the Reidsville Police Department and the State Bureau of Investigation immediately began an investigation. They discovered that a long distance call had been made from the victim's residence to Ruby Locklear at a Greensboro residence on the day of the murder. Locklear told the officers that the defendant sometimes called her. A search of the victim's home revealed latent fingerprints on the victim's telephone which matched those of the defendant. The officers began a search for the defendant on 20 September 1984. At about that time they learned that a warrant for the defendant's arrest for simple assault in Guilford County was outstanding. The officers learned that the defendant at times came to the residence of his girlfriend's mother, Peggy Eury. Shortly after 9:00 p.m. on Friday, 21 September 1984, officers went to the Eury residence and were admitted by Peggy Eury. They found the defendant there and arrested him under authority of the Guilford County warrant for simple assault.

The defendant was taken to the Reidsville Police Department at approximately 9:30 p.m. The warrant was read to the defendant, and he was advised of his constitutional rights. The defendant signed a written waiver stating that he had read his rights, understood his rights, wished to talk to the officers without the presence of an attorney, and that no promises or threats had been made. The defendant did not have the odor of alcohol about him or appear to be under the influence of any impairing substance. He appeared alert and responsive to questions asked by the officers and to understand what he was saying and doing. The officers advised the defendant that they wanted to talk to him

about the Guilford County assault and other crimes, including a murder in Reidsville. The defendant told the officers that he knew nothing about the Reidsville murder other than what he had read in newspapers.

The officers called an off duty magistrate at 11:15 p.m. and asked him to come to the police station in Reidsville. At that time, they asked the defendant if he wanted anything to eat. He responded that he did, and a meal was ordered for him. Shortly thereafter, Magistrate R. J. Hudson arrived and was informed of the Guilford County warrant for the defendant for simple assault. The magistrate advised the defendant that bond would not be set because no letter of transmittal recommending the amount of bond to be set or a court date accompanied the Guilford County warrant. The magistrate informed the defendant that he was charged with simple assault and that the magistrate was sending him back to Guilford County for the setting of a proper bond.

The meal the defendant had requested was then brought to him. At approximately 12:47 a.m. on 22 September 1984, the defendant, accompanied by three officers, was taken in an automobile from Reidsville to Greensboro. They arrived at the Greensboro Police Department at about 1:30 a.m. At that time the defendant was told that he would go before a magistrate for a bond hearing and was asked if he wished to talk to the officers before going to the magistrate. The defendant asked if he could sign his own bond and was told that any such decision was for the magistrate. The defendant was told on several occasions that he could go before a magistrate before making any statement to the officers. He said that he would go ahead and talk to the officers.

One of the officers told the defendant that he thought the defendant knew more about the murder in Reidsville than he had told the officers previously. The defendant was then asked to take a polygraph test and agreed. The defendant was taken across a hall to the office of Lieutenant Davis, a lieutenant of detectives with the Greensboro Police Department at approximately 1:38 a.m. Lieutenant Davis advised the defendant of his constitutional rights and explained the polygraph test. He told the defendant that if he had anything to do with the murder, other than what he had told the officers previously, it would show up on the polygraph. The defendant then read and signed an agreement in-

dicating that he desired to take the polygraph test. Lieutenant Davis told the defendant that he would advise the defendant not to take the polygraph test if he had any knowledge about the murder. At that point, the defendant advised the officer that the test would show that he was lying. Throughout the procedure with Lieutenant Davis, the defendant never complained, never showed any indication that he was dissatisfied, and cooperated fully with the officers.

The defendant then asked to use the telephone and called a person "who appeared to be Ruby Locklear" and asked for his father. He was told that his father was not present. Lieutenant Davis then sent two police officers to look for the defendant's father. The defendant was offered a cup of coffee at that time. After getting the coffee, the defendant stated, "what I am about to tell you, you won't like." The defendant then signed a written waiver of his constitutional rights which were again explained to him by Lieutenant Davis.

At approximately 2:44 a.m. on 22 September 1984, the defendant gave his inculpatory oral statement in the nature of a confession. after giving his oral statement, the defendant was told that the officers wanted to take a written statement from him. The taking of a statement by the defendant which was reduced to writing by the officers commenced at about 3:00 a.m. and was completed at 5:38 a.m. The defendant was then taken before a magistrate in Greensboro and brought back to Reidsville where a warrant for his arrest for murder had been issued.

After making such findings of fact, the trial court concluded in pertinent part that:

> Based upon the foregoing the Court concludes that the defendant was taken before Madistrate [sic] Hudson some time after 11:00 p.m., having been arrested about 9:30 p.m. And the Court finds this was not an undue delay.
>
> The Court further concludes Magistrate Hudson exercised his judicial function and ordered that the defendant be taken to the magistrate in Guilford County.
>
> The Court further concludes that once the defendant was taken to Guilford County sometime after 1:30 a.m. on September 21st [sic], that he was advised that he had the right to go

to the magistrate or talk and that the defendant waived his right to go before the magistrate and elected to talk.

The Court further concludes that the defendant's statement was freely and voluntarily given and knowingly, understandingly given. No promises or threats had been made to him and that under the totality of the circumstances it was not coercive but to the contrary, was freely and voluntarily and knowingly given after being advised of his constitutional rights.

The Court further concludes that even though Magistrate Hudson did not set bond while at the Reidsville Police Department that at that time there had been no prejudice to the defendant and that it was not until after the defendant waived his right to go before a magistrate that the defendant made any statement to the police officers.

Therefore, the Court concludes, that the statement given to the police officers in the Greensboro Police Department in the early morning hours of September the 21st [sic], 1984, are admissible in the trial of this case.

The defendant first argues in support of this assignment that the trial court erred in holding his confession admissible, because he was being held in custody unlawfully at the time he confessed. The defendant does not contend that the delay in bringing him before Magistrate Hudson was unreasonably long. Instead, the defendant argues that Magistrate Hudson was required under N.C.G.S. § 15A-511(e) to release the defendant or set reasonable bail when the defendant appeared before him at 11:54 p.m. on 21 September 1984. The defendant argues that had Magistrate Hudson done this, the defendant would have immediately effected his release from custody and would not have confessed. Therefore, the defendant argues that he was unlawfully in custody after his right to reasonable bail was denied at 11:54 p.m., and that his confession was *ipso facto* the result of such unlawful custody.

Assuming *arguendo* that Magistrate Hudson denied bail in violation of N.C.G.S. § 15A-511(e), the trial court was not required to suppress a voluntary confession given thereafter by the defendant. The statute itself does not so provide. *State v. Hines*, 266 N.C. 1, 11-12, 145 S.E. 2d 363, 370 (1965) (violation of N.C.G.S.

§ 15-47, a precursor to N.C.G.S. §§ 15A-501 and 511); *State v. Exum*, 213 N.C. 16, 22, 195 S.E. 7, 11 (1938) (violation of an earlier statute —ch. 257, Public Laws of North Carolina, 1937).

Further, any violation of Chapter 15A was not such "a substantial violation" as to require suppression of the defendant's confession under N.C.G.S. § 15A-974(2). *See State v. Reynolds*, 298 N.C. 380, 259 S.E. 2d 843 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 795 (1980). In determining whether that statute requires suppression, the reviewing court must consider the importance of the interest violated, the extent of the deviation from lawful conduct and whether the violation was willful, as well as the extent to which suppression will deter future violations. N.C.G.S. § 15A-974(2) (1983). Although the interest involved here was important, any deviation from lawful conduct does not appear to have been willful or extreme, and suppression of the defendant's confession would not significantly tend to deter future violations. The defendant has conceded that he was fully advised of his constitutional rights at all pertinent times and was taken before Magistrate Hudson within a reasonable time. Magistrate Hudson did not deny the defendant bail, although his action in referring the question of proper bail to a magistrate in Guilford County —which we have assumed *arguendo* to be error—temporarily had that effect. Nothing in the record before us tends to indicate that the officers' reliance upon the magistrate's ruling or his ruling itself were not in good faith. Therefore, to suppress the confession in this case would not significantly tend to deter future violations of Chapter 15A.

[2] The defendant argues that, nevertheless, the temporary denial of reasonable bail by Magistrate Hudson violated the eighth amendment to the Constitution of the United States and article I, section 27 of the Constitution of North Carolina. Holding him in custody thereafter, the defendant contends, was thus illegal. He argues that, as a result, suppression of his confession was required, because it was the result of an unreasonable seizure prohibited by the fourth amendment.

As authority for this argument, the defendant relies upon cases such as *Taylor v. Alabama*, 457 U.S. 687, 73 L.Ed. 2d 314 (1982), *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 824 (1979), and *Brown v. Illinois*, 422 U.S. 590, 45 L.Ed. 2d 416 (1975).

In each of those cases, the defendant was seized by police acting without a warrant or probable cause, and confessed shortly thereafter. The Supreme Court held in each case that the voluntariness of the confession for purposes of fifth amendment analysis was not controlling and that the confession must be excluded under the fourth amendment proscription of unlawful seizures. We conclude, however, that those cases do not imply that an otherwise voluntary confession must be suppressed as the fruit of an unreasonable seizure under the fourth amendment where the defendant has been arrested under a proper warrant but is temporarily denied the opportunity to post reasonable bail by a magistrate's good faith misinterpretation of law. *See Williams v. State*, 504 S.W. 2d 477 (Tex. Crim. App. 1974).

The defendant concedes he was taken before a judicial officer for the setting of bail within a reasonable time. While the magistrate may have erred at that point by referring the defendant's case to another judicial officer for the setting of bail rather than setting reasonable bail himself, the error did not make the defendant's temporary further confinement an unreasonable seizure or "wrongful confinement" in any constitutional sense. *See, e.g., United States v. Rose*, 541 F. 2d 750, 756 (8th Cir. 1976), *cert. denied*, 430 U.S. 908, 51 L.Ed. 2d 584 (1977) (defendant arrested without warrant retained in custody more than twenty hours without filing of formal charge in violation of statute requiring release if no charge brought within twenty hours of seizure). This contention is without merit.

[3] The defendant next argues in support of this assignment of error that his confession was the product of fear and, therefore, was involuntary and inadmissible. Specifically, the defendant argues that Lieutenant Davis who offered him the polygraph test did so in a manner which induced fear in the defendant causing his will to be overborne and resulting in his confession.

The evidence as to what occurred when Lieutenant Davis offered the polygraph test to the defendant was not in conflict. It tended to show that Davis advised the defendant fully of his constitutional rights, and that the defendant waived those rights orally and in writing and agreed to talk with Davis. Davis then asked the defendant whether he had ever taken a polygraph test and was told that he had not. Davis then conducted what he

described as the "pre-test interview" in which he explained to the defendant what would happen once he was connected to the machine. After telling the defendant of the machine's ability to detect physiological changes that occur if a person lies, Davis asked the defendant if he was afraid of snakes. The defendant said that he was. Thereafter, Davis told the defendant that for a person involved in the Darter murder, the questions asked during the exam "will become a snake," and, if the person lied, "the snake will bite them." Davis told the defendant that, for a person who had nothing to do with the Darter murder, the test would be like a "paper snake" and could do no harm.

Davis then gave the defendant a form to sign before the test was administered. He explained that the form was a disclaimer of liability, which meant the defendant could not sue the police department or Davis for damages arising from the test. Davis next told the defendant that, if Davis were the defendant's father or a defense attorney, he would tell the defendant, "if you are not telling the truth don't take a polygraph." The defendant looked at the polygraph machine and said it would show he was lying. He told Davis he needed to tell him something. The defendant then was given the opportunity to call his father. When he was unsuccessful in reaching his father, he was taken to another room where he was given a cup of coffee. Shortly thereafter, the officers again advised him of his constitutional rights. He waived them, gave his oral confession, then cooperated with the officers who reduced his confession to a writing which he signed.

The trial court made detailed findings, including that the defendant had been fully advised of his constitutional rights on several occasions prior to confessing, and had waived those rights on each occasion. The trial court found that the defendant had been given food and drink on more than one occasion prior to confessing. The trial court further found that during the "pre-test interview" with Lieutenant Davis concerning the polygraph test, the defendant never complained, never showed any indication that he was dissatisfied and cooperated fully. The trial court made findings to the effect that the defendant was alert and responsive and understood his situation at all pertinent times. The trial court's findings were supported by competent evidence. Based on its findings, the trial court concluded that

the defendant's statement was freely and voluntarily given and knowingly, understandingly given. No promises or threats had been made to him and that under the totality of the circumstances it was not coercive but to the contrary, was freely and voluntarily and knowingly given after being advised of his constitutional rights.

In the present case, the defendant conceded that the procedural requirements of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966) were met. Therefore, the determination of whether the defendant's confession was voluntarily and understandingly made must be reached from a consideration of the entire record. *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984). We have rejected any absolute or per se rule requiring the exclusion of a defendant's confession as involuntary in all situations in which promises or threats are made to him. *Id.* at 47-48, 311 S.E. 2d at 544-45. *See State v. Richardson*, 316 N.C. 594, 342 S.E. 2d 823 (1986). To the contrary, we have indicated that courts must look to the totality of the circumstances in determining whether any such promise or threat induced hope or fear which in fact overcame the defendant's will and caused him to confess or, instead, whether the confession was understandingly and voluntarily given despite a promise or threat. *State v. Corley*, 310 N.C. at 47-48, 311 S.E. 2d at 544-45; *State v. Jackson*, 308 N.C. 549, 581, 304 S.E. 2d 134, 152 (1983).

In a *voir dire* hearing on the admissibility of a defendant's confession, the trial court must determine whether the State has borne its burden of establishing by a preponderance of the evidence that the confession was voluntary. *State v. Corley*, 310 N.C. at 52, 311 S.E. 2d at 547. The findings of the trial court are conclusive and binding upon appellate courts when supported by competent evidence of record. *Id.* However, the trial court's conclusions of law are fully reviewable. *Id.*

In the present case, there was evidence before the trial court during the *voir dire* that the defendant was repeatedly given the *Miranda* warnings by the officers. On each occasion he was alert, responsive and appeared to understand his rights as they were described to him. He repeatedly waived those rights. There was also evidence before the trial court tending to show that the defendant was not deceived about the nature of the crimes under

investigation. He was provided food and drink and allowed to attempt to communicate with his father. When the defendant was unable to locate his father by telephone, two of the officers went to search for him. The evidence did not indicate that the officers even informed the defendant that they had found his fingerprints at the scene of the crime. The twenty-one-year-old defendant was not a juvenile. The record did not indicate that he was interrogated for an unduly long period of time. In light of the totality of the circumstances, the trial court concluded that Lieutenant Davis' comparison of the polygraph test to a snake and his advice to the defendant not to take the test if he was lying did not amount to a threat or coercion.

Having thoroughly reviewed the evidence introduced during the *voir dire* hearing and the trial court's findings and conclusions, we conclude that the trial court's findings are supported by competent evidence, and the findings in turn support its conclusions. Accordingly, we hold that the trial court did not err when it concluded that the defendant's confession was voluntary and admissible as evidence with regard to each of the charges against him.

[4] The defendant also assigns error to the trial court's refusal to allow more than one of his attorneys to participate in the final argument to the jury at the conclusion of the sentencing proceeding. We find merit in this assignment.

In *State v. Gladden*, 315 N.C. 398, 421, 340 S.E. 2d 673, 688, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 166 (1986), we stated:

> We construe N.C.G.S. § 84-14 to mean that, although the trial court in a capital case may limit to three the number of counsel on each side who may address the jury, those three (or however many actually argue) may argue for as long as they wish and each may address the jury as many times as he desires. Thus, for example, if one defense attorney grows weary of arguing, he may allow another defense attorney to address the jury and may, upon being refreshed, rise again to make another address during the defendant's time for argument.

In the present case, the trial court ruled at the conclusion of the sentencing proceeding that it would "allow the defendant to

have an opening argument by one attorney and the District Attorney to have one argument and the defendant to have the closing argument by one attorney." We indicated in *State v. Eury*, 317 N.C. 511, 516-17, 346 S.E. 2d 447, 450 (1986) that the teaching of *Gladden* was that, where the defendant is entitled to the final argument to the jury in a capital case,

> his attorneys may each address the jury as many times as they desire during the closing phase of the argument. The only limit to this right is the provision of N.C.G.S. § 84-14 allowing the trial judge to limit to three the number of counsel on each side who may address the jury.

The trial court erred in refusing to permit both counsel for the defendant to address the jury during the defendant's final argument. This deprived the defendant of a substantial right and amounted to prejudicial error. *State v. Eury*, 317 N.C. at 517, 346 S.E. 2d at 450. As a result the defendant is entitled to be resentenced at a new sentencing proceeding conducted according to the requirements of N.C.G.S. § 15A-2000. In fairness to the trial court we note that *Gladden* and *Eury* were not available to provide it with guidance here, as the defendant was sentenced prior to our decisions in those cases.

The defendant has presented numerous other assignments of error relating to the sentencing proceeding in the case in which he was convicted for first degree murder. As we have found prejudicial error in the sentencing proceeding in the murder trial, we remand the murder case to the Superior Court, Rockingham County, for a new sentencing proceeding and for resentencing. As the defendant's additional assignments involve matters which are not likely to arise during the next sentencing proceeding in the murder case, we find it unnecessary to reach or address them.

Case No. 84CRS9827—Conspiracy to Commit Murder—No Error

Case No. 84CRS9829—Robbery With a Dangerous Weapon—No Error.

Case No. 84CRS9828—First Degree Murder—Guilt Phase, No Error; Sentencing Phase, Remanded for Resentencing.

Justice MARTIN dissenting in part.

I concur in the majority opinion except for its holding that the trial judge committed prejudicial error by refusing to allow both of defendant's counsel to make final arguments. The ruling was erroneous, but defendant has failed to demonstrate prejudice. N.C.G.S. § 15A-1443(a) (1983).

The majority holds this "deprived the defendant of a substantial right and amounted to prejudicial error" citing *State v. Eury*, 317 N.C. 511, 346 S.E. 2d 447 (1986), a companion case to the instant appeal. In *Eury*, this Court did not hold that the trial judge's refusal to allow both counsel to make final arguments was prejudicial error per se. The Court only found it to be error and then applied a harmless error analysis, after which the Court determined that the error was prejudicial. *Eury*, 317 N.C. at 517, 346 S.E. 2d at 450.

Here, in Simpson's appeal, the majority has failed to make a harmless error analysis. For the reasons set forth here and in my dissenting opinion in *Eury*, 317 N.C. 511, 346 S.E. 2d 447, I respectfully dissent.

Justice MEYER joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. THOMAS ODELL CARSON, SR. AND THOMAS ODELL CARSON, JR.

No. 541A86

(Filed 7 July 1987)

1. **Indictment and Warrant § 5— superseding indictment—failure to dismiss original indictment at arraignment**

The mandate of N.C.G.S. § 15A-646 that prior indictments for an offense be dismissed at the time of a defendant's arraignment upon a superseding indictment or information is intended solely to require a ministerial act, and the failure of the trial court to do so does not render the superseding indictment void or defective.

2. **Indictment and Warrant § 5— superseding indictments—failure to serve on defendants**

There was no requirement that defendants be served with copies of superseding indictments in order for the indictments to be "filed" within the

meaning of N.C.G.S. § 15A-646 where defendants were represented by counsel at the time those indictments were returned by the grand jury.

3. Indictment and Warrant § 5— superseding indictments—failure to rule on objections until evidence presented

There was no merit to defendants' contention that superseding indictments were not "filed" within the meaning of N.C.G.S. § 15A-646 because the trial court failed to rule on defendants' objections to proceeding on those indictments until all of the evidence in the case had been presented.

4. Criminal Law § 92.1— joinder of offenses against father and son

The trial court did not err in joining for trial charges against defendant and his father for first degree rape and first degree sexual offense because the victim was not immediately able to identify defendant as one of her attackers but immediately identified the father from a photographic lineup where defendant and his father did not offer antagonistic defenses; both of them made pretrial statements indicating that they were together in the car bearing the license plate number identified by the victim at the time of and in the vicinity of the attack; and the victim unequivocally identified defendant at trial as her second attacker.

5. Bills of Discovery § 6— discovery request—failure to provide codefendant's statement—refusal to exclude as sanction

The trial court did not abuse its discretion in failing to exclude a codefendant's statement as a sanction for the State's failure to provide defendant with a copy of that statement in a timely manner pursuant to a pretrial discovery request where the State did give defendant notice of its intent to use the statement one day before the statement was introduced at trial, and the statement did not differ significantly from a pretrial statement made by defendant which was also introduced as evidence and was not assigned as error on appeal.

APPEAL of right by the defendants under N.C.G.S. § 7A-27(a) from judgments imposing life sentences entered by *Kirby, J.*, on 6 June 1986, after a joint trial at the 2 June 1986 Criminal Session of Superior Court, MCDOWELL County. Heard in the Supreme Court on 12 May 1987.

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 appellant Thomas Odell Carson, Sr.

Stephen R. Little for the defendant appellant Thomas Odell Carson, Jr.

MITCHELL, Justice.

On 28 May 1985, the Grand Jury of McDowell County returned four true bills of indictment against the defendants. Each defendant was charged by one indictment for first degree rape and by one indictment captioned "SECOND DEGREE SEXUAL OFFENSE." Superseding indictments charging each defendant with first degree sexual offense were returned later by the grand jury. The superseding indictments charged the defendants with the same acts for which they previously had been charged by the 28 May 1985 sexual offense indictments. The superseding indictment against Thomas Odell Carson, Sr. was returned by the grand jury on 2 June 1986, the day the trial of the defendants commenced. Although the superseding indictment against Thomas Odell Carson, Jr. bears no date, it appears that it was returned on the same day as the superseding indictment against his father.

Over the objections of the defendants, all charges against both of them were joined for trial and the trial court proceeded to try both defendants for first degree rape and first degree sexual offense. Each defendant was convicted of both offenses. The charges against Thomas Odell Carson, Jr. were consolidated for the purpose of judgment, and he was sentenced to imprisonment for life. The defendant Thomas Odell Carson, Sr. received consecutive sentences of life imprisonment.

The evidence for the State tended to show that the victim, a twenty-year-old woman, was with friends in Swannanoa during the early morning hours of Sunday, 24 February 1985. She and a companion left Swannanoa together, at which time she expected to be returned to her home in Rutherford County. After arguing with her friend, the victim was let out of a vehicle at approximately 4:00 a.m. at an exit from Interstate Highway 40 and told to walk. She was given a ride for some distance by a truck driver and then resumed walking.

After walking for about an hour, the victim was given a ride in a car driven by the defendant Thomas Odell Carson, Sr. The defendant Thomas Odell Carson, Jr. was a passenger in the car at the time. The men asked her how she was planning to pay for the ride. Carson, Jr. suggested that she pay with something other than money. Both men indicated that they wanted sex in payment

for the ride. The victim asked to get out of the car if she could not pay with money.

Carson, Sr. drove the car to a secluded area off a side road. The victim got out of the car and started walking backwards away from the two men. Both men came after her and grabbed her, and one of them shoved her to the ground. She began screaming and fought against the men by kicking and trying to pull away. She was hit by both men and pulled by the hair of her head. One of the defendants threatened to break her neck while holding her around the neck with his hands. She was put back into the car and forced to commit fellatio and sexual intercourse with both of the defendants.

Thereafter, the defendants drove away leaving the victim at the scene. She observed and memorized the license plate number of the car as it drove away. She then ran or walked until she found help. The victim then reported the rapes and sexual offenses to the McDowell County Sheriff's Department and gave a description of her assailants and the car, as well as the license plate number of the car.

The victim was later shown photographic lineups and identified Carson, Sr. as one of her assailants. She did not identify Carson, Jr. at that time, but indicated that another person's photograph had some resemblance to the second assailant. The victim identified both defendants at trial as the men who had attacked her.

The license plate number which the victim gave to the Sheriff's Department was registered in the name of the wife of Carson, Sr. A search of the car yielded the back of an earring lost by the victim during the attack against her and pubic hairs which were microscopically consistent with the pubic hairs of the victim. Thread identical to that in the trousers worn by the victim at the time of the attack was discovered from the back seat of the car.

Both defendants gave statements indicating that they were together in the car driving on Interstate Highway 40 at the approximate time of the attack against the victim. Each denied committing any of the offenses charged and denied having sexual relations with anyone or giving a ride to anyone. Neither defendant testified or presented evidence at trial.

Both defendants assign error to the trial court's action in allowing their trial to proceed, over their objections, on the superseding bills of indictment charging them with first degree sexual offense. They contend that the superseding bills were returned on the very day of trial, and that they were not served with copies of those indictments prior to trial. They argue that, before they were actually arraigned on the new indictments, the trial court informed prospective jurors that the defendants had entered pleas of not guilty to first degree sexual offense. Immediately thereafter, a jury was selected but not empaneled. The jury was sent from the courtroom, at which time counsel for the defendants objected to being arraigned on the superseding indictments charging first degree sexual offense and moved to dismiss them.

The trial court did not rule on the defendants' objections and motions in this regard until the following day, after all of the evidence had been presented. At that time, the trial court denied the defendants' motions to dismiss the superseding indictments. The earlier indictments, captioned "SECOND DEGREE SEXUAL OFFENSE," were not dismissed prior to judgments being entered against the defendants.

The defendants first argue in support of this assignment that the action of the trial court in commencing their trial on the first degree sexual offense charges without first having decided whether they had been validly indicted for those crimes denied them each the right to be tried only upon a valid indictment, guaranteed by article I, section 22 of the Constitution of North Carolina, as well as the right to due process of law, guaranteed by article I, sections 19 and 23 of the Constitution of North Carolina and the fifth and fourteenth amendments to the Constitution of the United States. The defendants based this argument upon their view that the indictments against them for first degree sexual offense were rendered invalid and void as superseding indictments due to the trial court's failure to comply with the requirements of N.C.G.S. § 15A-646. That statute states in pertinent part:

> If at any time before entry of a plea of guilty to an indictment or information, or commencement of a trial thereof, another indictment or information is filed in the same court charging the defendant with an offense charged or attempted

> to be charged in the first instrument, the first one is, with respect to the offense, superseded by the second and, *upon* the defendant's *arraignment* upon the second indictment or information, the count of the *first instrument* charging the offense *must be dismissed by the superior court judge.*

N.C.G.S. § 15A-646 (1983) (emphasis added).

[1] The defendants contend that the trial court's failure to dismiss the first indictments against them, captioned "SECOND DEGREE SEXUAL OFFENSE," rendered the later indictments for first degree sexual offenses void. Therefore, the defendants argue, they were not tried on valid indictments for those offenses. We do not agree.

It has long been the law in North Carolina that the existence of former bills of indictment for an offense

> constitute no legal impediment to the putting the defendant on trial upon the last and more perfect bill, at the election of the Solicitor. This is the recognized practice, and is convenient and necessary in the administration of the criminal law for the removal of all grounds of exception to the form of the bills previously sent, or for any irregularity in the manner of acting upon them.

State v. Hastings, 86 N.C. 596, 597 (1882). We do not believe the legislature intended that its adoption of N.C.G.S. § 15A-646 modify such time honored practices in any way. Instead, we conclude that the legislative mandate that prior indictments for an offense be dismissed at the time of a defendant's arraignment upon a superseding indictment or information was intended solely to require a ministerial act. The required dismissal would prevent any possibility that the State might inadvertently attempt to proceed further on a former superseded indictment and, thereby, create avoidable problems of double jeopardy. Although the better practice and, indeed, the required practice under the statute is for the trial court to dismiss any prior indictments charging an offense upon the arraignment of the defendant on a superseding indictment charging the same offense, the failure of the trial court to do so does not render the superseding indictment void or defective.

[2] The defendants also argue that the superseding indictments in the present case were not "filed" within the meaning of N.C.G.S. § 15A-646, because they were not served on the defendants prior to trial. There was no requirement that these defendants be served with copies of the superseding indictments, however, since it is clear from the record before us that the defendants were represented by counsel at the time those indictments were returned by the grand jury. *State v. Ginn*, 59 N.C. App. 363, 296 S.E. 2d 825, *review denied, appeal dismissed*, 307 N.C. 271, 299 S.E. 2d 217 (1982); *State v. Miller*, 42 N.C. App. 342, 256 S.E. 2d 512 (1979); N.C.G.S. § 15A-630 (1983). This argument is without merit.

[3] The defendants also argue that the superseding indictments were not "filed" within the meaning of N.C.G.S. § 15A-646, because the trial court failed to rule on the defendants' objections to proceeding on those indictments until all of the evidence in the case had been presented. The defendants argue that the superseding indictments could not be considered to have been "filed" within the meaning of the statute until the trial court had ruled upon their objections and motions to dismiss the superseding indictments. The defendants cite no authority for this proposition, and we have found none. The indictments in question were either valid superseding indictments, or they were not. The fact that the trial court reserved its ruling on the validity *vel non* of the indictments until after the trial had commenced was of little significance, since its ruling could not make an invalid indictment valid in any event. We have concluded that the indictments against these defendants for first degree sexual offense were valid superseding indictments as a matter of law. They were not rendered void or defective by any action of the trial court. Therefore, this argument is without merit.

Finally, in connection with this assignment of error by the defendants, we note that the defendants in their briefs specifically acknowledge that their trial on the superseding indictments did not deprive them of proper notice of the charges against them. They specifically reject any such contention and argue instead that the superseding indictments were void and failed to give the trial court jurisdiction to try them for the first degree sexual offenses. As we have found such contentions by the defendants without merit, this assignment of error is overruled.

[4] The defendant Thomas Odell Carson, Jr. assigns error to the action of the trial court in joining his cases for trial with those of his father. Carson, Jr. argues in support of this assignment that the victim was not immediately able to identify him as one of her attackers, although she did immediately identify his father from a photographic lineup. Carson, Jr. argues, therefore, that it was impossible for him to receive a fair trial in a joint trial with his father, because the victim would have identified any person sitting with Carson, Sr. at the trial as the other man who attacked her.

The trial court was required to deny joinder if it found severance "necessary to promote a fair determination of the guilt or innocence of one or more defendants . . . ." N.C.G.S. § 15A-927(c)(2) (1983). A trial court's ruling on such questions of joinder or severance, however, is discretionary and will not be disturbed absent a showing of abuse of discretion. *State v. Hayes*, 314 N.C. 460, 471, 334 S.E. 2d 741, 747 (1985). The trial court "may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

In the present case, the defendants did not offer antagonistic defenses. Each of them had given a pretrial statement to law enforcement officers indicating that they were together in the car bearing the license plate number identified by the victim at about the time of the attacks upon the victim and in the vicinity of the point at which those attacks occurred. The victim identified Carson, Sr. without hesitation prior to trial as one of her attackers. She identified Carson, Jr. as the other attacker at some later point, and unequivocally identified him at trial as having been her second attacker. Given these facts, we cannot say that the trial court's decision to join the defendants' cases for trial was not the result of a reasoned decision or was an abuse of discretion. This assignment is without merit and is overruled.

[5] The defendant Thomas Odell Carson, Sr. assigns error to the admission in evidence against him of a pretrial statement of his co-defendant, his son Carson, Jr. The defendant Carson, Sr. presents no constitutionally based argument in support of this assignment. Instead, his sole argument in support of the assignment is that the trial court abused its discretion by failing to ex-

clude the statement of Carson, Jr., because the State had failed to provide him with a copy of that statement in response to a pretrial request for voluntary discovery. Prior to trial, Carson, Sr. served the State with a request for voluntary discovery specifically demanding that the State provide him with: "All written, recorded, or oral statements of a co-defendant which the state intends to offer at trial, as provided by N.C.G.S. 15A-903(b) . . . ." The State indicated in response that it did not intend to offer any statements of the co-defendant at trial.

During the trial, the State introduced the pretrial statement of the co-defendant Carson, Jr. and the pretrial statement of Carson, Sr. The statements were very similar and were consistent in all significant respects. On appeal, the defendant Carson, Sr. has not assigned error to the admission of his own statement as evidence against him, but merely contends that the admission of his son's statement by the trial court amounted to an abuse of discretion.

The State undertook to make voluntary discovery when it responded to the request by Carson, Sr. for any statements made by his co-defendant. Therefore, the State's voluntary response was deemed under N.C.G.S. § 15A-902(b) to have been made under an order of the court. *State v. Anderson*, 303 N.C. 185, 192, 278 S.E. 2d 238, 242 (1981). As a result, the trial court properly could have invoked the sanctions provided in N.C.G.S. § 15A-910 for the State's failure to provide Carson, Sr. with a copy of the pretrial statement of Carson, Jr. in a timely manner. *Id.* The decision as to which sanctions to apply, or whether to apply any of the sanctions at all, however, rests with the discretion of the trial court. *State v. Stevens*, 295 N.C. 21, 37, 243 S.E. 2d 771, 781 (1978). The trial court may be reversed for an abuse of discretion in this regard only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Gladden*, 315 N.C. 398, 412, 340 S.E. 2d 673, 682, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 166 (1986).

In the present case, the State informed the defendant Carson, Sr. that it intended to introduce the pretrial statement of Carson, Jr. The State gave notice of its intent to use the statement after the trial had actually commenced and only one day before the statement was actually introduced. Although we do not

approve of the belated manner in which the State made its intention to use the statement known to the defendant Carson, Sr., we cannot say that the trial court's failure to impose sanctions was an abuse of discretion.

Carson, Sr. did have advance notice that the statement of Carson, Jr. would be used as evidence. That statement did not differ significantly from the pretrial statement made by Carson, Sr. himself, which was also introduced as evidence and has not been made the subject of an assignment of error on appeal. Therefore, the statement of Carson, Jr. in all probability had little impact on the State's case against Carson, Sr. This being the case, we are unable to say that the trial court's decision not to apply sanctions against the State could not have been the result of a reasoned decision. We conclude that the trial court did not abuse its discretion by failing to apply sanctions. This assignment is without merit and is overruled.

The defendant received a fair trial free from prejudicial error.

No error.

DUKE UNIVERSITY v. ROBERT L. STAINBACK, ELIZABETH STAINBACK, AND INVESTOR'S CONSOLIDATED INSURANCE COMPANY

No. 76A87

(Filed 7 July 1987)

Estoppel § 4.7— recovery of medical costs—estoppel to plead statute of limitations

Defendant was estopped from pleading the statute of limitations in an action by Duke University to recover costs of medical care rendered to defendant's minor son where the actions and statements of defendant, through his attorney, misled Duke reasonably to believe that it would receive payment for services rendered once a case between defendant and an insurance company was concluded, and such belief reasonably caused Duke to forego pursuing its legal remedy against defendant.

Justice MITCHELL dissenting.

Justice WEBB joins in this dissenting opinion.

APPEAL by defendant Robert L. Stainback pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported in 84 N.C. App. 75, 351 S.E. 2d 806 (1987), which affirmed the judgment of *Bowen, J.*, filed 1 October 1985 in Superior Court, DURHAM County. Heard in the Supreme Court 8 June 1987.

Moore & Van Allen, by Edward L. Embree, III and Bryan E. Lessley, for plaintiff-appellee.

Bobby W. Rogers for defendant-appellant.

MARTIN, Justice.

The sole issue on this appeal is whether the facts found by the trial judge support the conclusion of law that defendant Robert L. Stainback was estopped from pleading the statute of limitations against Duke in this action. We hold that the conclusion of law was properly supported and, therefore, affirm the decision of the Court of Appeals.

I.

Robert L. Stainback, Jr., a nine-year-old boy, was admitted to Duke Hospital on 21 May 1977 for treatment of injuries sustained in a collision between the bicycle he was riding and an automobile. His father, defendant Robert L. Stainback, was legally responsible for his son's medical expenses, and he also signed a written agreement accepting personal responsibility for these costs. The medical expenses totalled $42,812.90. After crediting $2,000 paid by an insurance company and $8,584.95 paid by Stainback, there remained a balance of $32,227.95 which has not been paid.

Stainback was also insured by Investors Consolidated Insurance Company (Investors), but it denied coverage of Stainback's claim. Stainback, represented by attorney Bobby W. Rogers, instituted suit against Investors and judgment for $39,606.90 was entered in favor of Stainback on 13 May 1982. Although Duke had been notified of the suit between Stainback and Investors, it neither joined nor intervened in the case. This judgment was satisfied by check payable to Stainback and Rogers, as his attorney.

Thereafter, on 18 November 1983, Duke instituted this action against Stainback. Defendant answered, pleading the applicable statute of limitations. The case was heard by the judge without a jury, and judgment was entered with findings of fact and conclusions of law, awarding Duke $32,227.95.

II.

The trial judge made the following pertinent findings of fact:

10. Investors received some bills from Duke for Duke's treatment of Stainback, Jr. which bills indicated that "benefits" had been assigned. The last such bill was submitted by Duke to Investors on October 20, 1977.

. . . .

12. Stainback's attorney, Bobby W. Rogers, told Duke in the summer of 1978 that he was attempting to get Investors to pay the balance of the bill and would keep Duke informed of the situation.

13. On August 2, 1978, Stainback filed suit against Investors in Vance County Superior Court (STAINBACK vs. INVESTORS, Vance County File No. 78 CVS 222) seeking to recover under the Investors policy the medical expenses incurred for treatment of Stainback, Jr. at the Duke University Medical Center.

. . . .

15. On August 11, 1978, Duke (Mrs. Miriam Lamb, Compensation and Liability Officer for the Private Diagnostic Clinic (PDC) of the Duke University Medical Center) wrote to Mr. Rogers requesting information as to the "status" of Stainback's outstanding bill to the Duke PDC. This letter also notified Stainback of his outstanding bill to Duke Hospital.

. . . .

17. On August 15, 1978, Mr. Rogers wrote to Duke (Mrs. Lamb) informing it that suit had been filed against Investors.

18. Duke was therefore aware of Stainback's lawsuit against Investors, however, it made no effort to join or intervene in the STAINBACK vs. INVESTORS case.

. . . .

20. Stainback's lawsuit against Investors came on for trial on December 7, 1981. Just prior to trial Stainback's attorney Mr. Rogers spoke with Duke (a Mrs. Dunn of Duke Hospital) and was informed of the outstanding balance on Duke's bill and provided copies of the unpaid bills. Mrs. Dunn was made aware that the case was about to be tried and volunteered to come to Henderson to testify concerning the amounts of these bills and to identify these bills if necessary. Once again, Duke made no effort to intervene or otherwise join in Stainback's action against Investors to protect its (Duke's) interests.

. . . .

23. Subsequent to the ruling of the North Carolina Court of Appeals (on October 26, 1983) a Duke representative spoke by telephone with Mr. Bobby Rogers who refused to pay the Duke bill as it has been rendered.

24. Duke was made aware of the Judgment obtained by Stainback only because of a telephone call from Investors attorney, David Neal.

The trial judge made the following relevant conclusion of law:

3. With regard to Duke's claim against Stainback, however, Duke was justifiably induced by representations and conduct of Stainback and particularly his attorney Bobby Rogers to refrain from bringing suit against Stainback to collect the bill for his son's treatment at Duke and to believe that it would be paid out of the proceeds of any recovery in the STAINBACK vs. INVESTORS Vance County action and Stainback is therefore estopped to plead the statute of limitations against Duke in this action.

At the outset we note that the dissent to the majority opinion of the Court of Appeals does not raise an issue of whether the findings of fact are supported by the evidence. We only have before us the issue of whether the findings of fact support the conclusion of law that defendant is estopped to plead the defense of the statute of limitations.

Equitable estoppel may be invoked, in a proper case, to bar a defendant from relying upon the statute of limitations. *Nowell v. Tea Co.*, 250 N.C. 575, 108 S.E. 2d 889 (1959).

> The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. . . . Its compulsion is one of fair play.

McNeely v. Walters, 211 N.C. 112, 113, 189 S.E. 114, 115 (1937) (citations omitted). Actual fraud, bad faith, or an intent to mislead or deceive is not essential to invoke the equitable doctrine of estoppel. *Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971). It is not necessary that there be misrepresentations of existing facts, as in fraud. If the debtor makes representations which mislead the creditor, who acts upon them in good faith, to the extent that he fails to commence his action in time, estoppel may arise. *Id.* The tolling of the statute may arise from the honest but entirely erroneous expression of opinion as to some significant legal fact. Equity will deny the right to assert the defense of the statute of limitations when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith. *Nowell v. Tea Co.*, 250 N.C. 575, 108 S.E. 2d 889.

Applying these principles to this appeal, we hold that the facts found are sufficient to support the conclusion that Stainback is estopped to plead the statute of limitations as a defense. The factual findings indicate a course of conduct by Stainback, through his attorney, which misled Duke. The actions and statements of Stainback's attorney caused Duke to reasonably believe that it would receive its payment for services rendered once the case between Stainback and Investors was concluded, and such belief reasonably caused Duke to foregoing pursuing its legal remedy against Stainback. The actions and statements of Stainback lulled Duke into a false sense of security. Defendant has breached the golden rule and fair play, justifying the entry of equity to prevent injustice. *McNeely v. Walters*, 211 N.C. 112, 189 S.E. 114.

The decision of the Court of Appeals is

Affirmed.

Justice MITCHELL dissenting.

I agree with the majority that the only question before us is whether the trial court's findings of fact support its conclusions of law. I would hold that they do not.

The trial court's findings merely indicate that the defendant Stainback, through his attorney Rogers, made Duke aware of the fact that he had brought an action against Investors and that, from time to time, he informed them of the status of that action. The findings are devoid of any statement by Stainback or Rogers expressing or implying an intent that any damages which might possibly be recovered in the suit against Investors would ever be paid in whole or in part to Duke.

I do not believe that the burden was upon Stainback to act affirmatively to notify Duke that he would not pay it out of any damages he recovered from Investors, in order to prevent the doctrine of equitable estoppel from being applied against him and in Duke's favor. Instead, it would be more reasonable to place the burden upon the functionaries of Duke's compensation and liability section to have asked Stainback or Rogers the simple question: "Do you plan to use any of the money you may recover to pay your bill with us?" The findings of the trial court did not reveal that any such question was ever asked of Stainback or of Rogers.

It seems to me that the trial court and the majority in this Court have concluded that, absent express notice by the defendant that he did not intend to pay Duke from any recovery he might receive in his suit against Investors, the defendant was equitably estopped from raising the statute of limitations as a defense in Duke's action against him. A comparison of the conclusions of the trial court, or the opinion of the majority here, with the trial court's findings simply supports no other view. Therefore, I must dissent.

I am not quite sure to what extent the majority applies the Golden Rule in this case. It occurs to me that, if the Golden Rule

were truly to be applied in the present case, Duke would be required to forgive the debt Stainback owed it for the treatment of his child, rather than seeking to invoke the doctrine of equitable estoppel against him where its own negligence caused it to fail to bring this action before the statute of limitations had run.

I respectfully dissent.

Justice WEBB joins in this dissenting opinion.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND DUKE POWER COMPANY (APPLICANT) v. WELLS EDDLEMAN (APPELLANT) AND PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION; LACY H. THORNBURG, ATTORNEY GENERAL; CITY OF DURHAM; AND CONSERVATION COUNCIL OF NORTH CAROLINA (CROSS-APPELLANTS)

No. 39A86

(Filed 28 July 1987)

1. Utilities Commission § 55— findings mislabeled—sufficient

Findings by the Utilities Commission satisfied the requirements of N.C.G.S. § 62-79, even though the findings and conclusions were mislabeled, where the Supreme Court was able to separate facts from conclusions.

2. Utilities Commission § 57— conclusion that decision to build and complete Catawba Unit 1 reasonable—supported by testimony of Duke's chairman

The Utilities Commission finding that Duke Power Company's decision to construct and complete Catawba Unit 1 was reasonable, prudent and made in good faith was supported by the testimony of Duke's chairman, even though that testimony was contradicted by other witnesses and even though the Commission did not indicate the weight given to the conflicting testimony. The Utilities Commission may agree with a single witness, no matter how many opposing witnesses come forward, if the evidence supports that witness's position; moreover, the Commission clearly stated why it found the opposing testimony less persuasive than the chairman's testimony. N.C.G.S. § 62-94 (b)(5).

3. Utilities Commission § 55— review of Utilities Commission order—function of Supreme Court

The statutory function of the Supreme Court is not to determine whether there was evidence to support a position the Commission did not adopt, but whether there was substantial evidence in view of the entire record to support the position the Commission did adopt. N.C.G.S. § 62-94(b) (1982).

4. Utilities Commission § 35— Catawba Unit 1—not excess generating capacity

The evidence in a general rate case supported the Utilities Commission's explicit rejection of appellants' arguments concerning calculation of Duke Power Company's reserve margin and the use of the Belews Creek Unit 1 as a cycling plant; moreover, the evidence as a whole supported the conclusion that Catawba Unit 1 did not represent excess generating capacity.

5. Utilities Commission § 15; Electricity § 2.5— nuclear plant built in South Carolina by Duke Power Company—no North Carolina certificate of convenience and necessity required

Duke Power Company was not required to obtain a North Carolina certificate of convenience and necessity prior to beginning construction of the Catawba Nuclear Station, which was built in South Carolina and which partially served North Carolina customers, because N.C.G.S. § 62-110.1 did not contemplate advance certification by the North Carolina Utilities Commission of

facilities built in other states. Facilities must still be "used and useful" in providing service to North Carolina customers before they can be included in a public utility's rate base, and the Utilities Commission is directed by N.C.G.S. § 62-110.1(c) to confer with officials from other states and the federal government for the purpose of assessing the need for future generating facilities.

6. Utilities Commission § 32— Catawba Nuclear Station—common plant included in rate base—only one unit in operation

The Utilities Commission acted within its authority when it included in Duke Power Company's rate base the company's ownership interest in all of the Catawba Nuclear Station's common plant, including such things as switching stations, waste treatment facilities, shops, laboratories, roads and parking lots, even though Catawba Unit 2 is still under construction. There was sufficient evidence that all of the costs for common plant were necessary for the safe and reliable operation of Catawba Unit 1 and were indivisible. N.C.G.S. § 62-133(b)(1).

7. Utilities Commission § 57— Catawba Nuclear Station—buyback agreement with municipal power agencies—agreement reasonably entered into

The Utilities Commission properly found that Duke Power Company's buyback agreements with municipal power agencies and cooperatives were reasonably entered into as a means of financing completion of the Catawba Nuclear Station where the evidence supported the Commission's finding that financing charges had been minimized as a result of the Catawba sales and that those savings will benefit retail rate payers.

8. Utilities Commission § 32— Duke Power Company—general rate hearing—inclusion of McGuire Nuclear Station in rate base

There was competent, material and substantial evidence in a general rate case to support the Utilities Commission's inclusion of the entire McGuire Nuclear Station in Duke Power Company's rate base, despite reliability exchange provisions with municipal power agencies and cooperatives which gave them the right to receive power from the McGuire station at very low rates prior to the completion of the Catawba Unit 2.

9. Utilities Commission § 57— Catawba Nuclear Station—amendment to buyback contract with local power agency—no error

In a general rate case involving Duke Power Company's Catawba Nuclear Station, the Utilities Commission acted within the scope of its authority when it permitted Duke Power to recover costs associated with amendments to its contract with the North Carolina Municipal Power Agency for the sale and buyback of a portion of the capacity of Catawba Unit 2.

10. Utilities Commission § 38— operating and maintenance costs—not levelized—no error

In a general rate case involving Duke Power Company's sale of some of the capacity of its Catawba Nuclear Station to municipal power agencies and cooperatives and a plan for Duke Power to buy back some of that capacity, the Commission did not err by refusing to levelize the operating and maintenance component of the buyback costs, even though there was little if anything in

the record to support the Commission's conclusion that operation and maintenance costs were more variable than capital costs, which were levelized. There was nothing to suggest that the Commission's conclusion was wrong and common sense indicates that it was reasonable. The use of AFUDC rates to compute carrying costs from the levelization plan was not erroneous, even though Catawba Unit 1 is now in commercial operation and is not under construction, because Duke Power was not granted an AFUDC as such.

11. Appeal and Error § 46— evenly divided Supreme Court—Utilities Commission affirmed on that issue without precedential value

In a general rate case in which Justice Meyer did not participate and the Supreme Court was evenly divided on the issue of whether the Utilities Commission properly allowed Duke Power to recover costs associated with its abandoned Perkins and Cherokee Nuclear Stations, the decision of the Utilities Commission was affirmed without precedential value.

12. Electricity § 2.5; Utilities Commission § 41— Duke Power—general rate case—rate of return

The Utilities Commission properly exercised its discretion in a general rate case by setting a rate of return within the range of those recommended by witnesses for Duke Power and for the public staff, and did not err by finding that Duke Power's capital rate structure included a common equity component of 45.52 percent. N.C.G.S. § 62-133(c).

13. Electricity § 3.1— rate differential—method for narrowing

The public staff did not meet its burden of showing that the Utilities Commission erred in its rationale for adopting Duke Power's proposed method of narrowing the disparity between the rates of return for the residential customer class and the general and industrial class.

14. Utilities Commission § 39— Duke Power Company—general rate case—interest synchronization

The Utilities Commission acted within its discretion and in conformance with applicable judicial precedent when it decided not to put Duke Power Company's receipt of a tax credit at risk by adopting the Attorney General's proposal for interest synchronization. At the time the order in the case was issued, the IRS rulemaking permitting interest synchronization was merely a proposed rulemaking which might never have become final.

15. Utilities Commission § 39— Duke Power not required to seek private letter rulings from IRS—no error

The Utilities Commission did not abuse its discretion by refusing to order Duke Power Company to seek private letter rulings from the IRS on accumulated deferred taxes and investment tax credits.

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

APPEAL by intervenors pursuant to N.C.G.S. § 7A-29(b) from the final order of the North Carolina Utilities Commission entered

17 September 1985 in Docket No. E-7, Sub 391. Heard in the Supreme Court 11 June 1986 and 9 February 1987.

Steve C. Griffith, Jr., George W. Ferguson, Jr., Ronald L. Gibson, and Kennedy Covington Lobdell & Hickman, by Clarence W. Walker and Myles E. Standish, for applicant-appellee Duke Power Company.

Wells Eddleman, intervenor-appellant pro se.

Robert Gruber, Executive Director, by James D. Little, Staff Attorney, and Michael L. Ball, Staff Attorney, Public Staff—North Carolina Utilities Commission, for the Using and Consuming Public.

Lacy H. Thornburg, Attorney General, by Jo Anne Sanford, Special Deputy Attorney General, Karen E. Long, Assistant Attorney General, and Angeline M. Maletto, Assistant Attorney General, for the Using and Consuming Public.

W. I. Thornton, Jr., City Attorney, for the City of Durham.

Edelstein and Payne, by M. Travis Payne, for the Conservation Council of North Carolina.

EXUM, Chief Justice.

This is an appeal from an order of the North Carolina Utilities Commission in a general rate case. Numerous questions concerning the legality of the order have been raised by appellant intervenors and will be treated seriatim.

Procedurally, the case comes to this Court as follows:

On 15 February 1985, Duke Power Company filed an application with the North Carolina Utilities Commission seeking to increase electric utility rates for North Carolina retail customers effective 17 March 1985. The rates sought would have produced approximately $339,980,000 in additional revenues for Duke Power, and would have increased the company's North Carolina retail charges by approximately 19.7 percent. Among the reasons given by Duke for the requested increase were: (1) the need to recover expenses associated with Duke's contractual obligation to purchase power from the joint owners of Catawba Nuclear Station; (2) the need to include in Duke's ratebase the company's 12.5

percent ownership in Catawba Unit 1; (3) the need for an increase in Duke's return on common equity; and (4) the need to recover increased operating expenses, including those associated with Duke's cancellation of its Perkins and Cherokee nuclear stations.

Various parties, including appellant and cross-appellants, were permitted to intervene in the proceedings. On 12 March 1985 the Commission entered an order suspending the proposed rate increase for a period of up to 270 days. The Commission then declared Duke's application to be a general rate case. Public hearings were held in five cities, and the Commission began hearing the case in chief on 9 July 1985. Duke Power subsequently reduced its requested increase to $292,763,000, primarily because of a decrease in the cost of capital and a two-month delay in commercial operation of Catawba Unit 1.

On 17 September 1985, the Utilities Commission entered an order granting Duke an overall revenue increase of 9.52 percent, or approximately $165,000,000. Intervenors Wells Eddleman, the Public Staff, the Attorney General, the City of Durham, and the Conservation Council of North Carolina appealed to this Court.

I.

Duke Power Company began construction of its Catawba Nuclear Station in 1973, at a time when Duke's forecasts indicated that additional generating capacity was needed if the company was to meet future demand for electricity. A year later, Duke suffered a financial crisis that made it impossible for the company to go forward with its expansion program. Construction of Catawba was suspended and Duke offered some of its assets for sale.

Duke then decided to finance further construction of Catawba by selling portions of the station to various municipal power agencies and cooperatives, each of which had access to capital not available to Duke. Before these sales could be made, however, certain statutory and constitutional changes had to take place in North Carolina. The legislature responded to this need in 1975 by enacting the Joint Municipal Electric Power and Energy Act, 1975 N.C. Sess. Laws ch. 186, § 1, which authorized joint ownership by municipalities of electrical generating facilities. N.C.G.S. § 159B-11(10) (Cum. Supp. 1985). Two years later the North Carolina Constitution was amended to allow the state's newly created

joint municipal power agencies to own property jointly with other public and private entities, including public utilities. N.C. Const. art. V, § 10. The General Assembly shortly thereafter enacted N.C.G.S. § 159B-5.1, which authorizes municipal power agencies to enter into agreements such as the one Duke Power was proposing with respect to Catawba.

In 1978, Duke sold a 75 percent interest in Catawba Unit 2 to the North Carolina Municipal Power Agency #1 (NCMPA), which serves some twenty cities in this state. The next year Duke sold the remaining 25 percent of Unit 2 to the Piedmont Municipal Power Agency (PMPA) in South Carolina. In 1981, Duke sold 75 percent of Catawba Unit 1 to its North Carolina and South Carolina cooperative customers. Duke retains a 25 percent interest in Unit 1. For purposes of this rate case, however, Duke is treated as if it has a 12.5 percent interest in Unit 1.[1]

1. The Utilities Commission, in its Evidence and Conclusions for Finding of Fact No. 10, stated:

> [Duke chairman] Lee testified that Duke had sold 100% of Catawba Unit 2 to NCMPA and PMPA and 75% of Catawba Unit 1 to [the cooperatives], leaving the Company with 25% of Catawba Unit 1. He stated, however, that Duke's true economic interest in Catawba Unit 1 was only 12.5% because of the exchange entitlements between the owners of Catawba Unit 1 and Catawba Unit 2. [See Part IV. of this opinion.] As a result of these exchanges, Duke is entitled to 12.5% of the output of Catawba Unit 1 and 12.5% of the output of Catawba Unit 2. Witness Lee explained that the reason Duke had title to 25% of Unit 1 rather than 12.5% of each unit was because of a legal problem that the South Carolina municipalities [PMPA] had in owning a unit jointly with an investor owned utility such as Duke. Therefore, these sales were structured so that the South Carolina municipalities would not have title to any property which was jointly owned by Duke but the economic substance of the transaction would be such that Duke and each of the Catawba Purchasers would own an equal interest in each unit. Witness Stimart testified that the payments made by the Catawba Purchasers and by Duke for the construction of the Catawba Station were made upon the basis of a percentage of the cost of the station rather than a percentage of the cost of the individual units each entity owned. . . .
>
> [T]he Commission concludes that it would be inappropriate to ignore the economic substance of the transaction and to rely merely upon which party has title in determining the amount properly includable in Duke's rate base. Thus, for purposes of this case, Duke is entitled to collect rates based upon 12.5% of the cost of Catawba Unit 1 in its cost of service.

None of the parties to this appeal has challenged the Commission's decision with respect to this matter.

The various Catawba sales agreements are lengthy and complex documents, but each contains several similar provisions. First, Duke is to operate Catawba just as it would any of its own plants; all power generated by the station flows into Duke's system. Second, the agreements establish how power received from Duke by the Catawba purchasers will be priced. Third, Duke is required to "buy back" a portion of the Catawba capacity owned by the municipal power agencies and cooperatives. Finally, the agreements provide for certain reliability exchanges between the two Catawba units and between Catawba and Duke's McGuire Nuclear Station.

The rate increase at issue in this case was requested by Duke shortly before Catawba Unit 1 was declared commercially operational on 29 June 1985. Approximately 80 percent of the $340 million increase sought by Duke was attributable to Unit 1, and included both the cost of Duke's ownership interest in that unit and the cost of buybacks mandated by the Catawba sales agreements. The Utilities Commission held several weeks of hearings and found, among other things: (1) that Duke's decisions to construct and complete Catawba Unit 1 were reasonable and prudent; (2) that Duke's ownership interest in Unit 1 is used and useful in providing electric utility service to Duke's North Carolina retail ratepayers; (3) that Unit 1 does not represent excess generating capacity; (4) that each of the Catawba sales agreements entered into by Duke was reasonable and prudent; and (5) that these agreements collectively resulted in lower rates for Duke's North Carolina retail customers than would have prevailed had Duke financed Catawba itself. The $165 million rate increase unanimously approved by the Commission was approximately 48.5 percent of the amount originally requested by Duke, and approximately 56.3 percent of the company's revised request.

II.

[1] The Attorney General and City of Durham contend that the findings of fact included by the Utilities Commission in its ratemaking order fail to satisfy the requirements of N.C.G.S. § 62-79. This statute states, in pertinent part, that:

> (a) All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine

> the controverted questions presented in the proceedings and shall include:
>
> (1) Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record . . . .

N.C.G.S. § 62-79(a) requires the Commission "to find all facts essential to a determination of the question at issue." *State ex rel. Utilities Comm. v. Haywood Electric Membership Corp.*, 260 N.C. 59, 64, 131 S.E. 2d 865, 868 (1963) (decided under predecessor statute N.C.G.S. § 62-26.3). The Commission, however, is not required to comment on "every single fact or item of evidence presented by the parties." *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 313 N.C. 614, 745, 332 S.E. 2d 397, 474 (1985), *rev'd on other grounds*, --- U.S. ---, 90 L.Ed. 2d 943 (1986).

> The purpose of the findings required by G.S. § 62-79(a) is to provide the reviewing court with sufficient information to allow it to determine the controverted questions presented in the proceedings. . . . The Commission's summary of the appellant's argument and its rejection of the same is sufficient to enable the reviewing court to ascertain the controverted questions presented in the proceeding. That is all that G.S. § 62-79 requires.

State ex rel. Utilities Comm. v. Conservation Council of North Carolina, 312 N.C. 59, 62, 320 S.E. 2d 679, 682 (1984).

The Attorney General and City of Durham contend that twenty-three of the Commission's thirty-one findings of fact actually are "mere conclusions." For example, Finding of Fact No. 6, which appellants seem to find particularly objectionable, states that "[t]he decisions made by Duke Power Company to construct and complete Catawba Unit 1 were reasonable, prudent, and made in good faith."

Appellants are correct in asserting that this statement is a conclusion of law rather than a finding of fact. Findings of fact are statements of what happened in space and time. These facts, when considered together, provide the basis for concluding, as the Commission did here, whether an action or decision was reasonable or prudent.

The Commission's mislabeling of its findings and conclusions will not, however, be fatal to its order if certain procedural requirements are met. The judgments and orders of courts and administrative bodies must reflect a basic understanding of how the decision-making process is supposed to work. "Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken . . . in logical sequence; each link in the chain of reasoning must appear in the order itself." *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E. 2d 185, 190 (1980). As long as "each link in the chain of reasoning" appears in the Commission's order, mislabeling is merely an inconvenience to the courts.

In this case, the Commission's summary of evidence, findings of fact and conclusions of law are mixed together in portions of the record denominated "Findings of Fact" and "Evidence and Conclusions for Findings of Fact." Proper labeling might have made this Court's task a little easier, but we nonetheless have been able to separate facts from conclusions in examining appellants' various assignments of error. Thus, the mislabeling of certain portions of the record does not require us to overturn the Commission's order.

[2] Appellants further contend that (1) the only evidentiary support for Finding of Fact No. 6 came from Duke's chairman, William S. Lee, whose testimony was contradicted by other witnesses; and (2) the Commission's order fails to indicate what weight, if any, it gave to the conflicting testimony.

First, we note that the Commission may agree with a single witness—if the evidence supports his position—no matter how many opposing witnesses might come forward. This Court is then required to determine whether the Commission's decision is supported by "competent, material and substantial evidence in view of the entire record as submitted." N.C.G.S. § 62-94(b)(5) (1982).

Second, the Commission, in its recitation of "Evidence and Conclusions for Finding of Fact No. 6," summarized the testimony of three witnesses opposed to Duke's application for a rate increase. In each instance the Commission clearly stated why it found this evidence less persuasive than the evidence supporting Duke's position. For example, witness Randall J. Falkenberg, testifying on behalf of the Carolina Industrial Group for Fair

Utility Rates, criticized Duke for not adopting until 1981 certain forecasting techniques that other utilities had been using for some time. This criticism implied that Duke's decision to construct and complete Catawba Unit 1 stemmed, at least in part, from overestimates of the company's future electrical load that could have been avoided if the new forecasting techniques had been employed. The Commission, in rejecting Falkenberg's critique, noted that Duke's load forecasts during the middle and late 1970s were consistently *below* the load forecasts of other utilities. Moreover, there was no evidence that Duke's decisions with respect to Catawba would have been any different if the company had used the forecasting techniques advocated by Falkenberg.

We do not deem it necessary to address each of the remaining twenty-two "findings of fact" that appellants find objectionable. The vast majority of these are simply listed by number in the Attorney General's brief. We have studied the briefs and the record, and we are persuaded that the Commission's summary of evidence, findings of fact, and conclusions of law satisfy the limited purpose of N.C.G.S. § 62-79(a).

III.

The $165 million rate increase granted to Duke by the Commission's order of 17 September 1985 was based in part on inclusion of Catawba Unit 1 in the company's ratebase. Catawba Unit 1 was declared commercial on 29 June 1985. The Attorney General, the City of Durham, and Wells Eddleman argue that inclusion of Catawba Unit 1 in Duke's ratebase was error.

North Carolina's statutory formula for public utility ratemaking is found in N.C.G.S. § 62-133. This statute requires the Commission to determine the utility's ratebase (RB), its reasonable operating expenses (OE), and a fair rate of return on the company's capital investment (RR). These three components are then combined according to a formula that can be expressed as follows:

$$(RB \times RR) + OE = \text{REVENUE REQUIREMENTS}$$

The ratebase component of this formula is determined by calculating

> the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable

> time after the test period, in providing the service rendered to the public within the State, less that portion of the cost which has been consumed by previous use recovered by depreciation expense plus the reasonable original cost of investment in plant under construction (construction work in progress).

N.C.G.S. § 62-133(b)(1) (Cum. Supp. 1985).

In this case the Commission determined that Duke's 12.5 percent interest in Catawba Unit 1 was "used and useful in providing electric utility service to Duke's North Carolina retail ratepayers . . . within a reasonable time after the end of the test period and prior to the time the hearings in this proceeding were closed." The Commission therefore found that Duke is entitled to collect rates based on the inclusion of 12.5 percent of Catawba Unit 1 in the company's ratebase.

Appellants contend that Catawba Unit 1 represents excess generating capacity within the Duke system and therefore cannot be "used and useful" in providing electricity to North Carolina retail ratepayers. *Cf. State ex rel. Utilities Comm. v. General Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972). In addition, appellants argue that Duke's failure to acquire a North Carolina certificate of convenience and necessity for the Catawba Nuclear Station precludes inclusion of any portion of Catawba in the company's ratebase.

[3] "The question of whether specific property is presently 'used and useful' in rendering service is one of fact to be determined by the Commission upon competent and substantial evidence." *Id.* at 354, 189 S.E. 2d at 728. This Court may not set aside the Commission's determination merely because we might have drawn different conclusions from the evidence. *Id.*

> The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or

(2) In excess of statutory authority or jurisdiction of the Commission, or

(3) Made upon unlawful proceedings, or

(4) Affected by other errors of law, or

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

(6) Arbitrary or capricious.

N.C.G.S. § 62-94(b) (1982). This Court's statutory function is not to determine whether there is evidence to support a position the Commission did not adopt. We ask, instead, whether there is substantial evidence, in view of the entire record, to support the position the Commission *did* adopt.

With these principles in mind, we will consider each of appellants' specific complaints in turn.

A.

[4] The Utilities Commission, after hearing evidence from numerous interested parties, determined that Catawba Unit 1 "is needed to enable Duke to meet the load on its system, and does not represent excess generating capacity." The Attorney General and City of Durham contend that the Commission made two separate errors in reaching this conclusion.

1.

First, appellants claim that the Commission erroneously calculated Duke's capacity reserve margin. "Capacity reserve" is the amount of installed generating capacity in a system above the amount required to meet peak system load. The Commission generally considers a reserve margin of approximately 20 percent to be reasonable. A public utility's reserve margin is calculated by subtracting the system's estimated peak load from its installed generating capacity at a given point in time. The remainder is expressed as a percentage of the utility's total installed capacity. Thus, if a system is capable of producing 100 megawatts (MW) on July 1st, and the peak load as of that date is 90 MW, the system's reserve margin is 10 percent. Of course, any error in the figures representing either installed capacity or peak load will result in an incorrectly calculated reserve margin.

Appellants contend that the calculations relied upon by the Commission were affected by both types of error. Specifically, appellants complain that: (1) the figure representing installed generating capacity did not include 997 MW that could be produced by several coal-fired units; and (2) the figure representing peak system load was artificially inflated by Duke.

William S. Lee, Duke's chairman of the board, testified that Catawba Unit 1 gives the company a reserve margin of 22.9 percent, based on a forecasted 1985 summer peak load of 12,150 MW. Without Unit 1, the margin would be only 13.4 percent. Lee acknowledged that the reserve margin calculated by Duke did not include 997 MW of capacity that had been placed in extended cold shutdown (ECS). This capacity consists of twelve small coal-fired units between twenty-seven and forty-three years old placed in ECS because they no longer can provide reliable service. Lee stated that Duke would, over a three-year period, examine these units to determine whether and at what cost they could be rehabilitated. Even if rehabilitation is feasible, none of the units placed in ECS can be brought back into service until the late 1980s or early 1990s, if at all.

Appellants contend that the twelve coal-fired units in question were placed in ECS to avoid the problem of excess capacity created when Catawba Unit 1 was brought into service. The Attorney General, in his brief, argues that

> [e]vidence was adduced which tended to show that the 12 ECS units could have been available for service, given different management objectives. The evidence suggested that, in fairness to the ratepayer, a proper measure of the company's capacity reserves should have assumed operational ability on the part of those units, because the company could have kept them available for service had its management goals been other than to make way for Catawba's capacity.

In support of this contention, the Attorney General cites evidence indicating that six of the twelve ECS units had availability ratings of 100 percent in June 1983, and three others were available more than 90 percent of the time.[2]

2. Duke chairman Lee testified that these figures were misleading because the units in question had been called on infrequently. If the demand on the units had been higher, their reliability might have been lower.

Appellants also point out that Duke's estimate of its 1985 summer peak load (12,150 MW) was 10 percent higher than its actual 1984 summer peak (11,043 MW), despite evidence that the rate of growth in summer peak loads is declining rapidly. Moreover, the 1985 summer peak estimate adopted by Duke for purposes of this case was higher than at least one of the company's earlier estimates. According to the Attorney General, "[t]his inflated projection of a drastic annual increase in summer peak . . . make[s] the company's reserve margin appear smaller than it would using a more accurate projection of summer peak."

The Commission, in finding that Catawba Unit 1 does not represent excess capacity, specifically rejected both of the arguments made by appellants with respect to calculation of Duke's reserve margin. In its "Evidence and Conclusions for Finding of Fact No. 9," the Commission stated that

> it is inappropriate to include the extended cold shutdown units in the calculation of Duke's current reserve margin. First, witness Lee's testimony concerning the condition of these units is uncontradicted. It is clear to the Commission that these units cannot provide reliable service until major repairs can be performed which will take a number of years. Second, the Commission concludes that the only way that these units can be rehabilitated so as to extend their lives for a number of years is through a comprehensive program such as the extended cold shutdown program. Ordinarily, plants of this age and condition are retired and replaced by new capacity. If this program can successfully rehabilitate these units, the units will be able to replace expensive new capacity which otherwise would have to be built. Therefore the Commission finds that the extended cold shutdown program is prudent and designed to minimize costs to the Company's North Carolina retail ratepayers. The Commission further concludes that to discourage such a program would not be in the best interests of Duke's retail ratepayers because over the long term it would increase costs by forcing the Company to run older units until they cannot be rehabilitated and thus force Duke to build new capacity rather than rehabilitating older, lower cost capacity.

> The Commission also concludes that Duke's September 1984 forecast of its summer 1985 peak of 12,150 MW is the appropriate forecast to use in determining Duke's reserve margin for the summer of 1985. That forecast was based upon the most recent information available to Duke at the time at which it was made and was based on the economic conditions thought likely to prevail during the period of time it covers. No party has shown any invalid or improbable assumptions which were included in the September 1984 forecast.

We hold that the Commission's findings and conclusions with respect to Duke's reserve margin meet the requirements implicit in N.C.G.S. § 62-94. Substantial evidence in support of the Commission's decision not to include the twelve ECS units in its calculation of Duke's reserve margin is found in the testimony of Duke chairman Lee, who indicated that rehabilitation of these units would require repair or replacement of turbine rotors, precipitators and feed water heaters, reinsulation of generator rotors, rewinding of generator stators and retubing of condensers, among other things. The Attorney General acknowledges in his brief that the ECS units were "mainly not in running order" at the time of the hearing in this case.[3] Finally, a report prepared by a consultant hired by one of the Attorney General's own witnesses concluded that Duke's extended cold shutdown program "is a prudent action that is carefully designed to reduce operating costs while retaining operating flexibility."

Evidence supporting Duke's 12,150 MW summer 1985 peak load estimate again came from witness Lee. He stated that this forecast had been made in September 1984 for budgetary purposes, and that it was higher than a forecast made in 1983 because the earlier projection had been made shortly after the bottom of a recession. The September 1984 estimate was based on the improved economic conditions then prevailing, and therefore was a more reliable forecast of what would happen in 1985. The

3. The Attorney General implies that Duke deliberately allowed these units to deteriorate so that Catawba, when it came on line, would not constitute excess capacity. The intervenors, however, produced little—if any—evidence to support this contention. Given the advanced age of the ECS units, the Commission cannot be faulted for rejecting a claim of this sort without substantial proof of calculated mismanagement.

Commission's findings and conclusions with respect to this point also are supported by the testimony of Thomas S. Lam, an engineer appearing on behalf of the Public Staff. Lam testified that Duke's *actual* peak load in January 1985 had been 12,687 MW, and that use of this exceptionally high figure would be appropriate because a utility must meet the highest peak load on its system, whenever that occurs.[4]

2.

The Attorney General and City of Durham claim that Duke's excess generating capacity is further demonstrated by the company's plans to convert its ten-year-old, coal-fired Belews Creek Unit 1 to service as a cycling plant. Cycling plants, as the name implies, cycle on and off as system load dictates. Baseload units, by way of contrast, operate continuously to meet the utility's basic generating requirements. Appellants point out that Belews Creek Unit 1 is a highly efficient plant, ranked seventh in the nation as recently as August 1984. Conversion of such a plant to cycling duty, they argue, "is *strongly* suggestive of a surfeit of baseload capacity from other units."

This argument misses the point. As we stated earlier, this Court's duty is not to determine whether there is any evidence to support a position the Commission did not adopt; rather, we examine whether the evidence, in view of the entire record, supports the position it *did* adopt. The Commission concluded that Duke's treatment of Belews Creek Unit 1 does not indicate that the company has excess generating capacity. Evidence supporting this conclusion is found in the testimony of Duke chairman Lee, who stated that conversion of coal-fired units from baseload to cycling duty is an inevitable result of the aging process; every coal-fired unit ever built by Duke has been treated in this fashion. Nuclear plants, on the other hand, generally serve as baseload units because their running costs are lower. Lee also stated that Belews Unit 1 will not be operated exclusively as a cycling plant, but will be used as a baseload unit at various times during the year.

4. Peak loads naturally go hand-in-hand with extreme weather conditions. Duke's peak loads normally occur in the summer.

The Attorney General's own witness, Dr. John W. Wilson, testified that Catawba Unit 1 could run with a capacity factor of almost 50 percent without displacing generation from either Belews Creek or Duke's older Marshall units. The Commission, in response to this testimony, noted that the average capacity factor for units comparable to Catawba is only 57 percent, and therefore the amount of generation displaced from Marshall and Belews Creek, if any, is likely to be minimal.

In sum, we find that there is substantial evidence supporting the Commission's explicit rejection of appellants' arguments concerning (1) calculation of Duke's reserve margin, and (2) use of Belews Creek Unit 1 as a cycling plant. Moreover, the evidence taken as a whole supports the Commission's conclusion that Catawba Unit 1 does not represent excess generating capacity. We therefore affirm the Commission's decision with respect to this matter.

B.

[5] The Catawba Nuclear Station is located in South Carolina. Before beginning construction, Duke obtained a certificate of convenience and necessity from the South Carolina Public Service Commission, as required by the law of that state. No such certificate was obtained from the North Carolina Utilities Commission. The Attorney General, the City of Durham, and Wells Eddleman contend that N.C.G.S. § 62-110.1 requires Duke to get a North Carolina certificate of convenience and necessity prior to beginning construction of any facility that will provide service to customers in this state. Appellants argue that the Commission has no authority to waive Duke's failure to comply with this statute, and therefore no authority to permit inclusion of Catawba Unit 1 in Duke's ratebase.

N.C.G.S. § 62-110.1 states, in pertinent part, that

> no public utility or other person shall begin the construction of any steam, water, or other facility for the generation of electricity to be directly or indirectly used for the furnishing of public utility service . . . without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction.

The Commission concluded that it was not necessary to determine whether this statute required Duke to obtain a North Carolina certificate for Catawba because "(1) if a certificate had been sought, it is clear from the evidence in this record that the certificate would have been granted for Catawba Unit 1 and (2) the Commission has been aware of the construction of Catawba Unit 1 from the time construction began."

We hold that Duke was not required to obtain a North Carolina certificate of convenience and necessity prior to beginning construction of the Catawba Nuclear Station. We therefore find it unnecessary to determine whether the Commission may waive the requirements of N.C.G.S. § 62-110.1, and equally unnecessary to determine the remedy for a violation of that statute.

The statute, while not a model of clarity on this point, does not appear to contemplate advance certification by the North Carolina Utilities Commission of facilities built in other states. For example, the statute directs the Commission to develop and maintain "an analysis of the long-range needs for expansion of facilities for the *generation of electricity in North Carolina.*" N.C.G.S. § 62-110.1(c) (1982) (emphasis added). Subsection (f) directs the Commission to "maintain an ongoing review of . . . construction as it proceeds"—an activity at least arguably outside the Commission's jurisdiction when the facility is located in another state. The procedural statute governing certificate applications requires applicants "to publish a notice thereof once a week for four successive weeks in a daily newspaper of general circulation in the county where such facility is proposed to be constructed." N.C.G.S. § 62-110.1(a) (1982). We think it is unlikely that the legislature intended to notify residents of other states that a utility has applied for a North Carolina certificate of convenience and necessity.

At least one commentator has adopted the approach taken by this Court, and we have found none who disagrees. Professor Richard J. Pierce, Jr., of Tulane University has written that the

> structure for ownership and operation of a multijurisdictional plant creates an allocation of regulatory authority very different from that applicable to the traditional single jurisdiction plant. First, because there is no federal requirement that new generating plants be certified, the state in which the

plant is to be located has the sole power to determine whether the plant can be built or completed.

Pierce, *The Regulatory Treatment of Mistakes in Retrospect: Canceled Plant and Excess Capacity*, 132 U. Pa. L. Rev. 497, 546 (1984).

It may be objected that our holding here tends to thwart the purpose of N.C.G.S. § 62-110.1, which is to prevent overbuilding of costly generating facilities. *State ex rel. Utilities Comm. v. High Rock Lake Assoc., Inc.*, 37 N.C. App. 138, 245 S.E. 2d 787, *cert. denied*, 295 N.C. 646, 248 S.E. 2d 257 (1978). The needs of North Carolina ratepayers may not be thoroughly considered by public officials in South Carolina or some other state, even though the facility in question is intended to generate electricity for delivery to this state as well as the state in which the plant is located.

The answer to this objection can be found in the statute requiring facilities to be "used and useful" in providing service to North Carolina customers before they can be included in a public utility's ratebase. N.C.G.S. § 62-133(b)(1). A generating station that constitutes excess capacity within a utility's North Carolina delivery system may not be included in the company's ratebase merely because some other state issued a certificate of convenience and necessity for that plant. In addition, N.C.G.S. § 62-110.1(c) directs the Commission to confer with officials from other states and the federal government for the purpose of assessing the need for future generating facilities.

Having carefully considered each of appellants' arguments concerning the Commission's treatment of Duke's 12.5 percent ownership interest in Catawba Unit 1, we find that the Commission acted within the limits of its authority when it included Unit 1 in the company's ratebase.

IV.

[6] Duke Power's application for a rate increase proposed that the company's ownership interest in all common plant associated with the Catawba Nuclear Station be included in Duke's ratebase along with Unit 1. Switching stations, waste treatment facilities, shops, laboratories, roads and parking lots—all of which are intended to serve both generating units at Catawba—are examples

of common plant. The Commission, in its order of 17 September 1985, included Duke's ownership interest in all of Catawba's common plant when it added Unit 1 to the company's ratebase.

The Public Staff, noting that Catawba Unit 2 was not yet operational at the time of Duke's application for a rate increase, contends that only half of the Catawba station's common plant should be associated with Unit 1. The other half, according to appellant, should be classified as construction work in progress, consistent with the Commission's treatment of Unit 2. Appellant apparently is concerned that inclusion of Catawba's entire common plant in Duke's ratebase at this time represents a *de facto* determination, based on no evidence whatsoever, that Unit 2 does not represent excess capacity.

As we stated earlier, property of a public utility may be included in the utility's ratebase when it is used and useful in providing service to the public in this state. N.C.G.S. § 62-133(b)(1). The Commission properly recognized that this principle controlled its decision with respect to this matter, and found that all—not half—of Duke's interest in the common plant associated with Catawba Nuclear Station was, at the appropriate time, used and useful in providing service to North Carolina ratepayers. The question for this Court, then, is whether the Commission's conclusion is adequately supported by the evidence. *See State ex rel. Utilities Comm. v. Duke Power Co.*, 305 N.C. 1, 287 S.E. 2d 786 (1982) (appellate review of Commission's decisions substantially circumscribed by provisions of N.C.G.S. § 62-94(b)).

We think the evidence is sufficient to support the Commission's decision. Both Duke chairman Lee and William R. Stimart, a company vice-president, testified that all of the costs incurred for common plant are necessary for the safe and reliable operation of Catawba Unit 1. This testimony was uncontradicted. The Public Staff's witness, James G. Hoard, acknowledged on cross-examination that he was unable to specify any common facilities that are not necessary for operation of Unit 1, and that he was simply proposing that half the cost of common plant be excluded from Duke's ratebase. In addition, appellant admits in its brief that Catawba's common plant "is indivisible, [and] in that sense . . . necessary for the safe, reliable operation of Catawba Unit 1."

The Commission's action in this case need not, and should not, affect its determination of whether Catawba Unit 2 represents excess capacity. The Commission stated in its order that its treatment of Catawba's common plant "does not imply any prejudgment, one way or the other, of any issues that may arise in the future with reference to Catawba Unit 2."

We hold, therefore, that the Commission acted within its authority when it included in Duke's ratebase the company's ownership interest in all of Catawba's common plant. We express no opinion as to how this decision might be affected if the Commission finds that Unit 2 does indeed represent excess capacity.

V.

As noted above, Duke Power financed construction of the Catawba Nuclear Station by selling portions of the facility to various municipal power agencies and cooperatives located in the Carolinas. The contracts covering these conveyances include: (1) an agreement with the North Carolina Municipal Power Agency #1 (NCMPA) dated 6 March 1978, granting NCMPA a 75 percent ownership interest in Catawba Unit 2; (2) an agreement with the Piedmont Municipal Power Agency (PMPA) dated 1 August 1980, granting PMPA a 25 percent interest in Unit 2; (3) an agreement with the North Carolina Electric Membership Corporation (NCEMC) dated 14 October 1980, granting NCEMC a 56.25 percent interest in Unit 1; (4) an agreement with the Saluda River Electric Cooperative, Inc. (Saluda) dated 14 October 1980, granting Saluda an 18.75 percent interest in Unit 1; (5) amendments dated 22 October 1982 to the agreement with PMPA; and (6) amendments dated 12 November 1982 to the agreement with NCMPA.[5] Each of the Catawba sales contracts includes a purchase agreement, an operating and fuel agreement, and an interconnection agreement. The purchase agreements state that Duke will continue to design and build Catawba and the purchasers will pay their pro rata share of the costs. The operating and fuel agreements provide that Duke will operate, maintain and fuel the plant to meet the system load. The interconnection agreements—

5. These agreements left Duke with a 25 percent interest in Catawba Unit 1. As noted earlier, *supra* note 1, for purposes of this rate case Duke is treated as if it has a 12.5 percent ownership interest in each of Catawba's two units.

which are at issue here—mandate certain reliability exchanges between the two Catawba units and between the Catawba station and Duke's McGuire Nuclear Station. In addition, the interconnection agreements provide that Duke will "buy back" a portion of the purchasers' Catawba capacity for a period of time.

Appellants challenge three aspects of the Catawba contracts. First, they contend that this Court must invalidate provisions that require Duke to buy back a portion of the Catawba capacity owned by each of the Catawba buyers. Second, appellants challenge the provisions setting up reliability exchanges between the two Catawba units and between the Catawba and McGuire stations. Third, appellants contend that Duke may not recover costs associated with the 1982 amendments to its contract with the North Carolina Municipal Power Agency #1.

A.

[7] The Catawba buyers—NCMPA, PMPA, NCEMC and Saluda—have purchased, in effect, portions of the station's capacity. The buyers' need for this capacity will be minimal during the early years of the plant's operation. Duke Power therefore agreed to buy back, in gradually diminishing amounts, part of the capacity owned by the purchasing cooperatives and municipal power agencies. In the case of the municipalities, the buyback begins at 97 percent of the purchasers' Catawba capacity and declines to zero over a period of fifteen years. In the case of the cooperatives, the buyback begins at 100 percent of the purchasers' Catawba capacity and declines to zero over a period of ten years. These provisions collectively required Duke to buy back approximately 83.3 percent of Unit 1's capacity during the 12-month period beginning 1 September 1985.[6] This amount will decrease over the next 15 years. The Commission determined that the Catawba contracts were reasonably and prudently entered into by Duke, and found that Catawba Unit 1 is used and useful in providing electric utility service to North Carolina retail ratepayers. Duke therefore was allowed to recover as operating expenses approximately $150 million paid to the Catawba purchasers under the buyback provisions of the Catawba contracts.

6. Duke was entitled to 12.5 percent of Unit 1's capacity by virtue of its ownership interest in the Catawba Nuclear Station. The remaining 4.2 percent of Unit 1's capacity was retained by the Catawba buyers.

Appellants make three substantive arguments concerning why the buyback provisions must be invalidated. First, the Attorney General and City of Durham contend that Duke may not recover its buyback costs because Catawba Unit 1 represents excess capacity within the Duke system and therefore cannot be used and useful in providing electricity to North Carolina retail ratepayers. We have already rejected appellants' excess capacity argument and see no need to rehash it here.

Second, the Conservation Council of North Carolina and Wells Eddleman argue that the buyback provisions are not operating expenses within the meaning of N.C.G.S. § 62-133(b)(3) because they do not "play the role of actually supplying electricity." Appellants contend that the buybacks are really a repurchase of the Catawba units from the Catawba buyers. Appellants apparently are concerned about the ramifications of this argument, because they quickly add that this "repurchase" of Catawba units is not the kind of capital expenditure that can be included in Duke's ratebase. This is because the ratebase includes "the reasonable original costs of the *public utility's* property," N.C.G.S. § 62-133(b)(1), and not the cost of property belonging to some other entity.

We need not address the latter half of appellants' argument because we hold that the Commission properly classified Duke's buyback costs as operating expenses. "When a narrow construction of the operating expense element of a regulatory act would frustrate the purposes of the act . . . the term should be liberally interpreted and applied." *State ex rel. Utilities Comm. v. Edmisten*, 294 N.C. 598, 606, 242 S.E. 2d 862, 868 (1978). Appellants are technically correct in asserting that the buyback provisions do not supply Duke's retail customers with any electrical capacity that wasn't already in Duke's system. Power generated at Catawba remains in Duke's system until it is distributed. The buyback provisions do, however, establish Duke's right to use capacity owned by the Catawba buyers to meet the demands of the utility's retail ratepayers. Duke, in other words, purchases the right to exercise control over Catawba capacity from those who hold legal title to that capacity. The buyback provisions, in this sense, are no different from Duke's many other contractual obligations. Duke purchases power from the Catawba buyers in much the same way as it purchases items ranging from nuclear fuel to

paper clips. Costs associated with those purchases are routinely recouped as operating expenses, and we see no reason to treat the purchase of power under the buyback provisions differently.

Third, appellants argue that the price paid by Duke for purchased power under the buyback agreements is unreasonable. Appellants complain, for example, that the cost of purchased power under the buyback agreements is about 8 cents per kilowatt hour (KWH), even though during the test period utilities could purchase power at rates as low as 2.1 cents per KWH. Duke responds that the low figures cited by appellants represent prices paid for short-term purchases and nonfirm capacity, not reliable base load capacity. Catawba, in contrast, will operate as a base load plant on Duke's system for approximately 40 years.

As we mentioned earlier, this Court's function under N.C.G.S. § 62-94 is to determine whether there is sufficient evidence to support the findings and conclusions of the Commission; we are not here to second-guess those findings and conclusions. "The Commission, not the courts, has been given the authority to regulate the rates of public utilities." *State ex rel. Utilities Comm. v. Thornburg*, 316 N.C. 238, 242, 342 S.E. 2d 28, 31 (1986). An order of the Commission

> will not be disturbed if upon consideration of the entire record we find the decision is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn.

State ex rel. Utilities Comm. v. Carolina Utilities Customers Assoc., Inc., 314 N.C. 171, 179-80, 333 S.E. 2d 259, 265 (1985).

We also note that the buyback provisions of the Catawba contracts cannot be viewed in isolation; like the exchange agreements approved in Duke's last general rate case, they are "an inseparable part of the Catawba Sale Agreements." *Id.* at 183, 333 S.E. 2d at 267. Thus, the reasonableness of the buyback provisions cannot be determined without reference to the reasonableness of the Catawba contracts as a whole.

The Commission found that the Catawba contracts, as a whole, "have resulted in the cost of electricity to the Company's

North Carolina retail ratepayers being substantially lower than the cost of electricity would have been if Duke had itself financed the entire plant." This finding, if supported by the evidence, strongly supports the Commission's conclusion that the Catawba contracts—including the buyback provisions—are reasonable and prudent, and that Duke's purchased power costs are therefore recoverable as operating expenses.

Witnesses for Duke testified that the Catawba sales agreements were, in effect, a financing tool that enabled Duke to complete construction of the Catawba station at a time when the company was in financial difficulty. The purchasing municipalities and cooperatives had access to relatively low-cost financing that was not available to Duke. If they, rather than Duke, were the principal owners of Catawba, the plant could be financed on terms favorable to both Duke and its retail ratepayers. The municipalities and cooperatives recognized, however, that they would not need large amounts of new capacity during the early years of Catawba's useful life. Thus, the buyback provisions at issue here were an important element of the agreements between Duke and the Catawba purchasers, because the buybacks enabled the purchasers to gradually assume their interest in Catawba over a period of ten to fifteen years.

Duke witnesses Lee and Stimart testified that the Catawba sales enabled the company to avoid expenses associated with the issuance of preferred stock and the assumption of substantial long-term debt. These savings were realized during the period from 1978 to 1984, when interest rates were very high. Lee stated that the Catawba sales will save North Carolina retail ratepayers approximately $28 million a year compared to what they would have had to pay if Duke had financed the plant itself. The Commission, based on this evidence, concluded that the Catawba sales agreements have helped minimize Duke's embedded cost of debt and preferred stock and have resulted in substantial benefits to North Carolina retail ratepayers.[7]

7. Wells Eddleman argues that Duke's admitted inability to finance Catawba itself means that any "savings" realized as a result of the Catawba sales—and the financing arrangements they made possible—are illusory. In other words, if there had been no sale of Catawba to Duke's wholesale customers the station would never have been built. Duke's North Carolina retail customers therefore would be

The Commission also concluded that ratepayers will benefit from a shift of high-cost Catawba capacity from Duke to the purchasing municipalities and cooperatives during the next several years. Catawba is the most expensive capacity on Duke's system. Duke vice-president Stimart testified that under the sales agreements, the Catawba purchasers retain a greater portion of Catawba's capacity than they would have paid for had they remained wholesale customers of Duke. Moreover, the purchasers' retained Catawba capacity gradually increases over the period of the buybacks. Stimart testified that this will result in savings to retail ratepayers in the hundreds of millions of dollars through the rest of this century.

We hold that the Commission properly found that the Catawba sales agreements, as a whole, were reasonably and prudently entered into by Duke as a means of financing completion of the Catawba Nuclear Station. The evidence supports the Commission's finding that financing charges have been minimized as a result of the Catawba sales, and that these savings will benefit retail ratepayers. The buyback provisions of the Catawba contracts were an integral and inseparable part of the total agreement package, and cannot be viewed in isolation. The Commission found that the price paid by Duke for purchased power under the buyback provisions is reasonable, and calculated the rates allowed Duke in this case accordingly. Rates fixed by the Commission are deemed prima facie just and reasonable. N.C.G.S. § 62-94(e) (1982). The party attacking the rates established by the Commission bears the burden of proving their impropriety. *State ex rel. Utilities Comm. v. Duke Power Co.*, 305 N.C. 1, 287 S.E. 2d 786. Appellants have not met that burden here, and we therefore affirm the Commission's ratemaking treatment of the buyback provisions.

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paying less than they are required to pay under the Catawba contracts—not, as the Commission contends, more.

Duke's retail customers might also be freezing in the dark. The Commission has determined that Catawba Unit 1 is used and useful in providing electric utility service to retail ratepayers in North Carolina, and that it does not represent excess generating capacity within Duke's system. Thus, we can infer that when Duke decided to complete Catawba, some method of either producing power or reducing demand was needed in order to prevent future shortages. Simply doing nothing was not an option. It is therefore not a reasonable basis for comparison.

B.

[8] The so-called "precommercial McGuire reliability exchange" provisions of the Catawba contracts give the Catawba purchasers the right to receive power from Duke's McGuire Nuclear Station at very low rates prior to the completion of Catawba Unit 2. The price paid by the Catawba buyers for this power reflects Duke's actual production cost, but does not include any charge for the capital costs of the McGuire Station. Various intervenors in this case proposed adjustments that would remove from Duke's rate-base and operating expenses a portion of the McGuire Nuclear Station equal to the percentage of that station's output sold to the Catawba purchasers. Intervenors argued that the adjustment was required because this portion of McGuire was serving the Catawba buyers and not North Carolina retail ratepayers.

A similar if not identical claim was made in Duke's 1984 general rate case, Docket No. E-7, Sub 373. In that case the Commission found that the entire McGuire Nuclear Station was used and useful to North Carolina retail ratepayers, and this Court affirmed. *State ex rel. Utilities Comm. v. Carolina Utilities Customers Assoc., Inc.*, 314 N.C. 171, 333 S.E. 2d 259.

In the present case, Duke chairman Lee testified that the reliability exchange provisions of the Catawba contracts were a necessary part of the sale, insisted upon by the purchasers. Duke's witnesses also pointed out that the exchange provisions in the contracts work both ways; once the Catawba station is completed, Duke will be entitled to receive power from Catawba in the event of an outage at McGuire. The exchange provisions thus tend, in the long run, to even out the effects of outages at both Catawba and McGuire, thereby providing stability to all parties, including Duke's retail customers. In addition, because McGuire is older than Catawba, it probably will be retired first. If so, benefits of the reliability exchange will then flow exclusively to Duke's retail customers.

Based on this evidence, the Commission again found that the entire McGuire station is used and useful. The Commission stated:

> No party has presented any facts which would cause the Commission to change its opinion with respect to the precommercial McGuire reliability exchange. In fact, the evidence in

> this case is even more compelling. . . . Duke presented overwhelming evidence in this case as to the benefits of the Catawba Sale Agreements with which the Commission has agreed. It clearly would be inequitable to pass on these benefits to the North Carolina retail ratepayers without also requiring the North Carolina retail ratepayers to pay the costs associated with the Catawba Sale Agreements. In addition . . . the McGuire reliability exchange is itself a fair sharing of costs which will be beneficial to the North Carolina retail ratepayers as well as to the Catawba Purchasers and their customers, who also include retail ratepayers in North Carolina. Finally, the Commission believes that consistency in regulation is important and should not be abandoned except for solid and legitimate reasons.

Appellants' argument appears to be that they did a better job of countering Duke's evidence in this case than they did in the 1984 rate case, and therefore our decision with respect to the reliability exchanges ought to be different this time. We are not persuaded. The reasons for our affirmance of the Commission's decision in the earlier case still exist. The precommercial McGuire reliability exchange provisions are an inseparable part of the Catawba sales agreements. *Carolina Utilities Customers Assoc.*, 314 N.C. at 183, 333 S.E. 2d at 267. We have already determined with respect to the buyback provisions that the Commission could properly find that the Catawba contracts, on balance, were beneficial to North Carolina retail ratepayers. We hold, in sum, that the Commission's inclusion of the entire McGuire Nuclear Station in Duke's ratebase is supported by "competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn." *Id.* at 179-80, 333 S.E. 2d at 265.

C.

[9] NCMPA agreed to purchase 75 percent of Catawba Unit 2 in March 1978, and the sale was closed in December of that year. At the time of the closing, the buyback provisions of Duke's contract with NCMPA stated that Duke would buy back the municipalities' Catawba capacity in amounts ranging from 50 percent the first year to zero percent by the end of the fifteenth year. The reliability exchange provisions of the same contract stated that

NCMPA would be entitled to receive power from the McGuire Nuclear Station if commercial operation of either Catawba unit was delayed more than a year from the dates specified in the contract. When Duke and NCMPA reached agreement in 1978 they expected Unit 1 to begin commercial operation in July 1981; thus, the date on which NCMPA could "trigger" its right to McGuire power was 1 July 1982.[8] The trigger date for Unit 2 was 1 January 1984.

In August 1980, PMPA agreed to purchase the remaining 25 percent of Catawba Unit 2 on terms essentially similar to those previously accepted by NCMPA, except that the reliability exchange trigger date for Unit 1 was set at 1 July 1983. Litigation in the South Carolina courts then delayed the closing of this sale. This litigation was resolved favorably to Duke and PMPA in early 1982, but PMPA still refused to close. In June 1982 a study conducted by PMPA concluded that purchase of a portion of the Catawba Nuclear Station under the terms of the original agreement was no longer feasible because of changes in interest rates and capital market conditions.

Duke, once again in dire financial straits, considered the sale to PMPA to be an "absolute financial necessity" and agreed to sweeten the pot. Specifically, Duke agreed to buy back an extra 47 percent of PMPA's Catawba capacity in the first year of the contract, plus an additional 50 percent of PMPA's capacity in each of the succeeding nine years. In return, PMPA agreed to delay its reliability exchange trigger dates to 1 January 1984 for Unit 1 and 1 July 1986 for Unit 2.[9] The agreement between Duke and PMPA was signed in October 1982, but closing was again delayed —this time until December 1984—by litigation in the South Carolina courts.

Meanwhile, in November 1982, Duke offered NCMPA the increased buyback it had just negotiated with PMPA. This amend-

8. NCMPA apparently elected not to trigger its right to receive McGuire power on 1 July 1982, but intended to do so on 1 January 1983. As explained below, Duke's desire to delay this trigger date was a substantial factor in the company's decision to amend its contract with NCMPA in November 1982.

9. Duke witness Lee testified that this delay in the trigger dates did not equal the cost of the increased buyback, but was an attempt on the part of the company to obtain maximum benefit for its retail ratepayers.

ment, which increased Duke's costs by approximately $250 million, was offered pursuant to a "most favored nation" clause in Duke's original agreement with NCMPA. The clause provides:

> If Duke enters into an interconnection agreement with the South Carolina Municipal Systems [PMPA] and/or any other entity relating to the sale to such entity of an ownership interest in Catawba Nuclear Station on more favorable terms than those contained in this Agreement, Duke will make such more favorable terms available to NCMPA provided NCMPA agrees to all the terms and conditions in such agreement relating to the net monetary benefits thereunder and the respective risks undertaken by the parties to that agreement.

NCMPA readily agreed to the increased buyback offered by Duke. In return, NCMPA agreed to delay the reliability exchange trigger dates in its contract to 1 July 1983 for Unit 1 and 1 January 1986 for Unit 2.

The Utilities Commission, in allowing Duke to recover the cost of its 1982 amendments to the NCMPA contract, found that

> [t]he contracts entered into by Duke Power Company to sell a major portion of the Catawba Nuclear Station to [NCMPA, PMPA, NCEMC and Saluda] . . . *and all amendments thereto* . . . are reasonable and prudent. These contracts collectively have resulted in the cost of electricity to the Company's North Carolina retail ratepayers being substantially lower than the cost of electricity would have been if Duke had itself financed the entire plant. (Emphasis added.)

The most favored nation clause in Duke's original contract with NCMPA was found to be an "essential part" of the overall agreement, and the Commission declined to view it in isolation.

The Public Staff contends that the Commission erred when it concluded that Duke acted reasonably and prudently in amending its contract with NCMPA in November 1982. Specifically, appellant argues that the amendments were not compelled by the most favored nation clause in Duke's original contract with NCMPA. This is because (1) the agreement with PMPA was not

closed until December 1984, and (2) by the time the PMPA sale was closed, NCMPA could not have satisfied the condition precedent in the most favored nation clause.[10]

This Court's function on appeal is *not* to determine whether, as a matter of law, the 1982 amendments to Duke's contract with NCMPA were legally mandated by the most favored nation clause. Instead, we must examine the action taken by the Utilities Commission to see if its findings and conclusions with respect to this matter—i.e., that Duke acted reasonably and prudently in amending the contract—are supported by "competent, material and substantial evidence in view of the entire record." N.C.G.S. § 62-94(b)(5). Legal interpretations of the most favored nation clause, in other words, are relevant only insofar as they bear upon whether Duke made a reasonable and prudent business judgment when it amended its contract with NCMPA. *Cf. State ex rel. Utilities Comm. v. General Telephone Co.*, 281 N.C. 318, 345, 189 S.E. 2d 705, 722 ("the management . . . of a public utility . . . rests with its board of directors in the absence of clear mismanagement or abuse of discretion").

As the Commission noted in its order of 17 September 1985, it is obvious that the most favored nation clause was not included in the original agreement between Duke and NCMPA for Duke's benefit. Duke witness Lee testified that NCMPA had insisted on the provision. Lee's testimony was corroborated by James Horwood, an attorney who represented NCMPA in the negotiations. Horwood stated that the most favored nation clause was important to NCMPA because of its economic value and because NCMPA would have been placed in a politically untenable position if another power agency obtained a better deal from Duke. We think this evidence is sufficient to support the Commission's finding that the clause in question was an "essential part" of Duke's original contract with NCMPA. We have, of course, already approved the Commission's finding that the Catawba sales agreements, as a whole, were reasonably and prudently entered into by Duke.

10. At least one of appellant's other arguments has been discussed elsewhere in this opinion. The Public Staff, along with Wells Eddleman, argues that any "savings" associated with the Catawba contracts are illusory because without the contracts Catawba never would have been built. This argument was considered and rejected in note 7, *supra*.

Duke amended its contract with NCMPA in November 1982, even though the deal with PMPA was not closed until December 1984. Duke witness Lee testified that he had been advised that the most favored nation clause in the company's contract with NCMPA did not require Duke to offer the amendment until PMPA closed. Duke chose to offer the amendment early, however, because NCMPA planned to trigger its right to receive cheap McGuire power on 1 January 1983. By amending the contract early, Duke was able to get the reliability exchange trigger dates pushed back. In addition, witness Lee testified that he expected the PMPA sale to be closed in early 1983, and could not have foreseen the lengthy delay caused by additional litigation in South Carolina.

Witness Horwood, counsel for NCMPA, testified that in his opinion the most favored nation clause required Duke to offer the PMPA terms to NCMPA as soon as the agreement with PMPA was signed, and not when the closing occurred. He stated that if Duke had not done so he would have recommended that NCMPA take legal action to enforce the provision.

The Commission found that Duke's renegotiation of the NCMPA contract in November was prudent and in the best interests of North Carolina retail ratepayers.

> While the language of the most favored nation clause is such that reasonable men may differ as to whether Duke was required to offer the amendments in 1982 or could have waited until after PMPA closed, it is clear that Duke would have been required to offer the amendments at some point in time. Duke, by offering the amendments when it did, acted in the best interests of the Company's North Carolina retail ratepayers by diminishing the period of time the precommercial McGuire reliability exchange was in effect. Moreover, as witness Lee testified, when Duke renegotiated the Interconnection Agreement with NCMPA, Duke expected PMPA to close within a short period of time. This testimony, and the reasonableness of this assumption, was uncontradicted. The renegotiation in November 1982, rather than in early 1983 when Duke expected PMPA to close, allowed Duke to avoid the triggering of the precommercial McGuire reliability exchange. Therefore, Duke's objective in renegotiating the

amendments with NCMPA in November 1982 was in the retail ratepayers' best interests and was reasonable and prudent.

We hold that the evidence is more than sufficient to support the Commission's conclusion. Witness Lee testified that Duke expected to close the sale to PMPA in early 1983. As the Commission noted, Lee's testimony, and the reasonableness of this assumption, were uncontradicted. Instead of waiting for the closing, Duke took action to prevent NCMPA from triggering its right to receive cheap power under the precommercial McGuire reliability exchange. Assuming for the sake of argument that Duke was not legally required to amend the NCMPA contract until the PMPA closing occurred, we think it was eminently reasonable for Duke to go ahead with the amendment in November 1982. Indeed, it probably would have been unreasonable to wait until the reliability exchange trigger date had passed.

The Public Staff contends that Duke would not have been required to amend its contract with NCMPA if company officials had waited until December 1984 to make the offer. This is because NCMPA would no longer have been able to accept—as required by the most favored nation clause—risks and benefits equal to those undertaken and enjoyed by the parties to the PMPA agreement. Specifically, NCMPA could not have agreed to delay the reliability exchange trigger date for Catawba Unit 1 because the exchange would have been triggered on 1 January 1983.

The Commission found, and we agree, that triggering of the McGuire exchange on the original schedule would not have prevented the most favored nation clause from taking effect. The clear intent of the most favored nation clause, as noted by the Commission, is to equalize the net monetary benefits to NCMPA and, in this case, PMPA. If necessary, an offset could have been implemented to reflect benefits received by NCMPA under the reliability exchange provisions of its original contract with Duke. Thus, Duke could have reasonably believed in November 1982 that the most favored nation clause would mandate amendment of the NCMPA contract when the PMPA sale was closed, as Duke then expected, in early 1983.

The Public Staff also points out that NCMPA did not agree to the same reliability exchange trigger dates accepted by PMPA. It does not necessarily follow, however, that the Commission erred when it determined that Duke acted reasonably and prudently when it amended the NCMPA contract in November 1982. The most favored nation clause does not require what Duke aptly terms "a slavish mirroring of all terms contained in another party's contract." When Duke and NCMPA negotiated the amendment in November 1982, Duke took the position that the most favored nation clause required NCMPA to accept the same trigger date provisions negotiated by PMPA. NCMPA, on the other hand, insisted that it was merely required to accept delays equal to the difference between the trigger dates in PMPA's revised agreement with Duke and those in the 1980 PMPA agreement, which was never closed. Duke and NCMPA eventually compromised and reached an agreement that the Commission characterized as being "somewhere in the middle between their respective positions." In light of the disagreement as to what the most favored nation clause required, the Commission concluded—and we agree—that Duke acted reasonably in its negotiations with NCMPA.

Appellant further argues that any benefits flowing from the delayed trigger dates accrued to Duke stockholders, and not to North Carolina retail ratepayers. As the Commission noted, this contention overlooks the fact that Duke, if it had not been able to postpone the exchange, could have filed for rate relief to recoup any costs it incurred. *See State ex rel. Utilities Commission v. Carolina Utilities Customers Association*, 314 N.C. 171, 333 S.E. 2d 259.

Finally, the Public Staff argues that this Court should declare the most favored nation clause in Duke's contract with NCMPA void as against public policy because it permits Duke's cost of doing business to escalate indefinitely. The United States Supreme Court has ruled that a state legislature may pass a statute invalidating indefinite gas price escalation clauses. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 74 L.Ed. 2d 569 (1983). It would be something else again for this Court to void a provision that the Commission found on supporting evidence to be reasonable, and we decline to do so.

In sum, the Commission properly found that Duke Power acted in a reasonable and prudent manner when it amended its contract with NCMPA in November 1982. Therefore, the Commission acted within the scope of its authority when it permitted Duke to recover costs associated with those amendments.

VI.

[10] The Catawba sales agreements provide that Duke Power will buy back capacity and energy from the Catawba purchasers in declining amounts over a period of years. Payments by Duke under the buyback plan have three components: capital costs, operating and maintenance (O&M) costs, and fuel costs. In its application for a rate increase and in testimony before the Commission, Duke proposed that it be allowed to recover these costs in current rates as the payments are made. The Public Staff recommended levelizing capital and O&M costs in order to stabilize this element of expense over time and to avoid "rate shock" to present customers.

The Commission, in its order of 17 September 1985, adopted what might be characterized as a compromise position:

> Since the Catawba sale is in reality a financing mechanism, it makes sense to levelize the Company's capacity capital costs and give rate stability for the period of the buy-back. . . . [S]uch levelization will serve to better align present and future customer payment responsibilities with the benefits which flow from the buy-back arrangements over the lives of those contracts. . . .
>
> Thus, the Commission concludes the purchased power capacity capital costs from Catawba Unit 1 should be reflected in Duke's cost of service levelized over the lives of the applicable contracts. . . . Annual demand O&M and fuel charges, which are by their very nature more variable than capacity capital charges, will not be levelized, but will be included in the cost of service as proposed by Duke.

The Commission's decision to levelize capacity capital costs is not challenged in this appeal. The Public Staff, however, contends that the Commission improperly refused to levelize the O&M component of the buyback costs. According to appellant, "there was not a shred of testimony" to support the Commission's conclusion

that O&M costs are more variable than capital costs, and therefore the Commission's refusal to levelize the O&M component was arbitrary, capricious, and an abuse of discretion.

We disagree. The Commission has been given the authority and responsibility for setting rates for public utilities. In doing so, it must have room to exercise its discretion and judgment. There is, in fact, little if anything in the record to support the Commission's conclusion that O&M costs are more variable than capital costs. Common sense, however, leads us to believe that the conclusion is a reasonable one. Operating and maintenance costs appear to be more like fuel costs than capital costs, in that they are likely to fluctuate and therefore are difficult to levelize. Capital costs, in contrast, can be more precisely ascertained because they are in the nature of principal and interest payments under a mortgage. In any event, there is nothing in the record to suggest that the Commission's conclusion with respect to the variability of O&M costs is wrong. Appellant claims that it "could advance extensive and well grounded substantive reasons why the Commission's conclusion is incorrect," but no such reasons have been offered. We hold, therefore, that the Public Staff has failed to meet its burden of demonstrating that the Commission's decision not to levelize O&M costs was unjust or unreasonable. N.C.G.S. § 62-94(e).

Under the Commission's levelization plan, Duke's capital costs under the buyback plan will not be fully reflected in the rates approved in this case. Consequently, the Commission ruled that the "difference between the amount included in purchased power expense and Duke's actual capacity payments should be placed in a deferred account and should accrue carrying costs at the Company's existing AFUDC rates." Appellant Wells Eddleman contends that "only plant under construction collects Allowance for Funds Used During Construction," and therefore the Commission cannot grant any AFUDC for Catawba Unit 1 because it is now in commercial operation.

We need only point out that the Commission has not granted Duke an AFUDC *as such* in this case, but has merely permitted the recovery of "carrying costs" computed by reference to the rate established for AFUDC purposes. Under the levelization plan, Duke's present buyback costs are higher than the corre-

sponding amount it is authorized to collect in current rates. The difference is money being provided by Duke. As Duke notes in its brief, "[t]he carrying charge allowed by the Commission recognizes that there is a cost involved in providing these funds." We therefore decline to disturb the Commission's order with respect to this matter.

VII.

[11] Duke Power began constructing its Perkins and Cherokee nuclear stations in the mid-1970s. Within a few years the rate of increase in demand for electricity dropped markedly, and Duke cancelled both stations at considerable expense. In these proceedings the Utilities Commission found that (1) Duke's decisions to build the Perkins and Cherokee stations were prudent when made; (2) the decisions to cancel these plants were likewise prudent; and (3) under these circumstances it is reasonable and necessary to allow the company to recover the sunk costs in a fair and equitable manner. The question presented in this appeal by the Attorney General, the City of Durham and Wells Eddleman is whether the Commission properly allowed Duke Power to recover costs associated with its abandoned Perkins and Cherokee nuclear stations.

The Court is evenly divided with respect to this matter, Justice Meyer not participating. Therefore, following the uniform practice of this Court, the decision of the Utilities Commission 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).

VIII.

[12] Dr. Ben Johnson, the Public Staff's cost of capital witness in these proceedings, recommended that Duke receive an allowed return on equity of 14 percent. Duke's witness, Dr. Charles Olson, recommended a return of 15 to 15.5 percent. The Commission gave Duke an allowed return on equity of 14.9 percent.

The Public Staff contends on appeal that the record, considered as a whole, does not support the Commission's judgment. According to appellant, "the record as a whole demonstrates that the Commission gave Duke a return calculated appropriately for a utility incurring the risks normally incident to an ordinary electric utility, while simultaneously insulating Duke from all such

risks," especially with respect to Duke's 1982 amendments to its contract with NCMPA.

We do not believe the Commission has insulated Duke from all risks associated with the operation of a public utility; thus, appellant's argument falls of its own weight. Moreover, we have held that the Commission may reject uncontradicted testimony concerning what constitutes a reasonable rate of return without even stating its reasons. *State ex rel. Utilities Comm. v. Duke Power Co.*, 305 N.C. 1, 287 S.E. 2d 786. Here the Commission properly exercised its discretion by setting a rate of return within the range of those recommended by witnesses for Duke and the Public Staff.

The Attorney General, the City of Durham and the Public Staff also contend that the Commission erred in finding that Duke's capital structure included a common equity component of 45.52 percent. We find no error in this essentially factual determination. In its application for a rate increase Duke stated that its capital structure as of 30 June 1984, the end of the test year, consisted of 44.24 percent long-term debt, 11.55 percent preferred stock, and 44.21 percent common equity. These figures were updated through 31 May 1985 at the hearing to reflect a common equity component of 45.73 percent. Witnesses for Duke testified that it was necessary to update the company's capital structure because the rate of return recommended by Duke and other parties was based on the risk inherent in Duke's actual capital structure at the time of the hearing, and not on the somewhat higher risk factors present at the end of the test period.

The Commission found that Duke's 31 May 1985 figure, with one modification, was reasonable and appropriate for use in this case.[11] We agree. N.C.G.S. § 62-133(c) permits the Commission to consider "such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues or the cost of a public utility's property used and useful . . . which is based upon circumstances and events occurring up to the time the hearing is closed." Evidence

11. The Commission agreed with Public Staff witness Johnson that the capital structure should be adjusted to exclude Duke's equity investment of approximately $24 million in two nonregulated subsidiaries, Cresent Land & Timber Corporation and Mill Power Supply Company.

of a change in Duke's common equity ratio was therefore admissible and provided an adequate basis for the Commission's decision with respect to this question.

IX.

[13] Evidence before the Commission indicated that Duke's residential class of customers pays less than its cost of service, while general service and industrial customers pay more than their cost of service. A uniform, across-the-board rate increase would tend to exacerbate this disparity. In an attempt to narrow the disparity and keep it within what the Commission has called a "10 percent band of reasonableness," Duke proposed that the dollar allowance it received because of increased availability of general and industrial time-of-use rates be allocated to all customer classes, including residential. This would have the effect of shifting a portion of Duke's revenue requirement from the general and industrial customer classes to the residential class, thereby narrowing the disparity between their respective rates of return. The Public Staff recommended an alternative method of narrowing the gap.

The Commission adopted Duke's proposal and explained its decision in the following terms: "The Commission declines to adopt the Public Staff's recommendation as it has concluded that Duke's proposal . . . results in a longer and more measured stride toward equalizing the respective class rates of return."

The Public Staff contends that the Commission's rationale for its decision is "just plain wrong." In support of this argument appellant has provided the Court with a sheet full of numbers and an unexplained assertion that these numbers prove that the Public Staff's proposal narrows the disparity in rates of return to a greater degree than Duke's proposal. Duke, in response, presents us with an exhaustive challenge to the accuracy of the Public Staff's calculations.

We will not pass judgment on which party in this case employs the better mathematicians. The Utilities Commission, not this Court, is the finder of fact in this proceeding. *State ex rel. Utilities Comm. v. Carolina Coach Co.*, 260 N.C. 43, 132 S.E. 2d 249 (1963); *State ex rel. Utilities Comm. v. Haywood Electric Membership Corp.*, 260 N.C. 59, 131 S.E. 2d 865. Findings of fact

made by the Commission are prima facie just and reasonable on appeal. N.C.G.S. § 62-94(e). The burden of showing the impropriety of rates established by the Commission lies with the party alleging such error. *State ex rel. Utilities Comm. v. Duke Power Co.*, 305 N.C. 1, 287 S.E. 2d 786. Appellant has not met that burden here.

X.

[14] Appellants, in their final assignments of error, challenge the Commission's decisions concerning several federal income tax matters. First, the Attorney General contends that the Commission erred by setting rates based on expense levels which did not reflect the proper allocation of certain investment tax credits. The tax credit at issue here—the Job Development Investment Tax Credit—is designed to stimulate employment by encouraging investment in new plants and equipment. It allows taxpayer utilities to reduce their tax liability by a percentage of their investment in qualifying property purchased during the tax year. *State ex rel. Utilities Comm. v. Carolina Telephone and Telegraph Co.*, 61 N.C. App. 42, 300 S.E. 2d 395 (1983).

When setting rates for a public utility, the Commission takes into consideration the utility's federal tax liability. This liability is calculated without deducting the investment tax credit at issue here. Therefore, the credit—if it is ultimately allowed—generates "capital" from ratepayers because funds ostensibly collected for the payment of federal income taxes are never actually paid out by the utility. *See id.*

The Attorney General argues that the Commission should treat the "capital" generated by the Job Development Investment Tax Credit as if it were proportionately contributed by each component of Duke's capital structure. Thus, a portion of the credit would be attributed to debt, a portion to preferred stock, and a portion to common equity. The portion of the credit attributed to Duke's bondholders, multiplied by the cost of that debt, would equal the amount of imputed interest expense related to the credit. Appellant would then deduct this imputed interest expense from Duke's test year level of income tax expense for ratemaking purposes. This rather complicated procedure, known as "interest synchronization," is intended to distribute the

benefits of the investment tax credit between the utility and its ratepayers.

At the hearings in this docket the Attorney General presented evidence that interest synchronization had been viewed favorably by the Internal Revenue Service in a proposed rulemaking issued 21 June 1985. 50 Fed. Reg. 26,385 (1985). Duke, in response, argued that the proposed rulemaking might never become final; consequently, interest synchronization could put the company's entire tax credit at risk if the IRS ultimately determined that the procedure would not be allowed. The Commission, in its 17 September 1985 order, agreed with Duke:

> Attorney General witness Wilson reduces income taxes in cost of service by imputing an interest deduction based on investment tax credits in the income tax calculation. His support for this adjustment is a *proposed* rulemaking issued June 21, 1985, by the IRS stating that this adjustment to tax expense will not be a violation of the IRS normalization rules for investment tax credits.
>
> [Duke] witness Stimart testified that this rulemaking is just a proposal at this time that may or may not be adopted by the IRS, and that if the Commission accepts Dr. Wilson's adjustment and this rulemaking is not adopted by the IRS, the company will be in violation of the IRS normalization rules and will be subject to the loss of investment tax credits, thereby increasing cost of service.
>
> The Commission finds that the company's filing on this matter is consistent with our past decisions and with . . . *State ex rel. Utilities Comm. v. Carolina Telephone Co.*, 61 N.C. App. 42 (1983). Therefore the Commission rejects the adjustment proposed by Dr. Wilson.

Appellant contends that the Commission's decision with respect to this matter was affected by error of law and was arbitrary and capricious. We disagree. At the time it issued its order in this case, the Commission had ample reason to reject interest synchronization. Our Court of Appeals had earlier determined that such an adjustment would violate sections of the Internal Revenue Code that limited the extent to which benefits of the tax credit could be "flowed through" to ratepayers.

Carolina Telephone, 61 N.C. App. at 49, 300 S.E. 2d at 399. Moreover, there was no assurance that the proposed rulemaking concerning interest synchronization would ever become final. The Commission therefore acted within its discretion and in conformance with applicable judicial precedent when it decided not to put Duke's receipt of the tax credit at risk by adopting the Attorney General's proposal for interest synchronization.

We note, however, that final regulations concerning the ratemaking treatment of investment tax credits were issued by the Internal Revenue Service after the Commission's decision in this case. 51 Fed. Reg. 18,775 (1986). These regulations "clarify that interest synchronization is permitted under a ratable flow-through method of accounting." *Id.* at 18,776. The Commission should take these regulations into account in future ratemaking proceedings, consistent with its responsibility to set utility rates as low as may be reasonably consistent with the requirements of due process. *State ex rel. Utilities Comm. v. Duke Power Co.*, 285 N.C. 377, 206 S.E. 2d 269 (1974).

[15] Finally, the Public Staff contends that the Commission erred when it refused to seek certain private letter rulings from the IRS.[12] Appellant proposed various adjustments to the ratemaking treatment of accumulated deferred taxes and investment tax credits which were rejected by the Commission in its order of 17 September 1985. In its 17 October 1985 motion for reconsideration, the Public Staff requested that the Commission order Duke to seek private letter rulings from the IRS as to each issue, and pending these rulings to establish various deferred accounts, the balance of which would be refunded to ratepayers if the IRS ruled in favor of the Public Staff's position. The Commission denied appellant's motion for reconsideration, stating:

> The Commission has carefully considered the tax matters that are the subject of the proposed private letter rulings from the IRS. In order to gain proper perspective, it should be noted that these matters were extensively investigated and reviewed during the public hearings in this

12. The Attorney General makes an identical contention with respect to the Commission's treatment of the Job Development Investment Tax Credit. We reject this assignment of error for the reasons stated here.

docket. The Commission took great care and performed in-depth and prolonged analysis in determining the appropriate ratemaking treatment to be afforded these items. These determinations were set out in the Order of September 17, 1985, and were discussed therein. Based on the foregoing, and the reaffirmation that the decisions reached in the Order of September 17, 1985, were fair and reasonable to both Duke and its ratepayers, the Commission concludes that it would not be appropriate to order Duke to request the private letter rulings. Further, the Commission concludes that the requested deferred accounting treatment would be inappropriate and should be denied.

The Public Staff does not seek review of the merits of its proposed adjustments, but appeals only the Commission's refusal to order Duke to seek private letter rulings with respect to these matters. We hold that the Commission acted properly in this instance. The General Assembly has given the Commission, not this Court, the duty and power to establish public utility rates. *State ex rel. Utilities Comm. v. Westco Telephone Co.*, 266 N.C. 450, 146 S.E. 2d 487 (1966). The Commission's subjective judgment concerning the need for a private letter ruling will not be disturbed simply because this Court's subjective judgment might have been different. *See State ex rel. Utilities Comm. v. Virginia Electric & Power Co.*, 285 N.C. 398, 206 S.E. 2d 283 (1974). Whether to seek such a ruling is a matter within the Commission's discretion, and appellant has failed to show any abuse of that discretion.

The order of the Utilities Commission is

Affirmed.

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

STATE OF NORTH CAROLINA v. PERCY ROBERT MOORMAN

No. 577PA86

(Filed 28 July 1987)

1. **Rape and Allied Offenses § 3— rape—sleeping victim—force implied in law**

The Court of Appeals erred by arresting judgment on a rape indictment on the ground that there was a fatal variance between the indictment and the proof where the indictment alleged force and the evidence showed that the victim had been asleep when intercourse began. In the case of a sleeping or similarly incapacitated victim, it makes no difference whether the indictment alleges that the intercourse was by force and against the victim's will or whether it alleged merely intercourse with an incapacitated victim; in such a case, sexual intercourse with the victim is ipso facto rape because the force and lack of consent are implied in law.

2. **Constitutional Law § 48— rape—ineffective assistance of counsel—prejudicial**

Defendant was denied his right to effective assistance of counsel in a trial for rape where defense counsel's investigation and trial preparation was limited and well below the standard of practice routinely engaged in by attorneys defending serious criminal cases in Wake County; defense counsel appeared disheveled and rumpled during the trial and demonstrated marked changes in mood from affable to lethargic, from aggressive to inattentive and drowsy; defense counsel's opening statement and wide-ranging defense theories were unsupported by the evidence and forecasted evidence did not materialize; defense counsel used drugs during the trial which subsequently impaired his sensory perceptions, reasoning, and judgment; defense counsel dozed off briefly during trial on at least one occasion; defense counsel's closing argument was deficient for crude language and defense counsel abandoned his client's interests during the closing argument by indicating that his client's testimony was unworthy of belief; and there was prejudice from defense counsel's deficiencies because the principal issue at trial was one of credibility.

Justice MEYER concurring in part and dissenting in part.

ON the state's petition for discretionary review of a decision of the North Carolina Court of Appeals, 82 N.C. App. 594, 347 S.E. 2d 857 (1986), which arrested judgment entered at the 28 May 1985 Session of Superior Court in WAKE County by *Bailey, J.*, presiding, in case No. 84 CRS 61128, wherein defendant was convicted of second degree rape. Defendant presents questions pursuant to Appellate Procedure Rule 16(a) affecting not only case No. 84 CRS 61128 but also case No. 84 CRS 61127 (misdemeanor breaking) and case No. 84 CRS 66019 (second degree sexual offense), in both of which the Court of Appeals found no error. Heard in the Supreme Court 16 April 1987.

Lacy H. Thornburg, Attorney General, by David Roy Blackwell, Assistant Attorney General, and John H. Watters, Assistant Attorney General, for the state appellant.

Tharrington, Smith & Hargrove, by Roger W. Smith, George T. Rogister, Jr., J. David Farren, Burton Craige, and G. Bryan Collins, Jr., for defendant appellee Moorman.

EXUM, Chief Justice.

Questions presented dispositive of the appeal are whether the Court of Appeals erred in (1) arresting judgment on defendant's conviction of second degree rape and (2) concluding defendant was not denied his right to effective assistance of counsel at trial. We answer both questions affirmatively, reverse the decision of the Court of Appeals and award defendant a new trial in all cases.

I.

Defendant was tried on indictments charging first degree burglary, second degree rape, and second degree sexual offense at the 11 February 1985 Session of Superior Court in Wake County before Judge Bailey. He was convicted by the jury as charged in the rape and sexual offense cases and of misdemeanor breaking on the burglary indictment. Judge Bailey ordered a presentence diagnostic study before imposing sentences.

On 18 March 1985 defendant moved in writing to have his trial counsel, Mr. Jerome Paul, removed from the case. The motion was allowed on the same day, and Mr. Roger Smith then entered the case as counsel for defendant.

On 23 May 1985 defendant moved in writing to set aside the verdicts and to dismiss the charges in the rape and sexual offense cases for insufficiency of the evidence. This motion was denied at the 28 May 1985 Session of Superior Court at which session the trial court, after a sentencing hearing, imposed sentences of imprisonment as follows: two years for misdemeanor breaking; twelve years for second degree rape; and twelve years for second degree sexual offense. All sentences were ordered to run concurrently, and defendant was sentenced in all cases as a Committed Youthful Offender. Defendant appealed from these judgments to the Court of Appeals.

On 10 June 1985 defendant filed a Motion for Appropriate Relief by which he sought a new trial on the ground that his trial counsel, Mr. Paul, provided such ineffective assistance of counsel that defendant was convicted in violation of the federal and state constitutions. An evidentiary hearing on this motion was held, beginning 22 July 1985, before Judge Donald Stephens. Extensive evidence was taken on this motion; and on 9 August 1985 Judge Stephens, after making full findings and conclusions, denied the motion. Defendant appealed from this order to the Court of Appeals.

II.

[1] The first question presented is whether the Court of Appeals erred in arresting judgment on the rape indictment on the ground there was a fatal variance between the indictment and the proof. We conclude that it did.

The rape indictment alleged that defendant "unlawfully, willfully and feloniously did ravish and carnally know [the victim] by force and and against her will, in violation of N.C.G.S. 14-72.3."

At trial evidence for the state tended to show as follows:

On the evening of 31 August 1984 the victim was out with friends. She returned to her dorm room at approximately 1:00 a.m. She entered her room, closed the door, turned on the radio and fell asleep fully clothed. The victim dreamed she was engaging in sexual intercourse. She awoke to find defendant on top of her having vaginal intercourse with her. She tried to sit up, but defendant pushed her back down. Afraid her attacker might injure her, the victim offered no further resistance. Thereafter defendant engaged in anal intercourse with the victim.

The victim went to the door and turned on the light. Defendant told her not to call the police. He said, "I'm Lynn's (the victim's roommate) friend, I thought you were Lynn and I wouldn't have done this if I had known it was you." The victim told several friends about the incident, but did not report the incident to the North Carolina State Public Safety Department or make a statement until two days later.

Defendant testified in his own behalf as follows:

He knocked on the victim's door. Hearing music, he believed his friend, Lynn, to be present and entered the room. Defendant observed a girl lying on the bed with her back facing him. Defendant called out the name Lynn but received no response. He then kissed the girl on the neck. The girl turned over and invited him to engage in oral sex. Defendant assisted the girl in removing her underpants. They engaged in oral sex, anal and vaginal intercourse. Following a brief rest, they engaged in sexual intercourse again. The girl then ran into the bathroom. When she returned, defendant noticed for the first time that his sexual partner was not Lynn. The victim told defendant not to worry because it could have happened to anybody. Defendant then left.

The Court of Appeals arrested judgment as to the charge of second degree rape. It first noted that N.C.G.S. § 14-27.3 provided for two theories of second degree rape: one theory is that the vaginal intercourse was committed "by force and against the will" of the victim, *id.*, (a)(1); the other theory is that such intercourse was committed against one who is "mentally defective, mentally incapacitated, or physically helpless, and the person performing the act should reasonably know" it. *Id.*, (a)(2). It then noted that N.C.G.S. § 14-27.1(3) defines "physically helpless" to mean "(i) a victim who is unconscious; or (ii) a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act." The Court of Appeals concluded that a sleeping person is a "physically helpless" person under N.C.G.S. § 14-27.3(a)(2). It held that an indictment for the rape of one who is asleep must proceed on the theory that the victim was "physically helpless" pursuant to N.C.G.S. § 14-27.3(a)(2) and not on the theory that the rape was "by force and against the will" of the victim as provided in subsection (a)(1). The result in the Court of Appeals was that there is a fatal variance between the indictment and the proof presented at trial, and judgment was arrested.

We conclude that while the state might have elected to proceed under N.C.G.S. § 14-27.3(a)(2), it was not required to do so and that the evidence in this case supports a conviction of rape on a theory of force and lack of consent. There was, therefore, no fatal variance between the indictment and the proof.

At common law rape occurred when there was sexual intercourse by force and without the victim's consent. *State v. Hines*, 286 N.C. 377, 380, 211 S.E. 2d 201, 203 (1975); *accord, State v. Burns*, 287 N.C. 102, 116, 214 S.E. 2d 56, 65, *cert. denied*, 423 U.S. 933, 46 L.Ed. 2d 264 (1975). Rape also occurred when there was sexual intercourse with a victim who was asleep or otherwise incapable of providing resistance or consent. *Harvey v. State*, 53 Ark. 425, 14 S.W. 645 (1890); *Brown v. State*, 138 Ga. 814, 76 S.E. 379 (1912); *Territory of Hawaii v. Tatsuo Noguchi*, 38 Haw. 350 (1949); *State v. Lung*, 21 Nev. 209, 28 P. 235 (1891); *Payne v. State*, 40 Tex. Crim. 202, 49 S.W. 604 (1899); 75 C.J.S. *Rape* § 11 (1952); 3 Wharton's Criminal Law § 289 (1978).

In *Brown v. State*, 174 Ga. App. 913, 331 S.E. 2d 891 (1985), defendant had sexual relations with the victim as she lay comatose in her hospital bed. The court said that "[s]exual intercourse with a woman whose will is temporarily lost from intoxication, or unconsciousness arising from use of drugs or other cause, or sleep, is rape." 174 Ga. App. at 913, 331 S.E. 2d at 892. An Oklahoma court held that an information which charged the accused with an act of sexual intercourse with a female while she was asleep and at the time unconscious of the nature of the act was sufficient to charge the accused with second degree rape and to give the court jurisdiction to pronounce judgment and sentence. *In re Childers*, 310 P. 2d 776 (Okla. Crim. App. 1957). The court said: "It is easily understood, and universally recognized, that a person who is unconscious by reason of intoxication, drugs, or sleep, is incapable of exercising any judgment in any matter whatsoever." *Id.* at 778. In *State v. Welch*, 191 Mo. 179, 89 S.W. 945 (1905), the court said:

> [T]he general, if not universal, rule is that if a man have connection with a woman while she is asleep, he is guilty of rape, because the act is without her consent. . . . We are, therefore, unanimously of opinion that the crime, which the evidence in this case tended to prove, of a man's having carnal intercourse with a woman, without her consent, while she was, as he knew, wholly insensible so as to be incapable of consenting, and with such force as was necessary to accomplish the purpose, was rape.

191 Mo. at 187-88, 89 S.W. at 947.

As can be seen from the foregoing cases the common law implied in law the elements of force and lack of consent so as to make the crime of rape complete upon the mere showing of sexual intercourse with a person who is asleep, unconscious, or otherwise incapacitated and therefore could not resist or give consent. Our rape statutes essentially codify the common law of rape. N.C.G.S. § 14-27.2 *et seq.* (1986); *State v. Booher*, 305 N.C. 554, 290 S.E. 2d 561 (1982); *State v. Locklear*, 304 N.C. 534, 284 S.E. 2d 500 (1981); *State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977). In the case of a sleeping, or similarly incapacitated victim, it makes no difference whether the indictment alleges that the vaginal intercourse was by force and against the victim's will or whether it alleges merely the vaginal intercourse with an incapacitated victim. In such a case sexual intercourse with the victim is *ipso facto* rape because the force and lack of consent are implied in law.

III.

[2] The second question presented is whether the Court of Appeals erred in concluding defendant was not denied his right to effective assistance of counsel at trial in violation of his rights guaranteed by the Sixth Amendment to the United States Constitution and Article I, §§ 19 and 23 of the North Carolina Constitution. We conclude that it did.

A hearing on defendant's motion for appropriate relief was held at the 23 July 1985 Criminal Session of the Superior Court of Wake County, Judge Stephens presiding. At the proceeding, defendant offered evidence which may be summarized as follows:

Several attorneys experienced in defending criminal cases in Wake County testified on defendant's behalf. According to these witnesses it is standard practice among criminal defense lawyers in the county, among other things, to locate and interview witnesses before trial; visit the physical location of any events that bear on the trial; prepare the client to testify at trial and inform him of what is to be expected on direct examination and cross-examination; adopt a defense theory; avoid promising to prove matters in opening statements, without a reasonable belief that evidence exists which supports the promises; and avoid concessions to the jury that defendant's testimony lacks credibility.

Judge Bailey, who presided at defendant's trial, testified that Mr. Paul promised in his opening statement to prove that defendant was physically and psychologically incapable of rape; yet no such evidence was forthcoming. Judge Bailey said it was unusual to make a prediction of evidence that is not produced because to do so seriously undermines your credibility and ultimately your client's credibility with the jury. Judge Bailey also testified that Paul: (1) did not appear to be listening to the state's case; (2) was generally disheveled or rumpled in his appearance, clothing and hair; (3) exhibited marked mood changes—there were times when he appeared alert and aggressive and other times when he appeared lethargic and even drowsy; and (4) appeared to be asleep during the cross-examination of defendant. Judge Bailey said that in his experience the combination of actions exhibited by Paul was unique.

Dorothy Moorman, defendant's mother, testified that during the trial Paul experienced pain and ingested medication to ease the pain. She also corroborated Judge Bailey's testimony that Paul fell asleep during the trial.

According to defendant's testimony at the post-conviction hearing, he never told Paul that it was physically or psychologically impossible for him to commit rape. Defendant said he had no idea what Paul meant when he promised to prove defendant was incapable of rape. Paul never visited the dormitory where the incident occurred; did not locate and interview witnesses before the trial started; and never spoke to the witnesses individually. After the trial began Paul spoke with the witnesses as a group for only thirty minutes. He never advised the witnesses of what to expect in court and never discussed the questions to expect on direct and cross-examination. Paul did not prepare defendant for trial. He never discussed with defendant his testimony or the questions to expect on direct or cross-examination. Paul simply told defendant to "expect the unexpected." At trial defendant saw Paul take medicine several times. On one occasion defendant was in Paul's car when Paul stopped at an Eckerd Drugstore and purchased a drug. When Paul returned to the car he ingested the drug. The drug appeared to be Valium. On two or three evenings during the trial defendant saw Paul in his hotel room with various drugs. The drugs caused Paul's speech to be slurred and Paul to fall asleep. Defendant corroborated other witnesses who said Paul fell

asleep during the cross-examination of defendant. Defendant said he heard Paul tell Angelo Barnes that he wanted to display prejudice and racism at the trial. Paul asked Barnes to stand up and protest out loud so the media would see the protest and act upon it. In explaining this action and others, Paul told defendant that he would "have to pay the price for a lot of people, that through [his] sufferings other people will benefit."

The state offered evidence tending to show that there were "problems" in defendant's case and that these problems would have to be satisfactorily explained to the jury for defendant to be acquitted. The state also presented the testimony of several persons who were present at the trial and who did not see Paul asleep, did not think Paul was inattentive, and did not believe Paul was under the influence of drugs.

Upon this evidence the trial court made detailed findings of fact and conclusions of law. The trial court found that Paul labored under a conflict of interest, *i.e.*, his interest in his "public cause" of establishing a racially motivated prosecution and his interest in pursuing the best defense for his client, individually. The state challenges these findings on appeal as being unsupported by the evidence. We do not consider these findings in our assessment of the case because there are ample additional findings which the state does not challenge on appeal and which are dispositive of the case. These are (paraphrased except where quoted):

> 1. "With regard to trial preparation, . . . Attorney Paul did little more than read the police report and meet several potential witnesses. He did not visit the crime scene and did not conduct any independent investigation of the matter. His discussions with potential witnesses were brief and failed to explore their knowledge of the incident. He failed to advise witnesses what they would be asked, what to expect, or whether or not they would even testify. This lack of preparation even extended to the defendant. Although Attorney Paul spent a considerable amount of time with Mr. Moorman, most of their conversations centered on football and other matters not related to the trial. The Court finds that Attorney Paul spent no more than an hour discussing with Moorman the specifics of his version of this incident and only briefly

discussed his potential testimony on two occasions. He merely advised Moorman to 'expect the unexpected.' This limited amount of trial preparation and the investigation was well below the standard of practice routinely engaged in by attorneys who defend serious criminal cases in the Superior Court of Wake County."

2. "The Court further finds that Attorney Paul's conduct during trial was equally deficient. He appeared during the trial 'disheveled and rumpled' and demonstrated marked changes in mood from affable to lethargic, from aggressive to inattentive and drowsy. Although his defense was primarily one of consent, he engaged in rhetoric and questions, unsupported by any evidence, which suggested that the charges were racially motivated and that the defendant was the victim of a conspiracy. In his opening remarks to the jury, he advised that the prosecution witness's account of the incident was preposterous, that a conspiracy against the defendant existed and that Moorman was physically and psychologically incapable of rape. He further stated that the defense would offer evidence regarding the victim's prior similar encounter with another black athlete. He made reference to 'one critical piece of evidence' which would show that it was physically impossible for Moorman to engage in the acts which the victim would describe. In view of Attorney Paul's failure to adequately investigate this matter, his opening statement was deficient because he was unable to produce any evidence to support the above claims. The impact of such a deficient opening statement was further aggravated by the prosecutor's closing argument which addressed the failure of the defendant to show any of the above. The prosecutor's closing remarks also focused on Attorney Paul's failure to adequately interview witnesses, including the defendant. Examples of such closing comments by Prosecutor Hart are numerous."

3. "Attorney Paul's opening statement and wide ranging defense theories unsupported by the evidence as well as his forecasted evidence which did not materialize were practices that were deficient and failed to fall within the range of competence expected of attorneys in criminal cases."

4. Counsel used and abused drugs during the trial. These drugs included Percocet, Dalmane, Fiorinal, Vicodin, Demerol, Vistaril and Phenergan. The drugs were ingested repeatedly throughout the ten-day period of the trial. The drugs were taken in combination with one another. The use and abuse of these drugs caused counsel's judgment and mental processes to be substantially impaired during the trial. The cumulative effect of these drugs substantially impaired counsel's sensory perceptions, reasoning, and judgment.

5. During the trial, counsel was lethargic, inattentive, and drowsy. During the defendant's testimony, counsel dozed off briefly on at least one occasion.

6. During the trial, counsel suffered from the debilitating effects of migraine headaches. Counsel took prescription medication including Inderal, Tofranil and Librium on a daily basis as a preventive measure. Counsel never advised the defendant or the Court about the extent of this disability.

7. "Attorney Paul's closing argument was also deficient for his crude language and his suggestion to the jury that his client's testimony was unworthy of belief as it related to Moorman's claim of misidentification of the victim. Although that statement by Paul appears accurate, in making the statement he abandoned his client's interest."*

8. Counsel's performance significantly impaired his effectiveness. Counsel's performance was below the routine standard of practice.

Upon the foregoing findings the trial court concluded:

"Based upon the foregoing findings of fact, the Court concludes as a matter of law that the pretrial and trial performance of Jerome Paul was significantly deficient and fell well below the minimum standard of professional competence expected and required of attorneys handling serious criminal cases in the Superior Courts of Wake County. The quality of Mr. Paul's representation was far below that standard of

* The state argues on appeal that there is no evidence to support the finding that Paul "abandoned" his client; but it does not challenge the fact that Paul made the argument as set out in this finding.

practice routinely engaged in by members of the Wake County Bar who practice criminal law in the Superior Court."

Notwithstanding these findings and this conclusion the trial court ultimately concluded that defendant suffered no actual prejudice from trial counsel's deficiencies; there was no reasonable probability or possibility that absent these deficiencies the jury would have had a reasonable doubt regarding defendant's guilt; and defendant failed to show that his attorney's conduct so affected the verdict that "defendant's trial cannot be relied on as having produced a just result." The court therefore denied defendant's motion for appropriate relief based on ineffective assistance of counsel.

The trial court's conclusion that defendant suffered no actual prejudice from his trial counsel's deficiencies was based on the following factual findings (paraphrased except where quoted):

1. The court has carefully examined the testimony at the post conviction hearing and at trial.

2. Defendant has not shown how the testimony of any witness would have been different had Paul properly interviewed and prepared them.

3. No additional witnesses which could have added any material evidence were revealed and "all witnesses with relevant evidence testified to the full extent of their knowledge" at trial.

4. Defendant has not shown how his trial testimony would have been any different had Paul properly prepared him as a witness.

5. Paul's cross-examination of the victim and other state's witnesses was "thorough and aggressive."

6. Although Paul was deficient in presenting the defendant's case, he "was not deficient in attacking the prosecution's case."

7. "[T]he jury verdicts were based upon a determination by the jury that [the victim] testified truthfully and that [the defendant] did not. . . . Although [the victim's] testimony . . . could be characterized as unusual, the testimony of the de-

fendant was simply not credible. [The victim's] testimony was corroborated by evidence of physical injuries to her neck and rectum consistent with an assault."

8. Absent all errors and deficiencies by Paul "there is no likely possibility that the factfinders would have had a reasonable doubt as to the defendant's guilt."

9. "The Court is satisfied that the jury in this case returned a verdict based upon the law and the evidence without regard to and unaffected by the conduct of Attorney Paul."

In reviewing an order entered on a motion for appropriate relief, the findings of fact made by the trial court are binding on us if they are supported by evidence, even though the evidence is conflicting. *State v. Stevens*, 305 N.C. 712, 291 S.E. 2d 585 (1982). Our inquiry as an appellate court is to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the hearing court. *Id.*

We find all of the foregoing facts regarding Paul to be supported by the evidence. Indeed, the state, as noted, does not challenge these findings on appeal. We determine, however, for the reasons which follow that the trial court's findings do not support its conclusion that Paul's failure to provide effective assistance of counsel had no probable effect on the trial's outcome.

The trial court based its ultimate conclusion that the trial result was unaffected by Paul's deficiencies upon its finding that the evidence would have been essentially the same had the deficiencies not been present; yet it recognized that the ultimate question for the jury was the credibility of the principal witnesses—the victim and the defendant. We agree with this assessment, and, for this reason, must disagree with the trial court's ultimate conclusion that on the facts as found there is no reasonable probability that Paul's failure to provide effective assistance affected the outcome of the trial. We are satisfied the facts found demonstrate the existence of such a probability.

Neither does the state challenge, as unsupported by the evidence or the findings, the trial court's overall conclusion that Paul's performance "was significantly deficient and fell well below

the minimum standard of professional competence expected and required of attorneys handling serious criminal cases in the Superior Courts of Wake County."

The essence of the state's argument is: notwithstanding the trial court's unchallenged factual findings regarding Paul's deficiencies, its conclusion that Paul's substandard representation did not prejudice defendant should be sustained under the standard set out in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674 (1984); and *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241 (1985).

A defendant's right to counsel includes the right to the effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241. The test for ineffective assistance of counsel is the same under both the federal and state constitutions. *Id.* The test of effective assistance of counsel has two components. First, defendant must show counsel's performance fell below an objective standard of reasonableness. *Id., citing Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674. Second, defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 80 L.Ed. 2d at 693; *State v. Braswell*, 312 N.C. at 562, 324 S.E. 2d at 248. The question becomes whether a reasonable probability exists that, absent counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. at 695, 80 L.Ed. 2d at 698.

Where, as here, ineffective assistance of counsel has been established, the full ramifications of counsel's deficient performance can never be completely reconstructed. *Strickland* and *Braswell* do not place on defendant the burden of proving that the trial outcome *would* have been different. Rather, defendant must show that "there is a reasonable probability that, but for counsel's ineffective performance, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. at 694, 80 L.Ed. 2d at 698; *accord, State v. Braswell*, 312 N.C. at 563, 324 S.E. 2d at 248.

We are satisfied there is a reasonable probability that but for Paul's acts of substandard performance not challenged by the state the result at trial would have been different and that these acts are sufficient to undermine confidence in the trial's reliabili-

ty. The principal issue at trial, as the trial court correctly concluded, was one of credibility. The victim testified that defendant engaged in vaginal intercourse with her while she was asleep; and when she awoke, he forcibly and against her will engaged in anal intercourse. Defendant testified both incidents were with the victim's consent, given while she was awake and aware of what was transpiring. The question for the jury, then, was which witness to believe. This translates into a relatively close case on the facts, especially when, as the trial court noted, the testimony of the victim, herself, "could be characterized as unusual."

A cardinal tenet of successful advocacy is that the advocate be unquestionably credible. If the fact finder loses confidence in the credibility of the advocate, it loses confidence in the credibility of the advocate's cause. When in a trial such as the one before us the whole defense rests on the credibility of the defendant as a witness, it is particularly crucial that the defendant's advocate not only retain credibility for himself but also that he do nothing which undermines the credibility of his client.

Paul undoubtedly undermined his own credibility with the jury when he promised in his opening statement to produce "one critical piece of evidence" which would demonstrate that defendant was physically and psychologically incapable of engaging in sexual acts, yet failed to produce a single bit of evidence remotely suggesting this fact. About this incident the presiding judge at defendant's trial testified at the post conviction hearing as follows:

> I was surprised at the time by his [Paul's] statement that he would prove that the defendant was physically and psychologically incapable of rape. I interpreted that to indicate that he . . . probably would prove impotency.
>
> . . . .
>
> When at a later time the defense lawyer called as a witness a young woman who candidly stated that she had intercourse with Mr. Moorman on three different occasions one afternoon prior to the rape it seemed to me that we had sort of lost contact with physical inability.

The record before us is void of suggestion that Paul had any basis for thinking that defendant was physically unable to commit the

crimes charged against him. Defendant testified Paul never discussed the matter with him in pretrial preparation and he had no knowledge of any plans to proffer such a defense. We are confident the inconsistency in counsel's promised defense of psychological and physical inability and the only defense supported by the evidence, consent, was not lost on the jury. This promised defense severely undercut the credibility of the actual evidence offered at trial, including defendant's own testimony, all of which supported only the defense of consent.

The effect of the unfulfilled promise of a defense of psychological and physical inability was exacerbated by similar references in counsel's opening statement that defendant was the victim of some kind of racially motivated conspiracy. Again the record contains no suggestion that Paul had any basis for this assertion, and he produced no evidence to support it.

The defense's failure to produce any evidence to support the theories proffered at the outset of the trial formed the basis of one of the principal closing arguments made by the state in favor of conviction. As the trial court found, "The impact of such a deficient opening statement was further aggravated by the prosecutor's closing argument which addressed the failure of the defendant to show any of the above. . . . Examples . . . are numerous:

(a) '. . . it was real hard to tell . . . what the defense was.'

(b) 'It is hard to tell what Mr. Paul wants you to believe.'

(c) 'I would ask you to think about all the different things that Mr. Paul said in his opening statement that he was going to show you . . . that were never shown through the evidence . . . .' "

Paul's assertion in closing argument that his client's testimony that he mistook the victim for someone else was not worthy of belief was devastating to the defense of consent and must have undermined defendant's credibility in the jury's eyes. This aspect of defendant's testimony formed the underpinning of his consent defense. According to this testimony defendant believed the victim to be his friend, Lynn, who consented to his sexual advances. It was not until the sexual episodes were over that defendant, according to his testimony, discovered his mistake. If defendant's own advocate suggests to the jury that this testimony

is not credible, why should the jury believe anything else the defendant has said?

The only defense supported by the evidence—consent—depended for its success on the jury's acceptance of defendant's credibility as a witness. Under this circumstance we conclude that Paul's wide-ranging opening assertions, which had no foundation in his pretrial investigation and were never remotely supported by any evidence proffered at trial, undercut the only defense supported by the evidence and defendant's own testimony. When Paul's opening statement and closing argument that an important part of his client's testimony was not credible are coupled with his regular use of a variety of pain killing drugs, his frequent migraine headaches, and his drowsiness, lethargy, and inattentiveness during portions of the trial, a reasonable probability is created that had all these things not occurred the trial outcome might have been different. Confidence in the trial's reliability is, therefore, undermined.

Courts of other jurisdictions have set aside trials upon findings of ineffective assistance of counsel based in part on counsel's failure to produce evidence promised in the opening statement. In *People v. Zaborski*, 59 N.Y. 2d 863, 465 N.Y.S. 2d 927, 452 N.E. 2d 1255 (1983), counsel raised the defense of entrapment but never produced evidence to support it. As could be expected, the prosecutor was able to use this omission against defendant. Based largely on counsel's failure in this regard, the court ordered a new trial. The same result obtained for similar reasons in *People v. Corona*, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978) (unfulfilled promises resulted in "devastating comments" by prosecutor); *People v. LaBree*, 34 N.Y. 2d 257, 357 N.Y.S. 2d 412, 313 N.E. 2d 730 (1974); and *Commonwealth v. Lambeth*, 273 Pa. Super. 460, 417 A. 2d 739 (1979). *See also Javor v. United States*, 724 F. 2d 831 (9th Cir. 1984) (new trial ordered when attorney was asleep or dozing during a substantial part of the trial); *White v. State*, 414 N.E. 2d 973 (Ind. App. 1981) (new trial ordered when attorney ill and taking five different medications); and *Ex Parte Love*, 468 S.W. 2d 836 (Tex. Crim. App. 1971) (new trial ordered when attorney impaired due to physical injury).

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

Reversed and remanded.

Justice MEYER concurring in part and dissenting in part.

I concur in that portion of the majority opinion that reverses the Court of Appeals decision arresting judgment on defendant's conviction of second-degree rape for variance in the indictment and the proof. I dissent from that portion of the majority opinion remanding the case for a new trial.

I am convinced that Judge Stephens' conclusion that the result of the trial is unaffected by attorney Paul's deficiencies is amply supported by his nine factual findings paraphrased in the majority opinion. These findings are conclusive on this Court if supported by the evidence, even though the evidence is conflicting. The majority correctly concludes that these findings are supported by the evidence, but, for reasons unsatisfactory to me, reaches a different conclusion of law. The majority concludes that a reasonable probability exists that, but for counsel's ineffective performance, the result of the proceedings would have been different. I am frank to say that, had I been the trial judge, I would have reached that very conclusion. However, I am convinced that the findings of Judge Stephens, which the majority concedes are supported by the evidence, will also support the contrary conclusion he reached.

Even the defendant did not contest the fact that the incidents of vaginal and anal intercourse occurred, and they are in fact supported by the evidence of the physical injuries to the victim's neck and rectum. As the majority indicates, this was essentially a credibility contest between the defendant, who contended that the incidents occurred with the prosecuting witness' consent, and the prosecuting witness, who contended that they occurred by force and against her will. Virtually nothing attorney Jerry Paul did or failed to do would have had much, if any, effect on this aspect of the case.

As pitiful as defense counsel's performance was in the conduct of the defendant's case, I am unpersuaded that there is a reasonable probability that, but for attorney Paul's ineffective assistance, the jury would have found the defendant innocent of the charges against him.

A disturbing aspect of the majority opinion is that it places in the hands of counsel the ability to *automatically* assure a new trial in any given case by including in his opening argument a promise to produce evidence which he has no intention of producing and/or by suggesting in his closing argument that some aspect of his client's testimony is not worthy of belief. While every attorney wants to believe that none of his colleagues at the bar will intentionally engage in such unprofessional practices, this case demonstrates what counsel might do, either by design, through ignorance, or through negligent inattention to his duties as defense counsel.

STATE OF NORTH CAROLINA v. TERRY WILLIAM SMITH

No. 277A85

(Filed 28 July 1987)

1. **Homicide § 21.5; Assault and Battery § 14.2— assault and murder—evidence sufficient**

The evidence in a prosecution for assault with a deadly weapon and first degree murder was sufficient to take the charges to the jury where both a murder and a felonious assault were clearly committed; the evidence clearly supports a finding that the defendant committed them; and the nature and number of decedent's wounds support a further finding that the murder was committed with premeditation and deliberation.

2. **Criminal Law § 103— instruction on role of jury—no error**

The trial court did not err during a prosecution for first degree murder and assault by stating to prospective jurors that their only concern was to determine whether defendant was guilty of the crime charged or any lesser offense. The statements in context merely gave prospective jurors a correct explanation of the procedure to be followed at trial.

3. **Criminal Law § 162— introduction of courtroom personnel—reference to people of Edgecombe County—no objection, no assignment of error—no plain error**

Defendant's assignments of error to references by the court and the prosecutor to the "people of Edgecombe County" and to the introduction of various courtroom personnel were overruled where defendant did not object to the references to the people of Edgecombe County, did not assign error to the introduction of various courtroom personnel, and failed to demonstrate plain error in either the references or the introductions.

4. **Jury § 7.11; Constitutional Law § 63— death qualification of jury—constitutional**

Death qualification of the jury does not violate the Sixth, Eighth and Fourteenth Amendments of the U. S. Constitution or Art. I, §§ 19 and 24, of the North Carolina Constitution.

5. **Constitutional Law § 30; Criminal Law § 87— defendant required to furnish list of witnesses before jury selection—no error**

The trial court did not err or abuse its discretion in a prosecution for first degree murder and assault by requiring defendant to furnish a list of witnesses prior to the voir dire examination of prospective jurors so that the jurors could answer questions of the court and counsel concerning their knowledge of and relationship to any of the witnesses who might be called on to testify. The trial court noted that this procedure had in the past resulted in considerable savings of time and defendant was unable to demonstrate specific prejudice. N.C.G.S. § 15A-905 (1983).

6. **Criminal Law § 88— cross-examination—restricted to attorney making objection on direct examination—no abuse of discretion**

There was no abuse of discretion in a prosecution for assault and first degree murder in the trial court's ruling that the attorney cross-examining a witness must also make the objections on direct examination of that witness. N.C.G.S. § 8C-1, Rule 611(a).

7. **Searches and Seizures § 44— denial of motion to suppress identification testimony—oral order at trial—written order six months later**

There was no error in a prosecution for assault and first degree murder in the trial court's entry of a written order denying defendant's motion to suppress identification testimony six months after trial where the order was simply a revised written version of the verbal order entered in open court.

8. **Homicide § 20.1— murder—photographs of body—admissible**

The trial court did not abuse its discretion in a prosecution for first degree murder by admitting photographs of decedent's body where the pictures illustrated testimony with respect to the crime scene in general, the location and position of the body when found, and the wounds suffered by deceased, there was no evidence that the body had been moved from the place where it had originally fallen, and the pictures were not unnecessarily gory or gruesome.

9. **Criminal Law §§ 60, 99.3— opinion of fingerprint expert—court's comment—no prejudice**

There was no prejudice in a prosecution for assault and murder from the judge's statement "that he testified to twelve points of identification without objection" after defense counsel objected to a question posed to an SBI agent testifying about fingerprint analysis of the murder weapon. The remark was not an expression of opinion but a response to an objection on a matter already in evidence; furthermore, the agent had already testified that there were twelve points of similarity between defendant's fingerprint and the fingerprint found on the pistol, and the State presented extensive evidence

that a gun owned by defendant was found at the murder scene and was identified by the wife as the weapon used against her.

10. Criminal Law § 85— defendant's character—excluded—no prejudice

Any isolated error in a prosecution for murder and assault relating to the failure of the court to allow evidence as to defendant's general character, his character for truthfulness and peacefulness, and the character for truthfulness of certain defense witnesses was clearly harmless in light of the extensive testimony given with respect to these matters. N.C.G.S. § 15A-1443(a) (1983).

11. Criminal Law §§ 69, 90.1— telephone conversation used as alibi—cross-examination of own witness not allowed—other evidence to same effect introduced—no prejudice

There was no prejudice in a prosecution for murder and assault from the court's refusal to allow defendant to ask certain questions of two employees of defendant's insurance company where defendant sought to establish that he placed a call to the insurance company to report that his pistol had been stolen at 1:19, and that he could not have gotten to his home from decedent's house in time to make that call. Defendant was allowed to introduce and pass among the jury a phone bill that established that a call was made from his house to the insurance company at 1:19 p.m. N.C.G.S. § 15A-1443(a) (1983).

12. Criminal Law §§ 101.4, 128.2— juror allegedly expressed opinion on evidence—mistrial denied—no abuse of discretion

The trial court in a prosecution for assault and murder did not abuse its discretion by denying defendant's motion for a mistrial, which had been based on information that one of the jurors had expressed an opinion on defendant's guilt prior to the close of evidence, where the court discussed the matter with the affiant who alleged that the juror had expressed an opinion, as well as with the juror, and concluded that the juror had done nothing improper but partially allowed defendant's motion by seating the alternate juror for the sentencing phase in place of the juror in question.

13. Criminal Law §§ 43, 21— intimate photographs of defendant and girlfriend—motion in limine not ruled on before trial—no prejudice

There was no prejudice in a prosecution for assault and murder from the court's failure to rule before trial on defendant's motion to suppress a photo album containing personal, intimate photographs of defendant and his girlfriend which could damage her reputation. Defendant did not renew the motion at trial, there was thus no indication that the girlfriend would have been called but for the court's refusal to grant defendant's motion in limine, and defendant's concern for his girlfriend's reputation was insufficient to show prejudice when balanced against the magnitude of the offense for which he was being tried. N.C.G.S. § 15A-1443(a) (1983).

14. Constitutional Law § 31— motion for appointment of psychiatrist during sentencing for murder—denied

There was no error in the sentencing phase of a murder prosecution from the denial of defendant's motion for appointment of a psychiatrist where defense counsel candidly admitted that there was no indication that defendant had a mental defect.

15. Criminal Law § 135.7— murder—instructions in sentencing phase—jury question on unanimity—error

The trial court committed plain error warranting a new sentencing hearing in a murder prosecution where the court initially instructed the jury that the court would be required to impose a sentence of death if the jury's unanimous recommendation was for death, or a sentence of life imprisonment if the unanimous recommendation was for life imprisonment; the jury asked if the life sentence was automatic if the jury's decision was not unanimous, or if the jury had to reach a unanimous decision regardless; and the court reiterated the need for the jurors to confer together without violating individual judgments and again informed the jury that its decision must be unanimous. *Upon inquiry by the jury,* the trial court must inform the jurors that their inability to reach a unanimous verdict should not be their concern but should simply be reported to the court.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing the sentence of death entered by *Winberry, J.,* at the 18 March 1985 Criminal Session of Superior Court, EDGECOMBE County. Heard in the Supreme Court 12 May 1987.

Lacy H. Thornburg, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

T. Chandler Muse and Eugene W. Muse for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of assault with a deadly weapon on Dorothy Bottoms and the first degree murder of her husband, John H. Bottoms. He was sentenced to a term of twenty years imprisonment on the assault conviction and to death for the first degree murder conviction. Evidence pertinent to the arguments presented is set forth *infra.* We find no error in the guilt phase but remand for a new sentencing hearing.

GUILT PHASE

We first consider whether the trial court erred in failing to dismiss all charges, at the close of the State's evidence and of all the evidence, for insufficient evidence. "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 grounds for appeal." *State v. Stocks,* 319 N.C. 437, 438, 355 S.E. 2d 492, 492 (1987). *See also*

State v. Bruce, 315 N.C. 273, 280, 337 S.E. 2d 510, 515 (1985). Because defendant offered evidence following denial of his motion to dismiss at the close of the State's evidence, denial of that motion is not properly before us. *Id.* Defendant renewed his motion to dismiss at the close of all the evidence, however, and denial of that motion is properly before us.

On a motion to dismiss for insufficiency of the evidence 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. Stocks*, 319 N.C. at 439, 355 S.E. 2d at 493 (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 defendant committed it, the case is for the jury and the motion to dismiss should be denied. *Id.*

The evidence showed that decedent and his wife of thirty-seven years had lived in Edgecombe County for about twelve years. Decedent operated a gun shop in the garage adjoining their house. There he sold shotguns, rifles, pistols and loading equipment, as well as miscellaneous hunting equipment and apparel. From time to time, depending on volume of trade, his wife helped out in the shop. Customers of the shop were admitted through a side door, but there was a direct connection between the house and the shop through a "mud room."

On the morning of 5 September 1984, a little before nine o'clock, a nineteen or twenty year old "boy" came into the shop. When decedent's wife looked into the well-lighted gun shop, she saw the boy looking around and talking to her husband. Periodically thereafter until the boy left, she went back and checked on her husband. Decedent's wife testified that she saw the boy's face but did not recognize him. He was a white male with long "bleached looking" hair wearing dungarees and a tank top shirt. She observed him from six to seven feet away over a period of approximately twenty minutes. He left the shop at approximately 9:15 to 9:20 a.m.

Shortly after 11:00 o'clock the boy came back into the shop. Decedent's wife let him in. The two had a brief, face-to-face conversation. After about five minutes decedent, who had been shav-

ing, came into the shop, and his wife went into the kitchen to fix her breakfast. Sometime thereafter decedent called to his wife and told her to go and get a shotgun. She did and took it to the shop where she again saw the boy talking to her husband. She then went to roll her hair.

As decedent's wife started out of the bathroom she heard a shot, and her husband said, "Dot, watch out." Then she heard three more shots. She walked into the family room and from there she saw the boy crouched in the kitchen with a pistol in his hands. He told her not to move, then shot her. It was the same boy she had seen several times earlier that day and whom she had last seen in the shop with her husband. The first shot hit her leg and knocked her down. When she tried to get up, the boy shot her again, breaking her right arm. She again tried to get up, and he shot her again in the left arm.

After shooting decedent's wife three times, the boy turned and went outside. While the wife was attempting to drag herself to the table in the corner where her pistol was located, she heard three more shots from the back of the house. The wife then got her pistol, hobbled into the kitchen to the phone, and dialed her sister-in-law. She heard the phone ring twice, but then was shot again and knocked down. As she lay there the boy started shooting through the screen door. He shot five times, striking her twice more, once in the hip. The boy came in through the screen door, picked up the phone and said, "Hello." At that time, the wife raised up and said, "I'm going to kill you if I can." The boy said, "Oh my God." He then dropped the pistol and ran out the mud room door.

On *voir dire* the wife identified defendant as the boy who shot her on 5 September 1984. She also related the circumstances of her identification of defendant from a series of pictures shown to her while she was in the hospital. She testified that an officer came into her room and said, "I have some pictures I want you to look at and see if you can identify any of them." He showed her the pictures. She immediately recognized defendant's picture and identified him to the officer as the person who had shot her. At trial she stated that her in-court identification was not the result of having seen defendant's picture while in the hospital but an in-

dependent identification based entirely on her recollection of the events at the time of the shooting.

Still on *voir dire* a safety and security officer at Nash General Hospital corroborated the wife's identification testimony. According to this officer the wife appeared coherent during the identification procedure, and there was no suggestion that she select any particular picture. A deputy sheriff who observed the out-of-court identification also testified that there was no indication of a suspect among the pictures. The trial court concluded that the pictorial lineup was not unduly suggestive; that it did not violate the defendant's right to due process; and that the wife's in-court identification was independent, based solely upon what she saw at the time of the assault.

The wife then identified defendant to the jury as the person who shot her. She further testified that after defendant dropped the pistol and ran out of the mud room door, she dragged herself to the phone and again called her sister-in-law to tell her that she had been shot. The sister-in-law and her husband came to the home and called for help. The wife received emergency medical attention and has since received extensive and recurring medical treatment for her wounds.

The sister-in-law testified that at approximately 11:40 a.m. she heard shots in the vicinity of the gun shop. Shortly thereafter her phone rang. When she answered it, there was no response. A few minutes later the phone rang again and she heard decedent's wife say, "John, [b]leeding to death." She and her husband rushed to the couple's home where they found the husband dead outside and the wife lying in a pool of blood inside. A pistol was lying on the floor, but the wife told her not to touch it because it was the gun she had been shot with. The pistol was later found to bear defendant's fingerprint. Evidence was also presented showing that defendant had bought this gun in August 1984.

A forensic pathologist testified that decedent had suffered six bullet wounds. One bullet entered through the back of his head, went through the brain, and lodged in the front of his skull. Another entered through his lip and lodged in the neck. Decedent also sustained two bullet wounds to his back, one to his right flank and abdomen, and another to his shoulder. The bullet that passed through the brain and one of the bullets that entered his

back and passed through his heart caused fatal wounds. The others would not have been immediately fatal, but could have caused his death with lack of proper attention.

An SBI laboratory technician testified that one of the bullets taken from the wife's body was fired through the pistol found at the crime scene which bore defendant's fingerprint. Evidence also showed that the bullets removed from the husband's body could have been fired through the same weapon.

Defendant testified that he had taken his girlfriend to school and gone to a shopping mall on 5 September 1984. A window on his truck was broken while he was in the mall and his pistol was taken from the glove compartment. After unsuccessfully trying to locate his insurance agent, he went to his father's home around 11:00 a.m. and told him about the break-in. He then returned to his home and reported the theft to his insurance company at 1:19 p.m.

Defendant also testified that he had been to the gun shop on many occasions and had spoken with the owner's wife several times. He specifically related a trip to the gun shop and a conversation with the wife on 1 September 1984.

Defendant's father testified that he saw his son's truck come back into the yard between 11:00 and 11:15 a.m. on the day in question, and that defendant thereafter told him about his truck having been broken into that morning and his pistol having been stolen. An employee at Interstate Insurance Company testified that defendant's insurance claim regarding the damage to his truck was reported between 2:00 and 3:00 p.m. that day. Finally, defendant offered numerous witnesses who testified that he had a good reputation for truthfulness and for being a peaceable person and that his character was generally good.

[1] Viewed in the light most favorable to the State, as required, the foregoing evidence was sufficient to take the charges to the jury. Both a murder and a felonious assault were clearly committed, and the evidence supports a finding that defendant committed them. The nature and number of decedent's wounds support a further finding that the murder was committed with premeditation and deliberation. *State v. Williams*, 319 N.C. 73, 80, 352 S.E. 2d 428, 433 (1987) (quoting *State v. Brown*, 315 N.C. 40, 58-59, 337

S.E. 2d 808, 822-23 (1985) ("[T]he nature and number of the victim's wounds is a circumstance from which premeditation and deliberation can be inferred.")). This assignment of error is therefore overruled.

[2] Defendant also contends the trial court committed reversible error in stating to prospective jurors that their only concern was to determine whether defendant was guilty of the crime charged or any lesser included offense. These comments, defendant argues, may have conveyed the erroneous impression that the jury had to find defendant guilty of murder or some lesser crime. When taken in context, however, the statements merely gave prospective jurors a correct explanation of the procedure to be followed in the trial. The court was explaining that, if necessary, a sentencing hearing would be held following the guilt phase of defendant's trial, but that during the guilt phase, the jury's only duty was "to determine *whether* the defendant [was] guilty of the crime charged . . . ." (Emphasis added.) The prospective jurors were properly advised both of their responsibilities and of the procedure to be followed. This assignment of error is overruled.

[3] During jury selection, the court asked prospective jurors: "Do you feel like you could . . . be a fair juror . . . to [defendant] and to the State of North Carolina and the people of Edgecombe County?" The prosecutor also asked prospective jurors if they could be fair to defendant, the State, and the people of Edgecombe County; and during closing argument he referred to himself as the representative for the State and county. Defendant contends these incidents overly emphasized concerns of the local community and that the court's inquiry constituted an expression of opinion prohibited by N.C.G.S. § 15A-1222. Finally, defendant argues that it was plain error for the court to introduce the sheriff to the jury as the "High Sheriff of Edgecombe County," to introduce the jurors to the deputy sheriff who was acting as bailiff, and to introduce assistant clerks in the courtroom during his trial.

Defendant did not object to references to "the people of Edgecombe County" by either the court or the prosecutor, nor did he object or assign error to the introduction of the various courtroom personnel. "[F]ailure to except or object to errors at trial constitutes a waiver of the right to assert the alleged error

on appeal." *State v. Oliver*, 309 N.C. 326, 334, 307 S.E. 2d 304, 311 (1983). *Accord* N.C.R. App. P. 10 (1987).

> 1. A party may not, after trial and judgment, comb through the transcript of the proceedings and randomly insert an exception notation in disregard of the mandates of Rule 10(b).
>
> 2. Where no action was taken by counsel during the course of the proceedings, the burden is on the party alleging error to establish its right to review; that is, that an exception, "by rule or law was deemed preserved or taken without any such action," or that the alleged error constitutes plain error.
>
> In so doing, a party must . . . establish his right to review by asserting . . . how the error amounted to a plain error or defect affecting a substantial right which may be noticed although not brought to the attention of the trial court.

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

Defendant has failed to demonstrate that either the references to Edgecombe County and its populace or the introduction of courtroom personnel constituted plain error. He has not shown that these references, if error, " 'tilted the scales' and caused the jury to reach its verdict convicting [him]." *State v. Walker*, 316 N.C. 33, 39, 340 S.E. 2d 80, 83 (1986). These assignments of error are overruled.

[4] Defendant also contends that death qualification of his jury violated the sixth, eighth, and fourteenth amendments to the United States Constitution and article I, sections 19 and 24, of the North Carolina Constitution. He argues that excusing all prospective jurors opposed to capital punishment rendered the resulting jury guilt-prone and thus not representative of a cross-section of the community.

This Court has noted that "[t]he practice of 'death qualifying' the jury in a capital case has recently been held to violate neither the United States Constitution, *Lockhart v. McCree*, --- U.S. ---, 90 L.Ed. 2d 137 (1986), nor article I, section 19 of the North Carolina Constitution, *State v. Barts*, 316 N.C. 666, 343 S.E. 2d

828 (1986)." *State v. Johnson*, 317 N.C. 343, 376, 346 S.E. 2d 596, 614 (1986). Defendant presents no argument as to why death qualification of jurors violates article I, section 24 (right of jury trial in criminal cases), of the North Carolina Constitution, but merely states that it does. We hold that it does not. This assignment of error is overruled.

[5] Defendant contends the trial court erred in requiring him to furnish a list of witnesses prior to the *voir dire* examination of prospective jurors and in indicating that witnesses whose names did not appear on the list would not be allowed to testify. Discovery statutes do not require a defendant to furnish the State with a list of proposed witnesses. *See, e.g.*, N.C.G.S. § 15A-905 (1983) Official Comment ("To balance the deletion of discovery of the names and addresses of State's witnesses, the General Assembly deleted from this section a proposal allowing the State to seek the names and addresses of defense witnesses."). By utilizing witness lists, defendant argues, the court made available to the State discovery material to which it was not entitled. Defendant contends that knowing in advance the identity of his prospective witnesses gave the State an unfair advantage and was thus prejudicial.

The trial court has broad discretion "to see that a competent, fair and impartial jury is impaneled and rulings of the trial judge in this regard will not be reversed absent a showing of abuse of discretion." *State v. Phillips*, 300 N.C. 678, 682, 268 S.E. 2d 452, 455 (1980) quoting *State v. Johnson*, 298 N.C. 355, 362, 259 S.E. 2d 752, 757 (1979). Here the court required the list so that jurors, "during voir dire, could look at the list and answer the questions of the Court and counsel concerning their knowledge of and relationship to any of the witnesses who might be called to testify." The court also noted that it had found "this procedure in the past, particularly in cases . . . involving large numbers of witnesses, to result in the considerable savings of time in the selection of the jury."

Defendant has not contended that he called or failed to call a witness because of this procedure, and he was allowed to call a witness not on the original list. In light of the court's purpose for requiring the list and defendant's inability to demonstrate specific

prejudice, we hold that the court did not err or abuse its discretion in requiring the lists.

[6] Defendant contends the trial court erred by ruling that the attorney cross-examining a witness must also make the objections on direct examination of that witness. He argues that the inability of both his attorneys to make objections deprived him of effective assistance of counsel.

No specific rule governs who may make objections when a party is represented by more than one attorney. However, "[g]enerally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within [the court's] discretion." *State v. Rhodes*, 290 N.C. 16, 23, 224 S.E. 2d 631, 635 (1976). *See also Shute v. Fisher*, 270 N.C. 247, 253, 154 S.E. 2d 75, 79 (1967). N.C.G.S. § 8C-1, Rule 611(a) empowers the court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth [and] (2) avoid needless consumption of time. . . ." Promulgation of the objections rule thus fell within the trial court's discretion. Defendant has shown no specific prejudice and thus no abuse of discretion. This assignment of error is therefore overruled.

[7] Defendant next assigns as error the trial court's entry, over six months post-trial, of a written order denying defendant's motion to suppress identification testimony. He argues that this order should be held void as entered out of term without the consent of the parties pursuant to *State v. Boone*, 310 N.C. 284, 286-91, 311 S.E. 2d 552, 554-55 (1984). The order, however, is simply a revised written version of the verbal order entered in open court which denied defendant's motion to suppress decedent's wife's identification testimony. It was inserted in the transcript in place of the verbal order rendered in open court. In *State v. Horner*, 310 N.C. 274, 278-79, 311 S.E. 2d 281, 285 (1984), we held that the trial court's order denying defendant's motion to suppress items of physical evidence was not improperly entered "out of session and out of district" where the court passed on each part of the motion to suppress in open court as it was argued and later reduced its ruling to writing, signed the order, and filed it

with the clerk. The procedure here did not differ substantially from that in *Horner*. We thus overrule this assignment of error.

[8] Defendant contends that photographs of the decedent's body which were introduced and exhibited to the jury were potentially misleading, since there was no evidence that the body had not been moved before the pictures were taken. He also argues that the pictures were relevant only to show the location of the wounds which had been previously shown through other photographs and diagrams. Thus, even if relevant, the photographs were cumulative and unfairly prejudicial and should have been excluded under N.C.G.S. § 8C-1, Rule 403.

There was, however, no evidence that the body had been moved from the place where it had originally fallen. The argument that the pictures are or could have been misleading is therefore meritless.

Two of the pictures show decedent's body in enough detail that bullet wounds can be seen. While the pictures are unpleasant, they are not unnecessarily gory or gruesome. As we stated in *State v. Young*, 291 N.C. 562, 570, 231 S.E. 2d 577, 582 (1977): "[I]f a photograph accurately depicts that which it purports to show and is relevant and material, the fact that it is gory or gruesome, or otherwise may tend to arouse prejudice, does not render it inadmissible." In *State v. Walden*, 311 N.C. 667, 672-73, 319 S.E. 2d 577, 581 (1984) we held that two photographs of a decedent were properly admitted since they were not gruesome or gory or excessive in number and did illustrate testimony concerning the position and appearance of the decedent's body after she had been shot.

The pictures defendant complains of illustrated testimony with respect to the crime scene in general, the location and position of the body when found, and the wounds suffered by the deceased. It was therefore within the trial court's discretion to allow these pictures into evidence, and no abuse of discretion has been shown. *State v. Mercer*, 275 N.C. 108, 120, 165 S.E. 2d 328, 337 (1969) (in trial court's discretion to determine when photographs depicting substantially the same scene become excessive in number, add nothing by way of probative value, and tend solely to inflame the jury.). This assignment of error is overruled.

[9] Defendant contends the court violated N.C.G.S. § 15A-1222 by expressing an opinion on fingerprint analysis testimony by an SBI agent. After defense counsel's objection to a question posed to the agent, the court stated: "He testified to twelve points of identification without objection." This statement, according to defendant, implied that the court believed there was substantial evidence that defendant's fingerprint was on the murder weapon and that defense counsel had no basis on which to raise any question as to this evidence.

A review of the transcript, however, reveals that the remark was not an expression of opinion but a response to an objection on a matter already in the record. Even if error, the court's remark could not have been prejudicial. Only moments earlier the agent had testified that there were twelve points of similarity between defendant's fingerprints and the print found on the pistol. Further, the State presented extensive evidence that a gun owned by defendant was found at the murder scene and identified by the wife as the weapon used against her. This assignment of error is thus overruled.

[10] Defendant next alleges that the trial court committed prejudicial error in failing to allow evidence as to his general character, his character for truthfulness and peacefulness, and the character for truthfulness of certain defense witnesses. He brings forward numerous exceptions and assignments of error dealing with rulings relating to character or reputation testimony. We have reviewed the transcript and we find no error. Isolated error, if any, with respect to a specific question is clearly harmless in light of the extensive testimony given with respect to these matters. N.C.G.S. § 15A-1443(a) (1983). There were at least seventeen defense witnesses who testified as to their opinion of defendant's character and reputation in the community for truthfulness and peacefulness. Several also testified as to their opinion of the truthfulness of defendant's father and his reputation for truthfulness. These assignments of error are therefore overruled.

[11] Defendant contends the trial court erred in refusing to allow defense counsel to ask certain questions of two employees of defendant's insurance company. Defendant called these witnesses to establish when he called the company to report that his pistol had been stolen. He then sought to impeach the answer of

the witness who recorded his claim by challenging her answer and by presenting another employee who testified that a deputy sheriff had asked her co-worker not to talk with defense counsel in this case.

Assuming without deciding that it was error not to allow these witnesses to testify, defendant has shown no prejudice. N.C.G.S. § 15A-1443(a) (1983). The transcript reveals that defendant sought to establish that he placed a call to the insurance company at 1:19 p.m. on 5 September 1984. Defendant argued that this call established his innocence because he could not have gotten from decedent's house to his house in time to make this call.

Despite testimony that defendant's claim was received sometime after 2:00 p.m., defendant was allowed to enter into evidence and pass among the jury a phone bill that established that a call was made from his house to the insurance company at 1:19 p.m. on 5 September 1984. Because defendant thus can show no prejudice in the refusal to allow this line of questioning, this assignment of error is overruled.

[12] Defendant next assigns as error the trial court's denial of his motion to set aside the verdict and order a new trial after receiving information that one of the jurors, prior to the close of the evidence, had expressed an opinion on defendant's guilt. After discussing the matter with the affiant who alleged that the juror had expressed an opinion, as well as with the juror, the trial court concluded that the juror had made no statement concerning defendant's trial except that "she would have to consider all of the evidence, and . . . was not supposed to talk about the case." The court further concluded that the juror had done nothing improper which would taint her service as a juror or the verdict rendered. The court did, however, partially allow defendant's motion by seating the alternate juror for the sentencing phase in place of the juror in question.

Whether to grant a motion for mistrial is in the trial court's discretion. *State v. Stocks*, 319 N.C. at 441, 355 S.E. 2d at 494. *See also State v. King*, 311 N.C. 603, 619, 320 S.E. 2d 1, 11 (1984). "Mistrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict." *State v. Stocks*, 319 N.C. at 441, 355 S.E. 2d at 492. The court's decision here was based on fact findings contained in

its order, which findings were supported by testimony of the juror. We thus find no abuse of discretion in the denial of the motion for mistrial.

[13] Defendant contends the trial court erred by failing to rule before trial on defendant's motion to suppress a photograph album and photographs taken from the defendant's home. The court was informed that the photo album contained very intimate personal photos of the defendant and his girlfriend and that use of the pictures could damage the girlfriend's reputation. The court, however, declined to rule on the motion prior to trial. Defendant claims he was therefore faced with risking the girlfriend's reputation, if he called her as a witness and the photos were ruled admissible, or having the jury wonder why she was not called as a witness. Defendant did not call the girlfriend as a witness and claims the failure to rule on his motion deprived him of due process of law.

"When a motion is made before trial, the court in its discretion may hear the motion before trial . . . or during trial." N.C. G.S. § 15A-952(f) (1983). Defendant has shown no prejudice by delay in hearing this motion. N.C.G.S. § 15A-1443(a) (1983). First, he did not at trial renew his motion to exclude the pictures. Thus, there is no indication that the girlfriend would have been called except for the court's refusal to grant defendant's motion in limine. *Cf. State v. Lamb*, 84 N.C. App. 569, 583-84, 353 S.E. 2d 857, 865, *disc. rev. allowed*, 319 N.C. 407, 354 S.E. 2d 722 (1987) (denial of defendant's renewed motion in limine seemed clearly the reason for defendant's failure to testify). Further, while defendant's concern for the reputation of his girlfriend is commendable, when balanced against the magnitude of the offense for which he was being tried it is insufficient to show that his rights were prejudiced. This assignment of error is overruled.

We conclude that, as to the guilt phase of his trial, defendant had a fair trial free from prejudicial error.

SENTENCING PHASE

[14] After defendant was found guilty, defense counsel asked the court for the first time to provide defendant a psychiatrist at cost to the State. In making that motion counsel stated: "[W]e have no notice or any reason to believe that he has any [mental]

defect, but . . . if, in fact, [defendant] is guilty of first degree murder, it is our opinion that there might well be some psychiatric or psychological or mental defect of which we are unaware . . . ." Defendant assigns as error the denial of this motion.

In *Ake v. Oklahoma*, 470 U.S. 68, 77-87, 84 L.Ed. 2d 53, 62-68 (1985), the United States Supreme Court held that when a defendant makes an *ex parte* threshold showing that his sanity is likely to be a significant factor in his defense, the Federal Constitution requires that the State provide a psychiatric expert to examine the defendant and assist in the preparation of his defense. *See Ake*, 470 U.S. at 83, 84 L.Ed. 2d at 66. The requirement that there be a threshold showing of specific necessity "is consistent with decisions of this Court holding that the denial of a motion for appointment of an expert is proper where the defendant has failed to show a particularized need for the requested expert." *State v. Penley*, 318 N.C. 30, 51, 347 S.E. 2d 783, 795-96 (1986) (quoting *State v. Jackson*, 317 N.C. at 1, 343 S.E. 2d at 814). Here counsel candidly admitted that there was no indication that defendant had a mental defect. Application of the factors enunciated in *Ake* thus leads to the conclusion that the denial of defendant's motion for appointment of a psychiatrist was not error.

[15] The final contention we must consider is whether the trial court erred in its instructions to the sentencing jury following the jury's submission of this question: "If the jurors' decision is not unanimous, is this automatic life imprisonment or does the jury have to reach a unanimous decision regardless?" The court responded to the jury's inquiry as follows:

> [A]s I instructed you, the decision that you reach must be unanimous. You may not reach a decision in response to any inquiry propounded to you by a majority vote. All twelve of you must agree unanimously in accord with the instruction I have given you.
>
> You all have a duty to consult with one another and deliberate with a view to reaching an agreement, if it can be done without violence to individual judgments. Each of you must decide these matters for yourselves, but only after impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, each of you should not hesitate to re-examine your own views and change your opin-

> ion if it is erroneous, but none of you should surrender your honest convictions as to the weight of effect the evidence [sic], solely because of the opinion of your fellow jurors, or for the mere purpose of returning a recommendation.

The jury had been instructed earlier: "if you unanimously recommend that the defendant be sentenced to death, this Court will be required to impose a sentence of death. If you unanimously recommend a sentence of life imprisonment, the Court will be required to impose a sentence of imprisonment in the State's Prison for life."

Defendant argues that the instruction in response to the jury's inquiry incorrectly implied that the jury had to reach a unanimous decision, either for life or for death, and he urges us to adopt a rule that juries making such an inquiry should be instructed that failure to reach a unanimous verdict is not a jury concern. He concedes that he did not object to these instructions at trial. The alleged error thus must amount "to a plain error or defect affecting a substantial right which may be noticed although not brought to the attention of the trial court." *Oliver*, 309 N.C. at 335, 307 S.E. 2d at 311-12. We must be convinced "that the error in question 'tilted the scales' and caused the jury to reach its verdict . . . ." *State v. Walker*, 316 N.C. 33, 39, 340 S.E. 2d 80, 83 (1986).

We have repeatedly held that it is not error to fail or refuse to instruct the jury that a sentence of life imprisonment will be imposed upon the defendant in the event the jury is unable to reach unanimous agreement on the proper sentence. *State v. Young*, 312 N.C. 669, 685, 325 S.E. 2d 181, 191 (1985); *State v. Moose*, 310 N.C. 482, 502, 313 S.E. 2d 507, 520 (1984); *State v. Williams*, 308 N.C. 47, 73, 301 S.E. 2d 335, 351-52, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983); *State v. Brown*, 306 N.C. 151, 184-85, 293 S.E. 2d 569, 590 (1982); *State v. Smith*, 305 N.C. 691, 710, 292 S.E. 2d 264, 276, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982); *State v. Hutchins*, 303 N.C. 321, 353, 279 S.E. 2d 788, 807 (1981); *State v. Johnson*, 298 N.C. 355, 369-70, 259 S.E. 2d 752, 761-62 (1979). We continue to adhere to those decisions. As we noted in *Smith*, to instruct the jury that a life sentence would be imposed if it failed to agree would be "tantamount to 'an open invitation for the jury to

avoid its responsibility and to disagree.' " *Smith*, 305 N.C. at 710, 292 S.E. 2d at 276 (quoting *Justus v. Commonwealth*, 220 Va. 971, 979, 266 S.E. 2d 87, 92 (1980)).

Heretofore, however, we have not addressed this issue from the standpoint of what a jury should be told *when it inquires into the result of its failure to reach a unanimous verdict.* The trial court here avoided the question by reiterating the need for the jurors to confer together without violating individual judgments and again informing the jury that its decision must be unanimous. While this comported with our earlier cases, *in the context of the jury's inquiry* the instructions probably were misleading and probably resulted in coerced unanimity. Particularly when combined with the prior instruction, the instruction in response to the inquiry probably conveyed the erroneous impression that a unanimous decision, either for death or for life imprisonment, was required. That impression, in turn, probably led to a unanimity that would not otherwise have been attained.

The jury here obviously was not unanimous when it posed the question; otherwise, it would not have inquired as to the effect of its failure to attain unanimity. The jurors had deliberated for over three hours when the question was posed. They deliberated another one hour and twelve minutes after the question was posed before reaching a verdict. If a single juror agreed to the verdict reached because of the erroneous impression that unanimity was required, that juror was the difference between life and death for this defendant.

We thus hold that *upon inquiry by the jury* the trial court must inform the jurors that their inability to reach a unanimous verdict should not be their concern but should simply be reported to the court. We further hold that the failure to so instruct here, combined with the misleading instructions given, probably " 'tilted the scales' and caused the [obviously divided] jury to reach its verdict . . ." imposing a sentence of death. *State v. Walker*, 316 N.C. at 39, 340 S.E. 2d at 83. It therefore constituted plain error warranting a new sentencing hearing.

The rule enunciated herein shall apply only to this case and any case(s) not finally determined on direct appeal as of the filing date of this opinion.

Guilt phase: no error.

Sentencing phase: new hearing.

ANTHONY MICHAEL DIDONATO, AS ADMINISTRATOR OF THE ESTATE OF JOSEPH EDWARD DIDONATO v. WILLIAM J. WORTMAN, JR., M.D., AND JOHN T. HART, M.D.

No. 280A86

(Filed 28 July 1987)

1. **Death § 3— wrongful death action—viable fetus as "person"**

A viable fetus is a "person" within the meaning of the N.C. Wrongful Death Act, N.C.G.S. § 28A-18-2. Therefore, an action could properly be maintained for the wrongful death of a stillborn child.

2. **Death § 7— wrongful death of fetus—damages recoverable**

Lost income damages normally available under N.C.G.S. § 28A-18-2(b)(4)a. cannot be recovered in an action for the wrongful death of a stillborn child. Nor may damages normally available under N.C.G.S. § 28A-18-2(b)(4)b. and c.—loss of services, companionship, advice and the like—be recovered in an action for the wrongful death of a viable fetus. However, damages for pain and suffering of a decedent fetus are recoverable if they can be reasonably established, and medical and funeral expenses, as well as punitive and nominal damages, may be allowed where appropriate.

3. **Death § 3— wrongful death of viable fetus—joinder with parents' claims**

An action for wrongful death of a viable fetus must be joined with any claims based on the same facts brought by the decedent's parents in their own right.

Justice MARTIN concurring in part and dissenting in part.

Justice MITCHELL joins in this concurring and dissenting opinion.

Justice WEBB dissenting.

APPEAL by plaintiff from the decision of a divided panel of the Court of Appeals, reported at 80 N.C. App. 117, 341 S.E. 2d 58 (1986). The Court of Appeals affirmed an order entered by *Grist, J.*, at the 17 July 1985 Civil Session of MECKLENBURG County Superior Court, dismissing plaintiff's claim for the wrongful death of a fetus pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). Heard in the Supreme Court 11 December 1986.

James, McElroy & Diehl, P.A., by Gary S. Hemric and Judith E. Egan, for plaintiff-appellant.

Golding, Crews, Meekins & Gordon, by John G. Golding and Andrew W. Lax, for defendant-appellees.

North Carolina Academy of Trial Lawyers, by Douglas B. Abrams, amicus curiae.

EXUM, Chief Justice.

This is an action for the wrongful death of a stillborn child. Plaintiff administrator alleges that defendant doctors provided prenatal care to the child's mother, Norma DiDonato. Defendants estimated that the child would be born on 10 October 1982. On 26 October 1982 the child had not yet been born, and Mrs. DiDonato underwent an examination that revealed a healthy fetal heartbeat. Four days later the heartbeat had stopped and Mrs. DiDonato delivered a stillborn baby by Cesarean section. Plaintiff alleges that defendants' negligence was a proximate cause of the child's stillbirth.

The sole question presented by this appeal is whether N.C.G.S. § 28A-18-2, North Carolina's Wrongful Death Act, allows recovery for the death of a viable but unborn child. We conclude that it does, and we therefore reverse the decision of the Court of Appeals. We hold, however, that the damages available in any such action will be limited to those that are not purely speculative. In addition, we hold that the action for wrongful death of a viable fetus must be joined with any action based on the same facts brought by the decedent's parents.

I.

In North Carolina, as in most states, actions for wrongful death exist solely by virtue of statute. *In re Miles Estate*, 262 N.C. 647, 138 S.E. 2d 487 (1964). This Court's primary task, therefore, is to determine whether the state's wrongful death statute permits recovery for the death of a viable fetus.

Our Court of Appeals has twice denied actions for the wrongful death of a stillborn child under the current statute. *Yow v. Nance*, 29 N.C. App. 419, 224 S.E. 2d 292, *disc. rev. denied*, 290 N.C. 312, 225 S.E. 2d 833 (1976); *Cardwell v. Welch*, 25 N.C. App.

390, 213 S.E. 2d 382, *cert. denied*, 287 N.C. 464, 215 S.E. 2d 623 (1975). These holdings have not been disturbed by the General Assembly. We must be leery, however, of inferring legislative approval of appellate court decisions from what is really legislative silence. "Legislative inaction has been called a 'weak reed upon which to lean' and a 'poor beacon to follow' in construing a statute." 2A N. Singer, Sutherland Statutory Construction 407 (1984). "[It is] impossible to assert with any degree of assurance that [legislative inaction] represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." *Johnson v. Transportation Agency*, 480 U.S. ---, 94 L.Ed. 2d 615, 656 (1987) (Scalia, J., dissenting). We cannot assume that our legislators spend their time poring over appellate decisions so as not to miss one they might wish to correct. In fact, we have not found any evidence that the legislature has ever considered the particular problem before us in this case. Our inquiry, therefore, must focus on the words of the statute itself, the public policies underlying North Carolina's Wrongful Death Act, and common law principles governing its application. *See Summerfield v. Superior Court*, 144 Ariz. 467, 698 P. 2d 712 (1985); *Amadio v. Levin*, 509 Pa. 199, 501 A. 2d 1085 (1985) (Zappala, J., concurring).

A.

The Wrongful Death Act states, in pertinent part:

> (a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable . . . shall be liable to an action for damages . . . . The amount recovered in such action . . . shall be disposed of as provided in the Intestate Succession Act.
>
> (b) Damages recoverable for death by wrongful act include:
>
> (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
>
> (2) Compensation for pain and suffering of the decedent;

(3) The reasonable funeral expenses of the decedent;

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:

a. Net income of the decedent,

b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;

(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;

(6) Nominal damages when the jury so finds.

N.C.G.S. § 28A-18-2 (1984).

In plain English, an action for wrongful death exists if the decedent could have maintained an action for negligence or some other misconduct if he had survived. *Nelson v. United States*, 541 F. Supp. 816 (M.D.N.C. 1982). The real party in interest in any wrongful death action is the beneficiary for whom the recovery is sought. *In re Ives' Estate*, 248 N.C. 176, 102 S.E. 2d 807 (1958); *Davenport v. Patrick*, 227 N.C. 686, 44 S.E. 2d 203 (1947). In the case of a stillborn fetus, the beneficiaries of a wrongful death action will necessarily be the child's parents, unless they too are dead. *See* N.C.G.S. § 29-15(3) (1984).

[1] The facts in this case require us to determine whether the word "person" in the Wrongful Death Act includes a viable fetus.[1] The statute does not provide a clear-cut answer to this question,

1. The legislature has stated that "[t]he word 'person' shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary." N.C.G.S. § 12-3(6) (1986). We find this definition to be of no assistance in resolving the question before us.

but case law regarding recovery by children for fetal injuries is instructive. Tort claims brought by children to recover for fetal injuries are recognized in virtually every state, including North Carolina. *Stetson v. Easterling*, 274 N.C. 152, 161 S.E. 2d 531 (1968). It would be logical and consistent with these decisions, and would further the policy of deterring dangerous conduct that underlies them, to allow such claims when the fetus does not survive. Courts construing wrongful death statutes similar to N.C.G.S. § 28A-18-2 generally have concluded that a viable fetus is among the class of "persons" contemplated by the statute's authors. *See Amadio*, 509 Pa. at 224-25 n.4, 501 A. 2d at 1097-98 n.4 (Zappala, J., concurring).

It is unlikely that the legislature would want to preclude recovery for the death of a fetus when recovery for a fetal injury not resulting in death is permitted. The unborn child's parents are the real parties in interest here, and they seek compensation for the complete loss of, rather than mere injury to, their offspring. Surely the legislature would find their claim as compelling as that of a child who seeks to recover for a prenatally inflicted but nonfatal injury, the consequences of which could vary from moderate to severe.

The legislature, moreover, has indicated that for purposes of the wrongful death statute, a "person" is someone who possesses "human life." The preamble to the most recent revision of N.C.G.S. § 28A-18-2 stated:

> WHEREAS, *human life* is inherently valuable; and
>
> WHEREAS, the present statute is so written and construed that damages recoverable from a person who has caused death by a wrongful act are effectively limited to such figure as can be calculated from the expected earnings of the deceased, which is far from an adequate measure of the value of *human life;* Now, therefore, [the damages available for the wrongful death of a person were redefined].

1969 N.C. Sess. Laws ch. 215, preamble (emphasis added). A viable fetus, whatever its legal status might be, is undeniably alive and undeniably human. It is, by definition, capable of life independent of its mother. A viable fetus is genetically complete and can be taxonomically distinguished from non-human life forms. Again,

this is some evidence that a viable fetus is a person under the wrongful death statute.

We conclude that although the face of the wrongful death statute does not conclusively answer the question before us, case law concerning recovery for fetal injuries and the amending legislation quoted above both point toward acknowledging fetal personhood.

B.

The Anglo-American history of wrongful death actions begins with the English case of *Baker v. Bolton*, 170 Eng. Rep. 1033 (1808), which held that at common law there was no right to an action for wrongful death. Parliament responded to this holding—albeit somewhat belatedly—by enacting a wrongful death statute known as Lord Campbell's Act in 1846. 9 & 10 Vict., ch. 93. All fifty American legislatures have since followed suit. Prosser & Keeton on Torts 945 (1984).

North Carolina adopted its first wrongful death statute shortly before the Civil War. Revised Code of 1854, ch. 1, § 9. At that time, this Court probably would not have recognized an action to recover for the death of a stillborn child. Until 1946, nearly all states denied recovery to persons who had suffered prenatal injuries, whether they survived or not. *Stetson*, 274 N.C. at 155, 161 S.E. 2d at 533. Following World War II, however, there occurred " 'the most spectacular abrupt reversal of a well-settled rule in the whole history of the law of torts.' " *Id.* (quoting Prosser on Torts § 56 (1964)). Courts everywhere began allowing children to bring actions for injuries they suffered prior to birth. In 1949, Minnesota became the first state to recognize an action for wrongful death brought on behalf of a stillborn child. *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W. 2d 838 (1949). Since then, more than thirty other states and the District of Columbia have recognized a cause of action for infants negligently or intentionally killed *in utero*. Comment, *Wrong Without a Remedy—North Carolina and the Wrongful Death of a Stillborn*, 9 Campbell L. Rev. 93, 110-11 (1986).

Before 1969, plaintiffs in North Carolina wrongful death actions could recover only "such damages as are a fair and just compensation for the pecuniary injury resulting from such death."

N.C.G.S. § 28-174 (superseded by N.C.G.S. § 28A-18-2(b)). The amount recoverable for this "pecuniary injury" was determined by deducting the probable cost of the decedent's living expenses from his probable gross income during the years he would have been expected to live had it not been for the defendant's tort. *Purnell v. Rockingham R.R. Co.*, 190 N.C. 573, 130 S.E. 313 (1925). This income-focused measure of damages severely limited recovery in many cases and eliminated it altogether in others. Often, evidence of pecuniary loss was unobtainable where the decedent was a child, homemaker or handicapped person. *Bowen v. Constructors Equipment Rental Co.*, 283 N.C. 395, 196 S.E. 2d 789 (1973). Wrongful death actions brought on behalf of stillborn infants were denied because the pecuniary injuries stemming from the prenatal death of a viable child were "sheer speculation." *Gay v. Thompson*, 266 N.C. 394, 402, 146 S.E. 2d 425, 429 (1966).

The legislature amended the Wrongful Death Act in 1969 by passing what was popularly known as "The Wife Bill." *Bowen*, 283 N.C. at 419, 196 S.E. 2d at 805. The purpose of the amendment was to permit recovery for losses unrelated to the decedent's actual monetary income. *See id.*; 1969 N.C. Sess. Laws ch. 215, preamble. Since 1969 the wrongful death statute has permitted beneficiaries to recover, in addition to lost income, compensation for the decedent's medical and funeral expenses, his pain and suffering, and loss of the decedent's services, protection, care, assistance, society, companionship, comfort, guidance, kindly offices and advice, among other things. N.C.G.S. § 28A-18-2(b). Punitive and nominal damages are also available. *Id.*

The legislature's 1969 expansion of the recovery permitted in wrongful death actions substantially undercut the rationale for this Court's earlier decision in *Gay*. Actions for the wrongful death of a fetus were disallowed in that case because the plaintiff could not prove "pecuniary injury"—that is, loss of income—without resorting to excessive speculation. Damages available under the amended statute are no longer limited, however, to lost income. The statute now permits recovery for such things as funeral expenses, which can be precisely calculated. Thus, it is plain that *Gay* should not control the outcome of this case.

The original purpose of our Wrongful Death Act was to change the common law rule of no recovery for the deaths of per-

sons victimized by tortfeasors. The statute provides compensation to beneficiaries of the decedent's estate for their loss, and helps to deter dangerous conduct. *See O'Grady v. Brown*, 654 S.W. 2d 904 (Mo. 1983). As Justice Cardozo said fifty years ago:

> Death statutes have their roots in dissatisfaction with the archaisms of the [common law rule of no liability]. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system.

Van Beeck v. Sabine Towing Co., 300 U.S. 342, 350-51, 81 L.Ed. 685, 690 (1937) (quoted in *O'Grady*, 654 S.W. 2d at 909).

The language of our wrongful death statute, its legislative history, and recognition of the statute's broadly remedial objectives compel us to conclude that any uncertainty in the meaning of the word "person" should be resolved in favor of permitting an action to recover for the destruction of a viable fetus *en ventre sa mere*.[2] To the extent that the Court of Appeals' decisions in *Yow* and *Cardwell* are inconsistent with the holding in this case, they are overruled.

II.

[2] Although the Court has determined that N.C.G.S. § 28A-18-2 permits plaintiff to maintain an action for wrongful death in this case, the matter does not end there. Damages available under the statute are not automatic; they are what the legislature will permit the beneficiaries to recover *provided those damages can be proved*. The law disfavors—and in fact prohibits—recovery for damages based on sheer speculation. *Jackson v. Bumgardner*, 318 N.C. 172, 347 S.E. 2d 743 (1986); *Chesson v. Keickheffer Container Co.*, 216 N.C. 337, 4 S.E. 2d 886 (1939); D. Dobbs, Remedies 150-57

2. Defendants argue that statutes in derogation of the common law must be strictly construed. *See Swift & Co. v. Tempelos*, 178 N.C. 487, 101 S.E. 8 (1919). The Wrongful Death Act, however, is not in derogation of the common law. It is, rather, a remedial statute and should be "liberally construed, according to its intent, 'so as to advance the remedy and repress the evil.'" *Cape Lookout Co. v. Gold*, 167 N.C. 63, 83 S.E. 3 (1914).

(1973); E. Hightower, North Carolina Law of Damages 49 (1981). Damages must be proved to a reasonable level of certainty, and may not be based on pure conjecture. *Norwood v. Carter*, 242 N.C. 152, 156, 87 S.E. 2d 2, 5 (1955) ("No substantial recovery may be based on mere guesswork or inference . . . without evidence of facts, circumstances, and data justifying an inference that the damages awarded are just and reasonable compensation for the injury suffered."). Damage awards based on sheer speculation would render the wrongful death statute punitive in its effect, *Graf v. Taggert*, 43 N.J. 303, 204 A. 2d 140 (1964), which is not what the legislature intended. *Hall v. Southern R.R.*, 149 N.C. 108, 62 S.E. 899 (1908); *Christenbury v. Hedrick*, 32 N.C. App. 708, 234 S.E. 2d 3 (1977).

This Court has said that the "pecuniary injury" suffered by a stillborn child—that is, its loss of income—could be determined only through sheer speculation. *Gay v. Thompson*, 266 N.C. 394, 146 S.E. 2d 425. Before 1969 this was sufficient reason to deny the action entirely; the wrongful death statute, as it was then construed, did not permit recovery of any other damages. Now that the damages available under the statute have been expanded, the rationale for denying the action in *Gay* has largely evaporated—*but the lesson of that case concerning the income-related losses of stillborn children remains valid.* As another court has said in this context:

> On the death of a very young child . . . at least some facts can be shown to aid in estimating damages as, for example, its mental and physical condition.
>
> But not even these scant proofs can be offered when the child is stillborn. It is virtually impossible to predict whether the unborn child, but for its death, would have been capable of giving pecuniary benefit to its survivors. We recognize that the damages in any wrongful death action are to some extent uncertain and speculative. But our liberality in allowing substantial damages where the proofs are relatively speculative should not preclude us from drawing a line where the speculation becomes unreasonable.

Graf, 43 N.J. at 310, 204 A. 2d at 144. When a child is stillborn we can know nothing about its intelligence, abilities, interests and other factors relevant to the monetary contribution it might—or

might not—someday have made to the beneficiaries in a wrongful death action. A jury attempting to calculate an award for such damages would be reduced to "sheer speculation." *Gay*, 266 N.C. at 402, 146 S.E. 2d at 429. We therefore hold that lost income damages normally available under N.C.G.S. § 28A-18-2(b)(4)a. cannot be recovered in an action for the wrongful death of a stillborn child. To hold otherwise would require us to overrule *Gay*, which we believe was correctly decided.

We also hold that damages normally recovered under N.C. G.S. § 28A-18-2(b)(4)b. & c.—loss of services, companionship, advice and the like—will not be available in an action for the wrongful death of a viable fetus.[3] The reasons are the same as in the case of pecuniary loss. When a child is stillborn we simply cannot know anything about its personality and other traits relevant to what kind of companion it might have been and what kind of services it might have provided. An award of damages covering these kinds of losses would necessarily be based on speculation rather than reason.

The Court is not convinced that the pain and suffering of a fetus can ever be satisfactorily proved, but given recent advances in medical technology relating to the observation and treatment of life *in utero*, we cannot foreclose the possibility as a matter of law. Thus, damages for the pain and suffering of a decedent fetus are recoverable if they can be reasonably established. Medical and funeral expenses, as well as punitive and nominal damages, are just as susceptible of proof here as in any other tort case, and should be allowed where appropriate.

III.

[3] Finally, we note that the parents of the fetus allegedly killed by defendants' negligence have filed suit to recover for personal injuries they allegedly suffered as a result of the same negligence. *DiDonato v. Wortman*, No. 84CVS4475 (Mecklenburg). This raises the possibility that defendants could be made to pay punitive damages to the parents in both actions. Such a result would be unjust and is certainly not what the legislature intend-

3. Recovery for the mother's mental anguish at having lost her child presumably will be available in a personal injury action brought in her own right. *See King v. Higgins*, 272 N.C. 267, 158 S.E. 2d 67 (1967).

ed. We can avoid this problem, however, by simply joining the action for wrongful death of the viable fetus with the parents' action for personal injuries.

This Court faced a similar situation in *Nicholson v. Hugh Chatham Memorial Hospital, Inc.*, 300 N.C. 295, 266 S.E. 2d 818 (1980). In that case, plaintiff alleged that her husband had been injured by defendant's negligence, and she sought damages for loss of consortium. Prior to our decision in *Nicholson* we had disallowed claims for loss of consortium brought by the wife. We had done so, in part, because we were

> concerned that to allow a wife's action for loss of consortium, particularly when the main component of that action was compensation for lost service, would allow double recovery. A husband, suing in his own behalf, would recover for loss of his services while a wife, suing for loss of consortium, would recover for loss of the selfsame services.

Nicholson, 300 N.C. at 300, 266 S.E. 2d at 821. In overruling an older decision and allowing the action for a wife's loss of consortium, we determined in *Nicholson* that the best way to avoid the problem of "double recovery" was to compel joinder of the wife's claim with any personal injury action brought by the husband. *Id.* at 303, 266 S.E. 2d at 823. The Court said: "The reasons for requiring joinder are sound. Not only does joinder avoid the problem of double recovery, it recognizes that, in a very real sense, the injury involved is to the marriage as an entity." *Id.*

In *Nicholson* there were, of course, two alleged victims—the wife and the husband—and therefore two alleged torts. In this case there are *three* alleged victims—the fetus, the mother and the father. Recovery of punitive damages in the wrongful death action would be related to the death suffered by the fetus, while recovery of punitive damages in the parents' personal injury suit would be related to injuries suffered by the mother and father.

This case is like *Nicholson*, however, in that the family unit allegedly has been injured by a single negligent act or course of conduct. As we have already noted, wrongful death actions are permitted not for the benefit of the decedent, but to compensate the decedent's survivors. The beneficiaries are the real parties in interest. *In re Ives Estate*, 248 N.C. 176, 102 S.E. 2d 807; *Daven-*

port v. Patrick, 227 N.C. 686, 44 S.E. 2d 203. Here, the recovery in both the wrongful death action and the parents' separate personal injury suit would go to the parents.

For the most part, the items of damage available in the wrongful death action and the parents' personal injury suit do not overlap. The decedent's funeral expenses, for example, are available only in the wrongful death action. *Boulton v. Onslow County Bd. of Educ.*, 58 N.C. App. 807, 295 S.E. 2d 246 (1982). Similarly, recovery for the mother's pain and suffering would be available only in the parents' lawsuit.

Punitive damages, however, would be available in both actions. If the actions are tried separately, defendants could be punished twice for a single act of negligence. The parents, moreover, would reap a windfall not contemplated by the legislature when it permitted actions for wrongful death. We therefore hold that plaintiff's claim for the wrongful death of a viable fetus must be joined with any claims based on the same acts of alleged negligence brought by the parents in their own right.

IV.

To summarize: The legislature does not appear to have directly considered the question presented in this case when it adopted and amended North Carolina's wrongful death statute. Therefore, it is the Court's obligation to construe the statute in a way that is consistent with both its language and the broad purposes it was intended to serve. An examination of that language and those purposes leads us to conclude that the death of a viable fetus falls within the purview of N.C.G.S. § 28A-18-2, and that this action must be allowed insofar as plaintiff seeks to recover damages that are not based on sheer speculation. Plaintiff's action for wrongful death must, however, be joined with any action based on the same facts brought by the decedent's parents.

Reversed and remanded.

Justice MARTIN concurring in part and dissenting in part.

I concur in the holding of the majority that a viable unborn child is a "person" within the meaning of the wrongful death statute, N.C.G.S. § 28A-18-2(b). On this issue, I deem it not inap-

propriate to set forth additional reasons that lead me to this conclusion.

In 1969 the General Assembly rewrote the wrongful death statute beginning with a preamble stating that "human life" is valuable. The legislature expanded the scope of recoverable damages to include pain and suffering of the decedent, loss of society, companionship, comfort, guidance, kindly offices and advice, and punitive damages. The revised statute thus contemplates that a much broader range of deaths will be compensable than under the earlier statute; that is, "person" now includes others than those who earn wages or those with easily provable monetary worth.

The public policy of this state as expressed by the legislature in our statutes recognizes that an unborn infant is a person. Significantly, an unborn infant, *in esse*, is "deemed a *person* capable of taking by deed or other writing any estate whatever in the same manner as if he were born." N.C.G.S. § 41-5 (1984) (emphasis added). *See also* N.C.G.S. § 29-9 (1984) (unborn infant can inherit property); N.C.G.S. § 31-5.5 (1984) (unborn child at testator's death can share in estate); N.C.G.S. § 33-2 (1984) (unborn child can have guardian appointed).

State v. Forte, 222 N.C. 537, 23 S.E. 2d 842 (1943), is also instructive. In *Forte* we held that an unborn infant has a "life capable of being destroyed" when it has "so far advanced as to be regarded in law as having a separate existence." *Id.* at 538, 23 S.E. 2d at 843.

A viable baby—one which has developed within its mother's womb to the point that it is capable of independent existence outside its mother's womb, Black's Law Dictionary 1404 (5th ed. 1979) (and cases cited therein)—clearly has an identity separate from its mother, medically and legally. The child has a separate physiological system; it is not a "part" or an organ of the mother but has an independent life.

The child here was well beyond full term and was obviously viable; therefore it had a separate and distinct existence and a life capable of being destroyed within the definition enunciated in *Forte*. If an unborn child has a life capable of being destroyed for the purposes of the criminal law, as in *Forte*, it has a life capable of being destroyed under the lesser civil standard of a wrongful

death action. Negligent destruction of such life must therefore be compensable in a wrongful death action. These manifestations of the public policy of our state are consistent with the decision of the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 35 L.Ed. 2d 147, *reh'g denied*, 410 U.S. 959, 35 L.Ed. 2d 694 (1973), recognizing that a state has a compelling interest in protecting the life of an unborn child after viability.

The majority's recognition of a cause of action for wrongful death of a fetus is also in accord with the great majority of the jurisdictions that have considered this issue.

I must dissent, however, from the opinion of the majority with respect to damages. The majority correctly holds that a viable unborn fetus is a "person" within the meaning of the wrongful death statute, then inexplicably attempts to cut away part of the statutory damages provided within the statute. This the Court cannot do. The plaintiff in this wrongful death action is no different from any other plaintiff; the plaintiff is entitled to recover such damages as are proved in accordance with the law. The trial judge *may* rule that plaintiff has failed to prove one or more elements of damages as a matter of law, but it is not for this Court to bar plaintiff from *trying* to prove all damages recoverable under the statute.

As I stated with regard to the limitation of damages in *Jackson v. Bumgardner*, 318 N.C. 172, 347 S.E. 2d 743 (1986):

> The better practice would be to allow the trial court in the first instance to address the issue of what damages are recoverable. The appellate division would then have a full evidentiary record upon which to make a proper analysis as to damages rather than attempting to formulate an abstract rule. The majority has decided damage issues that have not been presented to us upon an evidentiary record and which may never be so presented. Sound judicial discipline would dictate withholding such momentous decisions until all available evidence and arguments can be presented to the Court. Precipitous judgments are to be avoided.

Id. at 189, 347 S.E. 2d at 753 (Martin, J., concurring in part and dissenting in part). The legislature has defined the possible elements of damage recoverable in a wrongful death action and

must have intended that the same rule of damages apply to all such actions. It is not the prerogative of this Court to usurp a legislative function by rewriting the statute to change the rule of damages.

Nor can I adhere to the rule announced in the majority opinion that a wrongful death action based upon the death of a viable unborn fetus *must* be tried with any action the parents may have arising out of the fetal death. This is a matter better left to the discretion of the trial judge. There are many factors to be considered in deciding this question, such as the identity of parties and the negligent act or acts involved. Defenses available to defendant or defendants as to each plaintiff, time constraints within which to institute the different actions, the measurement of damages, and other factors, may vary. Protecting a defendant from paying double punitive damages on the same evidence can be accomplished on a case-by-case basis. The blanket rule required in the majority opinion would be at best unworkable and at worst unjust.

Justice MITCHELL joins in this concurring and dissenting opinion.

Justice WEBB dissenting.

I dissent. At the outset let me say that I would have no objection to allowing a wrongful death action for an unborn child if the Legislature had so prescribed. I do not believe the Legislature has done so and it is error for us to do it for them. The majority has then compounded the error by repealing a part of the statute they do not like.

The majority begins by denigrating legislative silence as a tool in statutory construction. It cannot add to the strength of this Court to use this canon of construction when we want to reach a certain result, *State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986), and ignore it when it suits our convenience. Whatever the majority thinks of this canon in general, I believe it is very helpful in this case. In *Gay v. Thompson*, 266 N.C. 394, 146 S.E. 2d 425 (1966), this Court held there could be no recovery for the wrongful death of an unborn child because there could be no proof of damage under the Act as then written. The General Assembly

then amended the Act to change the measure of damages. I believe we have to assume the General Assembly was aware of *Gay* when the Act was amended. They could very easily have defined person to include an unborn person but they did not do so. *Cardwell v. Welch*, 25 N.C. App. 390, 213 S.E. 2d 382, *cert. denied*, 287 N.C. 464, 215 S.E. 2d 623 (1975) and *Yow v. Nance*, 29 N.C. App. 419, 224 S.E. 2d 292, *cert. denied*, 290 N.C. 312, 225 S.E. 2d 833 (1976) were then decided. Both these cases hold there is no wrongful death claim for an unborn child. The General Assembly has not seen fit to change this rule for the last twelve years.

The majority says, "We cannot assume that our legislators spend their time poring over appellate decisions so as not to miss one they might wish to correct." I believe we have to assume the legislators were aware of *Gay* when they amended the Act and did not say persons includes unborn persons. If the canon of construction that legislative inaction means legislative approval has any validity, we have to assume that in such a high visibility field of law as this one the General Assembly has been aware of *Cardwell* and *Yow*. If, as the majority says, "the face of the wrongful death statute does not conclusively answer the question before us" we should use the best tool we have and affirm the Court of Appeals.

I believe the majority has committed further error by holding that although there may be a wrongful death claim for an unborn person, we shall not allow some of the damages for which the statute provides. This repeals a part of the statute by judicial fiat. I believe it is error to do so. If there are to be wrongful death claims for unborn persons, the plaintiffs should have whatever damages they may prove under the Wrongful Death Act.

GRACE BAPTIST CHURCH OF OXFORD, NORTH CAROLINA; REVEREND CECIL NEWTON, PASTOR OF GRACE BAPTIST CHURCH OF OXFORD, NORTH CAROLINA; AND EUGENE C. SHEARON, DEACON AND TRUSTEE, JAMES TAYLOR HUTSON, TRUSTEE, AND MARK COMPTON, TRUSTEE AND ALL MEMBERS OF THE GRACE BAPTIST CHURCH OF OXFORD, NORTH CAROLINA v. THE CITY OF OXFORD, NORTH CAROLINA; HUGH M. CURRIN, MAYOR AND MEMBER OF THE BOARD OF COMMISSIONERS OF THE CITY OF OXFORD, NORTH CAROLINA; HUBERT L. COX, ALLIE G. ELLINGTON, STANLEY FOX, J. EDDIE McCOY, ROBERT T. POWELL, JAMES W. SMITH, AND A. B. SWINDELL, MEMBERS OF THE BOARD OF COMMISSIONERS OF THE CITY OF OXFORD, NORTH CAROLINA; H. T. RAGLAND, JR., CITY MANAGER OF THE CITY OF OXFORD, NORTH CAROLINA; FRANK WHITE, BUILDING INSPECTOR OF THE CITY OF OXFORD, NORTH CAROLINA, AND THE STATE OF NORTH CAROLINA

No. 456A86

(Filed 28 July 1987)

1. **Municipal Corporations § 30.11— zoning ordinance—paved off-street parking—due process**

A zoning ordinance requiring paved off-street parking is related to a legitimate end and thus does not violate due process since it is based on definite advantages in connection with drainage, prevention of erosion, and appearance.

2. **Constitutional Law § 4; Municipal Corporations § 31.1— zoning ordinance—standing to challenge for selective enforcement**

Plaintiff church was in immediate danger of sustaining injury from a city zoning ordinance requiring paved off-street parking and thus had standing to challenge the constitutionality of the ordinance on the ground of selective enforcement where the city's answer prayed that the church be ordered to cease use of its property until it is in compliance with the ordinance, and the trial court found that the city "at the commencement of this action and presently" intends to enforce the provision requiring paved parking.

3. **Constitutional Law § 20.1; Municipal Corporations § 30.11— zoning ordinance—paved off-street parking—no selective enforcement**

A city ordinance requiring paved off-street parking was not selectively and discriminatorily enforced against plaintiff church in violation of the federal and state guarantees of equal protection where testimony from city officials was to the effect that since the enactment of the ordinance in 1970, the city issued no building permits that waived the requirements of the ordinance; there was testimony that enforcement proceedings had been undertaken in the courts against one other property owner; the city building inspector twice testified that other churches in town, against whom the ordinance had not been enforced, were erected prior to the effective date of the ordinance and were thus protected from enforcement proceedings by a "grandfather clause"; and with respect to nine entities identified as subject to the ordinance but without off-street paved parking on the premises, the record is silent as to whether

these businesses provided for off-street parking in other facilities, as is permitted by the ordinance, or whether these businesses obtained variances from the paved parking requirement. Amendment IV of the U.S. Constitution; Art. I, § 19 of the N.C. Constitution.

4. Constitutional Law § 20.1; Municipal Corporations § 30.15— zoning ordinance—paved off-street parking—constitutionality of grandfather clause

A city zoning ordinance requiring paved off-street parking does not violate equal protection because of a "grandfather clause" by which buildings erected prior to the effective date of the ordinance (1970) are not subject to such requirement since the ordinance applies with equal force to those similarly situated, and the fact that the ordinance is prospective and permits the continuation of existing uses does not amount to unlawful discrimination.

Justice MARTIN concurring in part and dissenting in part.

ON discretionary review of a decision of the Court of Appeals entered 1 July 1986, affirming the judgment of *Hight, J.*, in Superior Court, GRANVILLE County, holding the provisions of an ordinance of the City of Oxford valid. 81 N.C. App. 678, 345 S.E. 2d 242 (1986) (unpublished).

Plaintiff Grace Baptist Church brought this action to enjoin[1] enforcement of a zoning ordinance of the City of Oxford. On 17 September 1985, Hight, J., heard the matter without a jury and concluded that the challenged ordinance, as written and applied, did not violate the due process and equal protection clauses of the federal and state constitutions. The Court of Appeals affirmed. Plaintiff's petition for discretionary review pursuant to N.C.G.S. § 7A-31 was allowed on 6 January 1987. Heard in the Supreme Court 15 April 1987.

I. Beverly Lake for plaintiff-appellants.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by George W. Miller, Jr., and Robert W. Oast, Jr., and Watkins, Finch & Hopper, by Daniel Finch, for defendant-appellees.

1. As neither of the parties has raised the issue, we do not decide the question of whether a party may seek an injunction against enforcement of an ordinance where it has failed to exhaust its administrative remedies. *See Forsyth County v. York*, 19 N.C. App. 361, 198 S.E. 2d 770, *cert. denied*, 284 N.C. 253, 200 S.E. 2d 653 (1973), in which the Court of Appeals held that defendant prosecuted for violation of a zoning ordinance failed to exhaust statutory remedies and thus could not challenge ordinance on subsequent prosecution. *See also Elizabeth City v. LFM Enterprises*, 48 N.C. App. 408, 269 S.E. 2d 260 (1980) (no collateral attack was permitted on validity of ordinance where defendants failed to exercise remedies available under the zoning ordinance).

MEYER, Justice.

We will refer to the appellants herein in the singular, i.e., Grace Baptist Church. On appeal, appellant contends that a zoning ordinance of the City of Oxford is unconstitutional on its face and as applied. Specifically, appellant contends that an ordinance requiring off-street paved parking violates the due process and equal protection clauses of the federal and state constitutions. The Court of Appeals ruled on the facial validity of the ordinance but declined to rule on appellant's claim of selective enforcement of the ordinance. We affirm the Court of Appeals holding that the ordinance is constitutional; however, we modify that opinion to the extent that it held that the issue of selective enforcement was not ripe because no enforcement proceeding has been initiated by the City of Oxford. We find that the question of selective enforcement is ripe for review but that the appellant failed to demonstrate that the statute was selectively enforced in an unlawful manner.

At the outset, before reciting the relevant facts, it is appropriate to note that the appellant expressly states that the rights it asserts are not those protected by the first amendment to the United States Constitution or by the religious liberty clause of the North Carolina Constitution, N.C. Const. art. I, § 13.

The City of Oxford enacted a zoning ordinance in 1970. The ordinance included a provision requiring that all parking areas, except those attached to single family dwellings, be surfaced with "a stabilized all-weather material capable of carrying without damage, the heaviest vehicle loads that can reasonably be regularly anticipated on such surface." City of Oxford, Zoning Ordinance, § 502.7.3.

In 1972, Grace Baptist Church was built in a residential zone pursuant to a special use permit that required the church to be built in accordance with the ordinances of the City of Oxford. The church property includes a parking lot adjacent to the sanctuary; the parking lot is gravel based with grass and has two entrances that lead onto the street.

Appellant instituted this declaratory judgment action in November 1982. Appellant alleged that portions of the Oxford ordinance of 1970 were unlawful in that they deprived appellant of

due process of law and denied it equal protection of the law. Specifically, appellant challenged sections of the Oxford ordinance regulating the size of signs and requiring paved off-street parking. In an answer filed on 2 February 1983 the defendant city moved that the action be dismissed and that the church be ordered to cease using the property in violation of the zoning ordinance.

A hearing was held at the 9 September 1985 Civil Session of Superior Court, Granville County, Judge Henry Hight presiding. In an order filed on 17 September 1985, the court made findings of fact and concluded that the sign ordinance had been selectively enforced against the appellant and that such enforcement violated the due process and equal protection clauses of the state and federal constitutions. The court also found that the ordinance requiring paved off-street parking was valid on its face and was not administered in a discriminatory manner.

Appellant appealed that portion of Judge Hight's order declaring that the requirement of paved off-street parking is constitutionally valid on its face and as applied. The Court of Appeals, in an unpublished opinion, affirmed the finding of the facial validity of the ordinance. However, the Court of Appeals did not address the question of whether the challenged ordinance had been selectively enforced, inasmuch as it found that no enforcement action had been brought against appellant.

I.

[1] First we address appellant's challenge to the facial validity of the challenged ordinance. Appellant concedes that the city, in the exercise of its police power, may require that a church maintain an off-street parking area adequate in size to accommodate all vehicles regularly coming to the church. Specifically, appellant challenges the requirement that the off-street parking area be paved.

In addressing appellant's contentions, we are guided by some well-established principles of municipal law. Under the authority granted by the General Assembly, a city may, by ordinance,

> define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citi-

> zens and the peace and dignity of the city, and may define and abate nuisances.

N.C.G.S. § 160A-174(a) (1982). Grants of power are to be broadly construed to include any additional and supplementary powers that are reasonably necessary to effectuate the grant of power. N.C.G.S. § 160A-4 (1982). In reviewing an ordinance to determine whether the police power has been exercised within constitutional limitations, this Court does not analyze the wisdom of a legislative enactment. *Town of Atlantic Beach v. Young*, 307 N.C. 422, 298 S.E. 2d 686, *appeal dismissed*, 462 U.S. 1101, 77 L.Ed. 2d 1328 (1983).

When a zoning ordinance is challenged on the grounds that it violates due process, the test of its constitutionality is whether it bears some reasonable relation to the legitimate objectives of the police power. *Euclid v. Amber Realty Co.*, 272 U.S. 365, 71 L.Ed. 2d 303 (1926). A municipality's assertion that an ordinance has been enacted for the public welfare is not sufficient, in itself, to bring the ordinance within the valid exercise of its police power. *Town of Atlantic Beach v. Young*, 307 N.C. 422, 298 S.E. 2d 686.

Applying the foregoing principles, we turn to appellant's contention that the ordinance requiring paved off-street parking is not related to any legitimate end. We observe that requirements for paved parking are widespread, although some municipalities are rethinking such requirements. 4A N. Williams & J. Taylor, *American Planning Law* § 108.07 (1986). That the practice is widespread, however, does not make it constitutional. Nevertheless, it is clear that the requirement of paved parking areas is based on definite advantages in connection with drainage, prevention of erosion, and appearance. *State v. Larson Transfer and Storage, Inc.*, 310 Minn. 295, 246 N.W. 2d 176 (1976) (upholding, against due process challenge, city ordinance requiring paving of off-street parking areas). We therefore reject appellant's argument that the requirement of paved off-street parking is unrelated to a legitimate end.

II.

[2] Appellant next argues that the Oxford ordinance violated the equal protection clause of the fourteenth amendment because it was selectively enforced against the church. U.S. Const. amend.

XIV. The Court of Appeals declined to rule on this question because it found that the city had not brought any enforcement action against the church. We find that the Court of Appeals erred in declining to address the question of whether the ordinance, as applied, was selectively enforced against the appellant.

In order to challenge the constitutionality of an ordinance, a litigant must produce evidence that he has sustained an injury or is in immediate danger of sustaining an injury as a result of enforcement of the challenged ordinance. *Town of Atlantic Beach v. Young*, 307 N.C. 422, 298 S.E. 2d 686. *See generally* J. Nowak, R. Rotunda & J. Young, *Constitutional Law*, ch. 2, § 4 (2d ed. 1983).

Appellant's complaint contains an allegation that the city intends to require it to pave its parking lot. This complaint does not, in itself, confer standing. However, the defendant's answer prays that the church be ordered to immediately cease use of its property until "they are in compliance with the said Ordinance." Based upon the answer and the trial court's finding that the city, "at the commencement of this action and presently," intends to enforce the provision requiring paved parking lots, we hold that the church was in immediate danger of sustaining injury. Thus, it had standing to challenge the constitutionality of the ordinance.

III.

[3] Our inquiry now turns to appellant's allegation that the ordinance was enforced in a selective and discriminatory manner in violation of the federal and state constitutional guarantees of equal protection. U.S. Const. amend. IV; N.C. Const. art. I, § 19.

We note at the outset that the Grace Baptist Church facility was built pursuant to a special use permit under which compliance with the city ordinances, including the parking ordinance, was required. Although the question of whether a condition imposed by the special use permit can be the subject of a claim of "selective enforcement" is an interesting one, we do not address that question, as it was not addressed in the trial court or on appeal by either party.

An ordinance may be valid on its face yet deny equal protection because it is enforced in a discriminatory manner. *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed. 220 (1886); *Kresge Co. v. Davis*,

277 N.C. 654, 178 S.E. 2d 382 (1971). *See generally* Annot. "Enforcement of Zoning Regulation as Affected by Other Violations," 4 A.L.R. 4th 462 (1981 and Supp. 1986) (collecting cases in which selective enforcement has been raised as a defense to enforcement of zoning ordinances). A party seeking to prove that a municipality's enforcement of a facially valid ordinance amounted to a denial of equal protection must show that the municipality engaged in conscious and intentional discrimination. *E.g., City of Burlington v. Kutzer*, 23 Wash. App. 677, 597 P. 2d 1387 (1979) (bingo games conducted on defendant's premises in violation of ordinance, yet selective enforcement no defense; although another establishment not prosecuted, defendant failed to show discriminatory purpose). Mere laxity in enforcement does not satisfy the elements of a claim of selective or discriminatory enforcement in violation of the equal protection clause. *Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E. 2d 382.

The party who alleges selective enforcement of an ordinance has the burden of showing that the ordinance has been administered "with an evil eye and an unequal hand." *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 30 L.Ed. 220, 227. To satisfy this burden, he must demonstrate a pattern of conscious discrimination. *E.g., Bianco v. Town of Darien*, 157 Conn. 548, 254 A. 2d 898 (1969) (that all houses on plaintiff's street violated one or more ordinances does not demonstrate nature of other violations or conscious discrimination). *See* 4 R. Anderson, *American Law of Zoning* § 31.06 (3d ed. 1986).

With the foregoing principles as a guide, we now analyze appellant's claim that the provision of the ordinance requiring paved parking lots was enforced in a discriminatory manner. In support of his conclusion that the paved parking ordinance did not violate the federal or state constitution, Judge Hight found as an ultimate fact that the ordinance had been systematically and uniformly enforced. This finding of fact was supported by ample evidence. Testimony from city officials was to the effect that since the enactment of the ordinance in 1970, the city issued no building permits that waived the requirements of the ordinance. There was also testimony that enforcement proceedings had been undertaken in the courts against one other property owner. The city building inspector twice testified that other churches in town, against whom the ordinance had not been enforced, were

erected prior to the effective date of the ordinance and were thus protected from enforcement proceedings by a "grandfather clause."[2] This testimony was uncontested.

Although it is unnecessary to our decision, we also note that with respect to nine entities identified as subject to the ordinance but without off-street paved parking on the premises, the record is silent as to whether these businesses provided for off-street parking in other facilities, as is permitted by the ordinance. The record is also silent as to whether these businesses obtained variances from the paved parking requirement.

There is no indication that the church was singled out for prosecution as a result of some unlawful purpose. We therefore find that the trial court properly determined that the ordinance was not selectively enforced.

IV.

[4] Finally, we address appellant's contentions that the ordinance denies equal protection of law because of a so-called "grandfather clause" by which buildings erected prior to 1970 are not subject to the paved parking requirement. Appellant argues that there is no sound basis for requiring that buildings built after 1970 maintain paved off-street parking, while exempting from this requirement those buildings constructed prior to the enactment of the ordinance.

The governing principles in determining whether a legislative classification violates the equal protection clause were well summarized in *White v. Pate*, 308 N.C. 759, 304 S.E. 2d 199 (1983):

2. Section 501.1.1 of the City of Oxford zoning ordinance provides:

501.1.1: For all buildings and structures erected and all uses of land established after the effective date of this Ordinance, accessory parking and loading facilities shall be provided as required by the regulations of the districts in which such buildings or uses are located and in accordance with the amounts specified in Section 503, Off-Street Parking Space and Section 504, Off-Street Loading. However, where a building permit has been issued prior to the effective date of this Ordinance, and provided that construction is begun within thirty (30) days from such effective date and diligently prosecuted to completion, parking and loading facilities in the amounts required for issuance of said building permit may be provided in lieu of any different amounts required by this Ordinance.

> When a governmental classification does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the lower tier of equal protection analysis requiring that the classification be made upon a rational basis must be applied. *Vance v. Bradley*, 440 U.S. 93, 59 L.Ed. 2d 171, 99 S.Ct. 939 (1979); *Texfi Industries v. City of Fayetteville*, 301 N.C. [1] at 11, 269 S.E. 2d [142] at 149 [1980]. The "rational basis" standard merely requires that the governmental classification bear some rational relationship to a conceivable legitimate interest of government. Additionally, in instances in which it is appropriate to apply the rational basis standard, the governmental act is entitled to a presumption of validity. *Vance v. Bradley*, 440 U.S. at 97, 59 L.Ed. 2d at 176, 99 S.Ct. at 942-43.

White v. Pate, 308 N.C. at 766-67, 304 S.E. 2d at 204.

We note that although appellant is a church, it does not claim that the ordinance works a deprivation of a fundamental right. Rather, the church argues that there is no justification for compelling it to pave its parking lot while not subjecting churches built prior to 1970 to the same requirement. The simple answer to appellant's contentions is that the equal protection clause guarantees equal treatment of those who are "similarly situated." *Maines v. City of Greensboro*, 300 N.C. 126, 132, 265 S.E. 2d 155, 159 (1980). The ordinance in question applies with equal force to all "structures erected and all uses of land established after the effective date [1970] of this Ordinance." City of Oxford, Zoning Ordinance, § 501.1.1.

That a zoning ordinance is prospective, and permits the continuation of existing uses, does not invalidate the ordinance. This Court long ago held that a zoning ordinance's allowance of existing uses does not amount to unlawful discrimination. *Elizabeth City v. Aydlett*, 201 N.C. 602, 161 S.E. 78 (1931) (ordinance that prohibits gas station in certain district not discriminatory because it permits continued use of station existing prior to ordinance). *See also Kinney v. Sutton*, 230 N.C. 404, 411, 53 S.E. 2d 306, 311 (1949) (restrictions against use of property as restaurant or place of public dining; "provision exempting nonconforming structures and uses existing at the enactment of the ordinance has a sound basis and is not unreasonable"). Similar results have obtained in

other jurisdictions where the issue has been presented. *E.g., Puckett v. Paulding County*, 245 Ga. 439, 265 S.E. 2d 579, *cert. denied*, 449 U.S. 836, 66 L.Ed. 2d 43 (1980) (landowner sought variance from ordinance prohibiting operation of auto salvage yard on his premises; neighboring landowner's use of property as auto salvage yard did not result in equal protection violation since neighbor had preexisting conforming use and thus was not similarly situated). *See generally* 1 R. Anderson, *American Law of Zoning* § 6.05 (3d ed. 1986).

For the reasons set forth herein, we find that the challenged portions of the City of Oxford zoning ordinance, as written, do not offend the state or federal equal protection and due process clauses. We also find that the challenged provisions have not been enforced in an unlawful manner and thus reject appellant's claim of an equal protection violation based upon unequal application of the law.

Modified and affirmed.

Justice MARTIN concurring in part and dissenting in part.

I concur with the holding of the majority that the zoning ordinance, section 502.7.3, of the City of Oxford is not unconstitutional on its face. However, I dissent from the holding of the majority that the ordinance was constitutionally applied to the plaintiff Grace Baptist Church of Oxford.

I find that in the application of the ordinance to the Grace Baptist Church, the church was denied the equal protection of the laws as guaranteed by article I, section 19 of the Constitution of North Carolina. This constitutional protection is not limited to the enactment of legislation but extends also to the administration and execution of laws that are facially valid. *Maines v. City of Greensboro*, 300 N.C. 126, 265 S.E. 2d 155 (1980); *State v. Wilson*, 262 N.C. 419, 137 S.E. 2d 109 (1964). Although the burden is upon the Grace Baptist Church to show a purposeful discrimination upon which it relies, *Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E. 2d 382 (1971), I believe that the evidence in this case is sufficient to raise an inference of such purpose sufficient to support a finding to that effect.

Evidence supporting this contention in the record may be summarized as follows:

REVEREND CECIL NEWTON:

I know of my own knowledge, from personal inspection, there are in the City of Oxford 14 churches which have no off-street parking areas, (naming them); 6 churches (naming them) which have no paved parking areas, in addition to Grace Baptist Church, 1 (Oxford United Methodist Church) which has off-street parking for its staff only, and only 1 (West Oxford Baptist Church) which has a paved parking area. That is the only church in Oxford that has paved parking.

I know of my own knowledge 10 business establishments in the City of Oxford (naming them) which have no paved off-street parking. These include a vacuum cleaner bag plant, a funeral home (changed between 1982 and 1983 from Adams Products Building); another funeral home (which added a chapel in 1982); a park; a doctor's office (a new building in 1984); an apartment house, made into duplex apartments in 1982 to 1983; another apartment house; a Housing Authority Apartments built in 1971 to 1973; another Housing Apartments project built in 1971 to 1973; and a community center, opened from an old school building in 1981-82.

MICHAEL GARFIELD WARD:

I made a point at each church to look at the parking facilities available. Oxford Baptist Church, on Main Street, had a place for about 6 or 8 cars and staff parking, nothing else; Oxford Presbyterian Church had no parking at all; Mount Calvary Holy Church, on Lanier Street, had a little place to park but no paved parking lot; Delrayno Baptist Church, on College Street, had a parking lot but it was not paved; Morning Star Baptist Church, on Roxboro Road, had one but it wasn't paved; New Light Baptist Church, on Goshen Street, had one but it was not paved; Grace Baptist Church had one and it was not paved; West Oxford Baptist Church had a parking lot, the only parking lot that was paved; Oxford Church of God had a small area of parking but it was not paved; Mount Zion Holy Church on Orange Street,

did not have a parking lot at all; New Hope Baptist Church didn't have hardly a street to park on.

Satterwhite's Funeral Home did not have a paved parking. A. J. Weinstein was parking on the street and sidewalk. WCBC had no paved parking. The Apartments on College Street, 206 and 208 College Street, had no paved parking. On Hillside Drive, the Housing Authority, and Crescent Drive Housing Authority did not have paved parking.

B. FRANK WHITE:

I am familiar with the Satterwhite Funeral Home and Attorney Darby's office space in the old Adams Company building on Hillsboro Street. There has been a recent change in usage and that is reflected in the Plaintiffs' evidence as a parking violation, which is accurate.

I am familiar with the College Street Apartments. It was two duplex apartments built after the adoption of this Ordinance, which I failed to recognize on this map (Plaintiffs' Exhibit 8) that do not have paved off-street parking, and should be.

I am familiar with the A. J. Weinstein property on Broad Street, which was changed about 1981 to a vacuum bag processing. It is indicated on this map (Plaintiffs' Exhibit 8) as an off-street parking violation, which it is.

I am familiar with the apartments on Cherry Street. They were built since the enactment of this Ordinance. It is correct that they have no off-street paved parking.

I am familiar with the WCBQ Radio Station. It is correct that it has no paved, off-street parking.

I am familiar with the Granville County Community Center which was the old school building on Orange and Spring Streets. It was converted to the Community Center about 1981-1982. That is correctly shown in Plaintiffs' evidence (Plaintiffs' Exhibit 8) as an off-street parking violation.

I am familiar with the Illusions Club on Granville and Hillsboro Streets. It is a nightclub. It may have changed

owners or operators but it was being used as some type of night club prior to the adoption of this Ordinance. At one time where the car wash is on Board Street they had leased that property for off-street parking, and then later they changed hands and the lot was sold for a car wash. They do not have off-street parking now. All of that occurred since 1970.

I am familiar with the Hughes Brothers Garage on Granville Street which has been changed to Mitchell Trucking. It does not have off-street parking.

I am familiar with Newton's Welding Machine on Granville Street. That does not have off-street paved parking.

All of these places came into being since the enactment of the Ordinance in 1970. A lot of these buildings were in existence before then. They have changed uses, and like all other Ordinances and all other laws, has not been enforced in its entirety.

The city contends that the church buildings described above were erected before 10 March 1970 and are thus exempted from the provisions of the ordinance. However, there is no direct specific evidence as to when any of the church *buildings* were erected. There are only vague opinions expressed, such as "in my opinion" and "I would say that, to the best of my knowledge," that the "churches" were in "existence" before 1970. There is no explanation of the word "churches," whether it means church building or the church itself. I do not find this testimony to be sufficient to support the trial judge's conclusion that the ordinance had been uniformly enforced with respect to the parking requirement.

It is to be noted that the trial judge failed to make any factual finding as to when the various church buildings were erected. However, the trial judge did find that the sign portion of the ordinance was selectively enforced against Grace Baptist Church.

The city's own evidence, through B. Frank White, its building inspector, shows that at least nine and perhaps more violations of the zoning ordinance have been permitted by the city and that the city has only initiated proceedings against the Grace Baptist Church for violation of the zoning ordinance. It thus appears upon

the face of the record that the Grace Baptist Church has been singled out for prosecution. There was further sworn testimony by Reverend Cecil Newton that Mr. Ragland, City Manager of the City of Oxford, made the following statement at a meeting of the city council: "We do not want your Gospel preached here; do not need it and want you to take it elsewhere." Although Mr. Ragland denied making this statement, this testimony is sufficient to establish an intent on behalf of the city to practice intentional, purposeful discrimination against the Grace Baptist Church. While the actions of public officials are presumed to be regular and done in good faith, *Maines v. City of Greensboro*, 300 N.C. 126, 265 S.E. 2d 155, I find that the entire testimony on the record is sufficient to rebut the presumption. The Grace Baptist Church has produced sufficient evidence to show that actions as to it were unequal when compared to others similarly situated.

For these reasons I would modify the decision of the Court of Appeals by holding that the city ordinance has been applied to the Grace Baptist Church in violation of its equal protection rights under the Constitution of North Carolina.

STATE OF NORTH CAROLINA v. JOSEPH DOUGLAS JACKSON

No. 644A86

(Filed 28 July 1987)

1. **Criminal Law § 55.1; Bastards § 5.1 — rape — paternity test — G.S. § 8-50.1 not applicable**

A question of parentage is not central to a charge of rape and N.C.G.S. § 8-50.1 is not applicable.

2. **Criminal Law § 50.1 — rape — opinion of geneticist admitted on identity of father of victim's child — no prejudice**

In a prosecution for first degree rape of a female under the age of thirteen, the testimony of an expert geneticist that defendant was "probably" the father of the victim's child was of no assistance to the trier of fact and should have been excluded on that basis where the testimony was based not only on the paternity index, but also on the witness's assumptions about the degree of defendant's access to the victim. However, there was no reasonable possibility that the jury would have reached a different result had the error not been committed because the jury was made aware of the limitations on the witness's ability to access the evidence of paternity and the jury had before it

defendant's inculpatory statement and the victim's statements that defendant was the father of her child. N.C.G.S. § 8C-1, Rules 702, 704, 403; N.C.G.S. § 15A-1443 (1983).

3. **Criminal Law § 73.5— rape—statements of victim to medical personnel—admissible**

The trial court did not err in a prosecution for the first degree rape of a female under the age of thirteen by allowing medical personnel to testify as to statements made to them by the victim where the statements were made for the purpose of diagnosis and treatment. There was no apparent denial of defendant's Sixth Amendment right to confrontation, even though the witness's statements had been recanted, because the victim testified favorably to defendant and defendant had the opportunity of cross-examination. Moreover, a defendant may always challenge under N.C.G.S. § 8C-1, Rule 403 otherwise admissible evidence which tends to have a prejudicial effect that outweighs its probative value. N.C.G.S. § 8C-1, Rule 803 (4).

4. **Criminal Law § 86.8— child rape victim—opinion of psychiatrist as to victim's truthfulness—no prejudice**

In a prosecution for rape of a female under the age of thirteen, a psychiatrist's testimony that the victim was a truthful person was inadmissible; however, when the psychiatrist testified, the jury had already heard the victim testify that she had not engaged in sexual intercourse with defendant and had also heard testimony that the victim had stated to medical personnel that defendant was the father of her child. In view of the victim's inconsistent statements, it was unlikely that the psychiatrist's single statement would sway the jury to believe the victim's prior statements rather than her trial testimony.

5. **Rape and Allied Offenses § 6.1— first degree rape of child—no instruction on attempted first degree rape—no error**

In a prosecution for first degree rape of a female under the age of thirteen, defendant was not entitled to an instruction on the lesser offense of attempted first degree rape where defendant made no written request for instructions, the record does not reflect a formal oral request, defendant did not set forth the omitted instruction in his record on appeal, there was ample evidence of penetration, and defendant relied on an alibi defense. N.C. Rule of App. Procedure 10(b)(2).

BEFORE *Rousseau, J.*, and a jury at the 26 May 1986 Criminal Session of Superior Court, SURRY County, defendant was convicted of first-degree rape, and judgment sentencing defendant to life imprisonment was entered on 28 May 1986. Defendant appeals pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court 14 May 1987.

Lacy H. Thornburg, Attorney General, by John F. Maddrey, Assistant Attorney General, for the State.

Larry Bowman for defendant-appellant.

MEYER, Justice.

Defendant was convicted of first-degree rape of a female under the age of thirteen. On appeal, he argues that the trial court erred in (1) allowing an expert to testify that the defendant was probably the father of the victim's child, (2) admitting statements made by the victim to medical personnel, (3) allowing an expert to express an opinion as to the victim's character for truthfulness, and (4) declining to submit the lesser included offense of attempted first-degree rape. We hold that defendant's arguments (2) and (4) lack merit and although defendant's arguments (1) and (3) are meritorious, they do not constitute prejudicial error warranting a new trial.

On 26 July 1985, the victim, an eleven-year-old female, was taken to the emergency room of Northern Surry Hospital. She had been complaining of abdominal pains; upon examination, the emergency room physician determined that the victim was pregnant and in labor. On the morning of 27 July, she gave birth to a premature male infant, who was subsequently transferred to the pediatric intensive care unit of North Carolina Baptist Hospital.

On 29 July 1985, Officer Gray Shelton was contacted by a protective services worker about a possible sexual offense involving defendant, who was the victim's mother's boyfriend, and the victim. He interviewed the victim, her mother, and the defendant. On 8 August 1985, after being apprised of his *Miranda* rights, the defendant stated to Officer Shelton that he had sexual intercourse with the victim on several occasions, beginning in November 1984. On 13 August 1985, while still being treated at Baptist Hospital, the infant died.

At trial, several witnesses testified that the victim had made statements that the defendant was the father of her child. Dr. Tom Vaughn, the treating physician at Northern Surry Hospital, testified that during her hospitalization, the victim—on three or four occasions—stated that the defendant was the father of her child. Dr. Mary Ann Rozakis, the pediatrician who delivered the

infant, testified that the victim stated that her child's father was the defendant.

Dr. Suzanne Kerney, a psychiatrist who first saw the victim on 15 August 1985, also testified that the victim told her that defendant was the father of her child. Additionally, Dr. Kerney testified that the victim expressed concern for defendant's welfare. Over objection, Dr. Kerney was permitted to offer her opinion that the victim "is a truthful person."

The victim testified and denied that defendant was the father of her child. She also denied that she had sexual intercourse with the defendant. She testified that a man named Tom Strickland was the father of her child.

Officer Gray Shelton of the Surry County Sheriff's Department testified that during an interview conducted on 29 July 1985, the victim stated that defendant was the father of her child and that she had been having sexual intercourse with the defendant since "around Christmas." Rita Johnson, a protective services worker who interviewed the victim on 27 July 1985, testified that the victim stated that defendant was the father of her child. The court instructed the jury that the testimony of Gray Shelton and Rita Johnson was to be considered only for purposes of impeaching the testimony of the victim.

Through Dr. Mary McMahan, a geneticist, the State offered the results of human leukocyte antigens (HLA) white blood cell typing and serum protein typing of defendant, the victim, and the victim's child. Dr. McMahan testified that based on the results of the blood typing, the likelihood of defendant's paternity was between 93.4% and 99.91%. She offered her opinion, based upon the test results, that the defendant "probably is the natural father of the child."

Defendant testified and denied that he had engaged in sexual intercourse with the victim. He admitted giving an inculpatory statement to Officer Shelton on 8 August, but testified that he gave the statement so that he would be removed from the victim's home, thus permitting her to return and live with her mother. Defendant also testified that he had been "working tobacco" in Madison, Indiana, during November 1984 and that he returned home to Mount Airy on 14 December 1984.

Defendant also offered the testimony of Annie May Ceasar, Carolyn Love, and Jeanie Rebels, all of whom testified that the victim had stated that defendant was not the father of her child.

I.

Defendant first argues that the court erred in allowing Dr. McMahan to offer her opinion that defendant was probably the father of the child. We find merit in defendant's argument.

Dr. McMahan testified that based on the HLA tissue tests of the victim (mother), defendant, and the child, (1) defendant could not be excluded as the father of the victim's child; (2) the frequency of the defendant's genes in the black population, based upon a probability that a random man in the population would carry his gene markers is 0.0068, or less than 1%; (3) the "likelihood of paternity" is 93.4% at the low range, 99.21% at the median range, and 99.91% at the high range; (4) the "paternity index," expressed as an "odds ratio," is, at the low range, 14 to 1; at the median range, 126.2 to 1; and at the high range, 1,135 to 1; (5) the likelihood of nonpaternity is 6.6% at the weak level, 0.79% at the median level, and 0.09% at the strong level. She then testified as follows:

> Q. Based on these tests and these findings, do you have an opinion satisfactory to yourself as to whether or not Joseph Douglas Jackson is the father of [the child].
>
> Mr. Bowman: Objection.
>
> Court: Overruled. Exception #1
>
> Q. You may answer.
>
> A. Yes.
>
> Q. And what is your opinion?
>
> A. I believe that he probably is the natural father of the child.

[1] Defendant argues that although N.C.G.S. § 8-50.1 makes the statistical results of a paternity test admissible, the statute does not permit an expert to offer an opinion as to the probability that a defendant is the father of a child. At the outset, we note that N.C.G.S. § 8-50.1 applies only where "the question of parentage

arises." A question of parentage is not central to a charge of rape. Thus, the commands of N.C.G.S. § 8-50.1 are inapplicable. Instead, we are guided by the North Carolina Rules of Evidence, N.C.G.S. § 8C-1, Rules 701 through 706, relating to the testimony of experts.

The State contends that Dr. McMahan's statement was admissible under our rules governing expert testimony. Specifically, the State relies on: (1) Rule 702, which provides that witnesses may testify, in the form of an opinion, concerning scientific or technical matter if it will assist the trier of fact; (2) Rule 703, which provides that the facts or data upon which an expert bases an opinion may be those either perceived or made known to him; and (3) Rule 704, which authorizes expert testimony in the form of an opinion even if it embraces an ultimate issue.

Before addressing the parties' contentions, it is appropriate to review some of the evidentiary problems associated with the use of HLA tissue tests in the determination of paternity. As a result of scientific advances in the past twenty years, tests which compare the human leukocyte antigens (HLA) of a mother, child, and alleged father are now frequently employed in civil paternity proceedings. *See* Annot. "Weight and Sufficiency of Human Leukocyte Antigen (HLA) Tissue Typing Tests in Paternity Cases," 37 A.L.R. 4th 167 (1985). Likewise, but to a lesser extent, the tests have been used in cases in which the defendant, the alleged father, has been charged with rape of the mother. *E.g.*, *State v. Thompson*, 503 A. 2d 689 (Me. 1986) (defendant charged with incest, gross sexual misconduct, sexual abuse of minor). *See generally* E. Cleary, McCormick on Evidence §§ 205, 211 (3d ed. 1984); I. Ellman and D. Kaye, *Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?*, 54 N.Y.U. L. Rev. 1131 (1979); 1A Wigmore, *Evidence* § 165a-165b (Tillers rev. ed. 1983); *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 Fam. L. Q. 247 (1976).

Where HLA tests are performed and comparisons made of the genetic markers of the father, mother, and child, experts frequently offer testimony of the putative father's "paternity index." The "paternity index" is an odds ratio representing "how much more likely the alleged father is to be the true father than is an

unrelated random man of the same race." P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 17-9, at 613, quoting R. Armitage and D. Cross, *Paternity Testing in a Judicial Setting*, 39 J. Mo. Bar 477, at 479 (1983). The index may be a number from zero to, theoretically, infinity. The most frequently encountered indices for nonexcluded men range between nineteen and one hundred. R. Peterson, *A Few Things You Should Know About Paternity Tests [But Were Afraid to Ask]*, 22 Santa Clara L.R. 667 (1982).[1]

The "paternity index" is often expressed as a percentage reflecting the odds ratio. Thus, if one has an odds ratio or paternity index of 19 (19 to 1), that is expressed as 95% $(\frac{19}{19+1})$. *See* R. Peterson, *A Few Things You Should Know About Paternity Tests [But Were Afraid to Ask]*, 22 Santa Clara L.R. 667, at 683 (1982); P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 17-9, at 618.

In calculating the probability of paternity, the expert applies Bayes theorem, which demonstrates the effect of a new item of evidence on a previously established probability. The new item of evidence is the prior probability of paternity based on nongenetic evidence. The expert employs Bayes theorem to combine the nongenetic probability and the HLA test results to arrive at a probability of paternity.[2] Commentators suggest that the

1. The formula for determination of the paternity index is expressed as follows:

$$PI = \frac{X}{Y}$$

where X is the probability that in combination with an egg from the mother, a sperm from a man phenotypically indistinguishable from the defendant would produce a zygote with the child's phenotypes; Y is the probability that in combination with the mother's egg, a sperm from a random, unrelated man would produce the zygote. See P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 17-9 for a thorough explanation of the paternity index.

2. Applying Bayes theorem, the probability of paternity has been expressed as follows:

$$Odds\ (B/T) = LR \times Odds\ (B)$$

where B equals paternity, T signifies the test result, B/T is the probability of paternity revised in light of the test result, and LR is the likelihood ratio (odds ratio). Thus, if the odds are 50/50 (as likely as not), as applied in paternity testing, the

expert should apply varying degrees of prior probability to the established genetic probability reflected in the paternity index. R. Peterson, *A Few Things You Should Know About Paternity Tests [But Were Afraid to Ask]*, 22 Santa Clara L.R. 667 (1982). *See also Plemel v. Walter*, 303 Or. 262, 735 P. 2d 1209 (1987) (discussion of HLA test results as evidence).

In the present case, Dr. McMahan testified that defendant's "paternity index" ranged from 14 to 1 (expressed as a percentage of 93.4%) at the "weak" level, to 126.2 to 1 at the median level (expressed as a percentage of 99.31%), to 1,335 to 1 at the high range (expressed as a percentage of 99.96%). Dr. McMahan testified that the lower range would apply if the jury were to find that the outside evidence was weak. On cross-examination, she stated that the "weak" value was based on a prior probability of 0.1. On cross-examination, she also stated that the genetic evidence could not stand alone, and if there were no access by defendant to the victim, then the prior probability would be 0.000.

[2] We now turn our attention to defendant's specific assignment of error, that the trial court erred in allowing Dr. McMahan to testify that the child born to the victim was probably fathered by the defendant. As noted, we are guided by the North Carolina Rules of Evidence. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C.G.S. § 8C-1, Rule 702 (1986).

Rule 702 sets forth the cornerstone for admissibility of expert testimony. The State argues that under Rule 704, which removes the former prohibition against an expert offering an opinion on an ultimate fact, the testimony of Dr. McMahan was properly admitted. We disagree.

Rule 704 does not eliminate the helpfulness requirement set forth in Rule 702. Although an expert's opinion testimony is not

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probability will be equal to the likelihood ratio. E. Cleary, McCormick on Evidence § 211, at 659 (3d ed. 1984).

objectionable merely because it embraces an ultimate issue, it must be of assistance to the trier of fact in order to be admissible. 3 D. Louisell & C. Mueller, *Federal Evidence* § 395, at 699 (1979 and Supp. 1986); 1 Brandis on North Carolina Evidence § 126 (Cum. Supp. 1986).

It must be emphasized that an expert's testimony is admissible only where it informs the jury about matters not within the full understanding of lay persons. *E.g., United States v. Webb*, 625 F. 2d 709 (5th Cir. 1980) (defendant charged with shooting at helicopter offered sole defense that he was planting turnips at the time of the offense; expert testimony that defendant lacked propensity to commit such offense excludable as it was not necessary to assist the trier of fact). In the present case, Dr. McMahan's testimony on the use of the paternity index was unquestionably of assistance to the trier of fact. The question presented is whether her conclusion that defendant was "probably" the father of the victim's child assisted the fact finder.

Dr. McMahan's testimony that defendant was "probably" the father of the victim's child was based not only on "scientific, technical or other knowledge," i.e., the paternity index, but also on her own assumptions about the degree of defendant's access to the victim. With Dr. McMahan's testimony concerning the paternity index and the evidence of defendant's access before it, the jury was in as good a position as Dr. McMahan to determine whether defendant was "probably" the father of the victim's child. Therefore, Dr. McMahan's testimony that defendant "probably" was the father of the victim's child was of no assistance to the trier of fact and should have been excluded on that basis.

The State argues that our decision in *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985), controls. There, we held that the trial court properly allowed a medical expert to offer his opinion, based upon medical reports, that it was "highly likely" that the victim had engaged in sexual intercourse. *Smith* is factually distinguishable from the present case. In *Smith*, the expert opined that the victim had sexual intercourse, not that she had sexual intercourse with a certain *individual*. In the present case, there was no question but that the victim had sexual intercourse; Dr. McMahan's testimony effectively identified the *individual* with whom she believed the victim had sexual intercourse. In

Smith, the expert's opinion was based upon the medical report of one who had personally examined the victim; in the present case, Dr. McMahan's opinion was based entirely on blood test results. We find these distinctions crucial and hold that *Smith* does not control.

Additionally, an expert's opinion may be objectionable because its prejudicial effect outweighs its probative value. N.C. G.S. § 8C-1, Rule 403 (1986). Allowing an expert to offer a personal opinion as to whether a defendant was the father of the victim's child runs the risk of placing before the jury evidence the prejudicial effect of which could outweigh its probative value. The possible prejudice that flows from the use of expert testimony as to probability of paternity was amply illustrated in *Cole v. Cole*, 74 N.C. App. 247, 328 S.E. 2d 446, *aff'd*, 314 N.C. 660, 335 S.E. 2d 897 (1985). There, the results of a blood test indicated that the probability of paternity was 95.98%; however, the evidence also showed that five years prior to the child's birth, defendant had a vasectomy and was therefore infertile. The Court of Appeals reversed a finding that the defendant was the father of the child. This Court affirmed in a per curiam opinion.

In the present case, because the expert's testimony that defendant "probably is the father of the child" was not of assistance to the trier of fact, we find error in its admission. We must now determine whether there is a reasonable possibility that the jury would have reached a different result had the error not been committed. N.C.G.S. § 15A-1443 (1983).

Following Dr. McMahan's testimony that defendant was probably the father of the child, she testified:

> But may I say I know none of the outside evidence. I'm basing that entirely on genetic evidence.

Thus, the jury was made aware of the limitations on Dr. McMahan's ability to assess the evidence of paternity. Moreover, the jury had before it the defendant's inculpatory statement and the victim's several statements that defendant was the father of her child. We find no reasonable possibility that the jury would have reached a different result had the challenged opinion testimony not been admitted.

II.

[3] By his second argument, defendant contends that the trial court erred in allowing medical personnel to testify as to statements made to them by the victim. Defendant concedes that such statements, *when made for the purpose of diagnosis and treatment*, are admissible as an exception to the hearsay rule. N.C.R. Evid. 803(4); *State v. Aguallo*, 318 N.C. 590, 350 S.E. 2d 76 (1986) (child's statement to physician identifying defendant as perpetrator was admissible because pertinent to diagnosis and treatment). Nevertheless, he argues that because the victim later repudiated the statements implicating defendant, these statements are not reliable and are therefore inadmissible under Rule 803(4).

We find that the statements were properly admissible under Rule of Evidence 803(4), as they were made to medical personnel for the purpose of diagnosis and treatment. In response to defendant's contention that trial courts should not rigidly apply the Rule 803(4) exception, we note that under our Rules of Evidence a defendant may always challenge evidence which, although otherwise admissible, tends to have a prejudicial effect that outweighs its probative value. N.C.G.S. § 8C-1, Rule 403 (1986).

Defendant contends that, because the witness' statements had been recanted, in "an unusual sense" he was denied his rights under the confrontation clause of the sixth amendment to the United States Constitution. Inasmuch as the victim testified (in fact, favorably to defendant) and defendant had the opportunity of cross-examination, a denial of his rights under the confrontation clause is not apparent, and we therefore are compelled to reject defendant's argument.

III.

[4] By his third argument, defendant maintains that the trial court erred in allowing Dr. Suzanne Kerney to testify as follows:

> Q. Dr. Kerney, do you have an opinion satisfactory to yourself as to [the victim's] character and reputation for truthfulness?
>
> A. My opinion is that she is a truthful person.
>
> Q. And would you state whether or not that is based on your interviews with her and your studies and so forth with her?

MR. BOWMAN: Objection. Exception #5

COURT: Overruled.

A. Yes, it's based on that.

We have consistently held that expert testimony as to the credibility of a witness is inadmissible. *See* Commentary to N.C.G.S. § 8C-1, Rule 608(a) (1986); *State v. Aguallo*, 318 N.C. 590, 350 S.E. 2d 76 (1986); *State v. Heath*, 316 N.C. 337, 341 S.E. 2d 565 (1986). Dr. Kerney's opinion testimony was clearly of the type we have held inadmissible in *Aguallo* and *Heath*, and it was therefore error to admit it.

We must now determine whether there is a reasonable possibility that had the testimony not been admitted, the outcome of the trial would have been different. N.C.G.S. § 15A-1443(a) (1983). When Dr. Kerney testified as to the victim's character and reputation for truthfulness, the jury had already heard the victim testify that she had not engaged in sexual intercourse with the defendant. The jury had also heard testimony that, at the time her child was born, the victim stated to medical personnel that defendant was the father of her child. Unlike the situations in *Aguallo* and *Heath*, in the present case the State's case did not hinge on the credibility of the witness whom the expert identified as a truthful person. Because the victim's testimony contradicted her earlier statements, it was plain that at some point she had not told the truth. In view of the victim's inconsistent statements, it is unlikely that Dr. Kerney's single statement would sway the jury to believe the victim's prior statements rather than her trial testimony. We therefore find that the error in admitting Dr. Kerney's testimony does not warrant a new trial.

IV.

[5] In his final argument, the defendant maintains that the court erred in failing to submit the lesser offense of attempted first-degree rape. The trial transcript reflects that, during a discussion of the possible verdicts to be considered by the jury, defense counsel stated that he thought that some of the State's evidence tended "to suggest attempted [rape]." Defense counsel suggested that the testimony was that the victim was penetrated on certain dates and that on other dates actual penetration was not successful, and thus the necessity for the charge depended on which

date the jury chose. There was no written request for instructions, and the record does not reflect a formal oral request. When asked if defense counsel had "anything for the record about the charge," he said, "No, your Honor." The State argues that the defendant failed to comply with Rule 10(b)(2) of the Rules of Appellate Procedure, which provides:

> (2) *Jury Instructions; Findings and Conclusions of Judge.* No party may assign as error any portion of the jury charge *or omission therefrom* unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury. In the record on appeal an exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference. An exception to the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall identify the *omitted* instruction, finding or conclusion by setting out its substance immediately following the instructions given, or findings or conclusions made. A separate exception shall be set out to the making or *omission* of each finding of fact or conclusion of law which is to be assigned as error.

(Emphases added.)

In the record on appeal, defendant failed to set forth that which he contended was the omitted instruction. Assuming, *arguendo*, that defendant properly set forth an exception to the court's failure to charge on attempted rape and that he preserved it on appeal, this Court is not persuaded that a charge on attempted rape was warranted. In *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833, this Court held:

> Where there is evidence of some penetration sufficient to support a conviction of rape and the defendant denies having any sexual relations with the victim, the defendant is not entitled to a charge of attempted rape.

Id. at 102, 337 S.E. 2d at 850.

In the present case, there was ample evidence of penetration. Defendant relied on an alibi defense, thus denying having had any form of sexual relations with the victim. Therefore, he is not entitled to an instruction on attempted rape.

For the reasons set forth, we find that the defendant received a fair trial, free from prejudicial error.

No error.

FRANK O. ALFORD, WILKIE P. BEATTY, AS EXECUTRIX OF THE ESTATE OF PAUL B. BEATTY, CARSON INSURANCE AGENCY, INC., PATRICIA A. EDLUND, STANLEY EDLUND, JAMES M. GILFILLIN, LARRY G. GOLDBERG, RAQUEL T. GOLDBERG, BETTY F. RHYNE, ROBERT R. RHYNE AND NORMAN V. SWENSON, DERIVATIVELY IN THE RIGHT OF ALL AMERICAN ASSURANCE COMPANY, PLAINTIFFS v. ROBERT T. SHAW, AMERICAN COMMONWEALTH FINANCIAL CORPORATION, GREAT COMMONWEALTH LIFE INSURANCE COMPANY, ICH CORPORATION, CHARLES E. BLACK, S. J. CAMPISI, ROY J. BROUSSARD, TRUMAN D. COX, FRED M. HURST, C. FRED RICE AND PEGGY P. WILEY, DEFENDANTS, AND ALL AMERICAN ASSURANCE COMPANY, BENEFICIAL PARTY

No. 132PA85

(Filed 28 July 1987)

1. **Corporations § 6— shareholders' derivative action—special litigation committee—judicial inquiry into recommendation**

A special litigation committee's decision to terminate a minority shareholders' derivative action against corporate directors is not binding upon the courts; rather, there must be a judicial inquiry on the merits of the special litigation committee's recommendation.

2. **Corporations § 6— shareholders' derivative action—excusal of demand on corporate directors**

Plaintiffs' allegations in a shareholders' derivative action that defendant shareholders, who were responsible for certain fraudulent transactions, used their control of the corporation to nominate and elect defendant directors and that defendant directors permitted the fraudulent transactions to occur established a demand-excused situation and sufficiently complied with the procedural requirement of N.C.G.S. § 55-55(b).

3. **Corporations § 6— disposition of shareholder derivative suits—necessity for court approval**

Under N.C.G.S. § 55-55(c), court approval is required for the disposition of *all* shareholder derivative suits, even where the directors are not charged with

fraud or self-dealing, or where the plaintiff and the board of directors agree to discontinue, dismiss, compromise, or settle the lawsuit.

4. Corporations § 6— stockholders' derivative action—self-dealing by directors—burden of proof—report of special litigation committee

When N.C.G.S. §§ 55-55 and 55-30(b)(3) are read *in pari materia*, they indicate that when a stockholder in a derivative action seeks to establish self-dealing on the part of a majority of the board of directors, the burden should be upon those directors to establish that the transactions complained of were just and reasonable to the corporation when entered into or approved. The fact that a special litigation committee appointed by those directors charged with self-dealing recommends that the action should not proceed, while carrying weight, is not binding upon the trial court; rather, the court must make a fair assessment of the report of the special committee, along with all the other facts and circumstances in the case, in order to determine whether the defendants will be able to show that the transaction complained of was just and reasonable to the corporation.

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

Justice MEYER dissenting.

Justice WEBB dissenting.

ON plaintiffs' petition for rehearing pursuant to Rule 31(a) of the North Carolina Rules of Appellate Procedure. Reheard in the Supreme Court 16 April 1987.

Petree Stockton & Robinson, by Ralph M. Stockton, Jr. and Daniel R. Taylor, Jr., for appellant All American Assurance Company, respondent on rehearing.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Daniel W. Fouts and Peter G. Pappas, for appellants Charles E. Black, S. J. Campisi, Roy J. Broussard, Truman D. Cox, Fred M. Hurst, and Peggy P. Wiley, respondents on rehearing.

Cansler & Lockhart, P.A., by Thomas Ashe Lockhart and Bruce M. Simpson, for appellees, petitioners on rehearing.

MARTIN, Justice.

[1] The sole issue raised by this appeal is whether a special litigation committee's decision to terminate plaintiff minority shareholders' derivative action against defendant corporate directors is binding upon the courts. In our earlier opinion in this case, 318 N.C. 289, 349 S.E. 2d 41 (1986), we stated that the "business

judgment rule," a doctrine shielding the good faith actions of disinterested corporate directors from judicial inquiry on the merits, required deference to the decisions of independent special litigation committees. Consequently we held that summary judgment had been properly granted for defendants. Upon this rehearing we have elected to reconsider our prior holding and to redetermine the question raised by the appeal.

We withdraw our prior decision, reported in 318 N.C. 289, 349 S.E. 2d 41 (1986), and treat the case before us as a hearing de novo on the issue raised. *See Trust Co. v. Gill, State Treasurer*, 293 N.C. 164, 237 S.E. 2d 21 (1977); *Clary v. Board of Education*, 286 N.C. 525, 212 S.E. 2d 160 (1975).

Briefly summarized, the record discloses the following: In response to charges of mismanagement asserted by plaintiff minority shareholders, the board of directors of All American Assurance Company (AAA) voted to appoint a committee to conduct an investigation. The board then elected Marion G. Follin, a retired insurance executive, and Frank M. Parker, a former judge of the North Carolina Court of Appeals, to board membership and designated them as a special investigative committee. The committee was authorized to determine whether it would be in the best interest of AAA and its shareholders to initiate legal action against those implicated in any wrongdoing uncovered by the investigation.

Before the committee had completed its investigation, plaintiffs filed a shareholders' derivative action in superior court, naming as defendants the controlling shareholders of AAA and a majority of its directors. The complaint alleged inter alia that in a series of transactions involving corporations affiliated with AAA, defendants had violated fiduciary obligations by engaging in a pattern of fraud, self-dealing, and negligent acquiescence which amounted to a "looting" of corporate assets for defendants' own benefit.

Upon completion of its investigation, the committee filed a report in the trial court recommending that the majority of plaintiffs' claims be dismissed with prejudice and that two remaining claims be settled in accordance with an attached settlement agreement. Based on the committee's report, defendants moved for summary judgment and approval of the settlement agreement.

The trial court held that the business judgment rule controlled the disposition of the case and granted the motions. The Court of Appeals reversed, 72 N.C. App. 537, 324 S.E. 2d 878 (1985), holding that corporate directors who are parties to a derivative action may not confer upon a special committee the power to bind the corporation as to the derivative litigation. We affirm the Court of Appeals, subject to the modifications discussed below.

We deem it unnecessary for the purposes of this opinion to review the development of the basic principles of derivative litigation. For a general discussion of derivative suits, see D. DeMott, *Shareholder Derivative Actions Law and Practice* §§ 1:01-:05 (1987); R. Robinson, *North Carolina Corporate Law and Practice* §§ 14-1, -2 (3d ed. 1983).

In determining the proper role, if any, of special corporate litigation committees in the termination of derivative shareholders' actions, three basic approaches have been adopted by other jurisdictions:

1. *Auerbach.* In *Auerbach v. Bennett*, 47 N.Y. 2d 619, 393 N.E. 2d 994, 419 N.Y.S. 2d 920 (1979), the Court of Appeals of New York extended the business judgment rule to the decisions of special litigation committees, precluding judicial review of the merits of those decisions. Under *Auerbach*, judicial review of committee decisions is limited to the issues of good faith, independence, and sufficiency of the investigation.

2. *Miller.* In *Miller v. Register and Tribune Syndicate, Inc.*, 336 N.W. 2d 709 (Iowa 1983), the Iowa Supreme Court adopted a prophylactic rule as a means of circumventing the "structural bias" inherent in the committee appointment process. Under *Miller*, directors charged with misconduct are prohibited from participating in the selection of special litigation committees.

3. *Zapata.* In *Zapata Corp. v. Maldonado*, 430 A. 2d 779 (Del. 1981), the Delaware Supreme Court promulgated a two-step test for judicial review of the decisions of special litigation committees. The first step requires an inquiry as to the independence, good faith, and investigative techniques of the committee, expressly placing the burden of proof as to these matters on the corporation. The second step, as a safeguard against structural bias, provides for an additional, discretionary level of scrutiny on

the merits in which trial courts may exercise their own "independent business judgment" in deciding whether derivative actions should be dismissed. The report of the special litigation committee may be considered along with all the other evidence before the court.

The recent trend among courts which have been faced with the choice of applying an *Auerbach*-type rule of judicial deference or a *Zapata*-type rule of judicial scrutiny has been to require judicial inquiry on the merits of the special litigation committee's report. *See* Note, *Derivative Actions—Presumed Good Faith Deliberations By Special Litigation Committees: A Major Hurdle For Minority Shareholders—Alford v. Shaw*, 22 Wake Forest L. Rev. 127, 139-44 (1987).

In our previous decision in this case, we applied a modified *Auerbach* rule. We interpret the trend away from *Auerbach* among other jurisdictions as an indication of growing concern about the deficiencies inherent in a rule giving great deference to the decisions of a corporate committee whose institutional symbiosis with the corporation necessarily affects its ability to render a decision that fairly considers the interest of plaintiffs forced to bring suit on behalf of the corporation. *See generally* Cox & Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 Law and Contemporary Problems, Summer 1985 at 83 (1985). Such concerns are legitimate ones and, upon further reflection, we find that they must be resolved not by slavish adherence to the business judgment rule, but by careful interpretation of the provisions of our own Business Corporation Act. We conclude from our analysis of the pertinent statutes that a modified *Zapata* rule, requiring judicial scrutiny of the merits of the litigation committee's recommendation, is most consistent with the intent of our legislature and is therefore the appropriate rule to be applied in our courts. While we affirm the holding of the Court of Appeals reversing summary judgment for defendants, we reject that court's application of the *Miller* rule.

In 1973 the General Assembly enacted N.C.G.S. § 55-55 which expressly authorizes shareholders' derivative actions and prescribes the rules governing all such actions brought in the state courts of North Carolina. Section 55-55 contains liberal pro-

visions which do not impose many of the restrictions upon derivative actions encountered in other jurisdictions. The legislature has placed the minority shareholder in North Carolina "in a more favorable position to seek redress on behalf of his corporation for wrongs allegedly done to it by the majority shareholders, the directors and officers, or outside third parties." R. Robinson, *North Carolina Corporation Law and Practice* § 14-1 at 214 (3d ed. 1983).[1]

This policy of protecting minority shareholders is manifested by section 55-55(c), which states that a shareholder's derivative action

> shall not be discontinued, dismissed, compromised or settled without the approval of the court. If the court shall determine that the interest of the shareholders or any class or classes thereof, or of the creditors of the corporation, will be substantially affected by such discontinuance, dismissal, compromise or settlement, the court, in its discretion, may direct that notice, by publication or otherwise, shall be given to such shareholders or creditors whose interests it determines will be so affected. If notice is so directed to be given, the court may determine which one or more of the parties to the action shall bear the expense of giving the same, in such amount as the court shall determine and find to be reasonable in the circumstances, and the amount of such expense shall be awarded as costs of the action.

The plain language of the statute requires thorough judicial review of suits initiated by shareholders on behalf of a corporation: the court is directed to determine whether the interest of any shareholder will be substantially affected by the discontinuance, dismissal, compromise, or settlement of a derivative suit. Although the statute does not specify what test the court must

1. While affording minority stockholders' bona fide derivative suits greater protections under the statutory provisions already discussed, the legislature was not unmindful of corporate concerns about a possible proliferation of meritless "strike" suits. N.C.G.S. § 55-55(e) states that

> [i]n any [derivative] action the court, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the defendant or defendants the reasonable expenses, including attorneys' fees, incurred by them in the defense of the action.

apply in making this determination, it would be difficult for the court to determine whether the interests of shareholders or creditors would be substantially affected by such discontinuance, dismissal, compromise, or settlement without looking at the proposed action substantively.

To make the required assessment under section 55-55, the court must of necessity evaluate the adequacy of materials prepared by the corporation which support the corporation's decision to settle or dismiss a derivative suit along with the plaintiff's forecast of evidence. If it appears likely that plaintiff could prevail on the merits, but that the amount of the recovery would not be sufficient to outweigh the detriment to the corporation, the court could still allow discontinuance, dismissal, compromise, or settlement.

Although the recommendation of the special litigation committee is not binding on the court, in making this determination the court may choose to rely on such recommendation. To rely blindly on the report of a corporation-appointed committee which assembled such materials on behalf of the corporation is to abdicate the judicial duty to consider the interests of shareholders imposed by the statute. This abdication is particularly inappropriate in a case such as this one, where shareholders allege serious breaches of fiduciary duties owed to them by the directors controlling the corporation.

[2] Section 55-55(c) is a broadening of the *Zapata* approach. As in other jurisdictions, exhaustion of intracorporate remedies (that is, "demand") is a procedural prerequisite to the filing of a derivative action in North Carolina. Section 55-55(b), codifying prior case law, makes this explicit:

> The complaint shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and the reasons for his failure to obtain the action or for not making the effort.

An equitable exception to the demand requirement may be invoked when the directors who are in control of the corporation are the same ones (or under the control of the same ones) as were initially responsible for the breaches of duty alleged. In such case,

the demand of a shareholder upon directors to sue themselves or their principals would be futile and as such is not required for the maintenance of the action. *Hill v. Erwin Mills, Inc.*, 239 N.C. 437, 80 S.E. 2d 358 (1954); *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279 (1978), *cert. denied and appeal dismissed*, 296 N.C. 740, 254 S.E. 2d 181 (1979). Here plaintiffs alleged that defendant shareholders, who were responsible for the fraudulent transactions, used their control of AAA to nominate and elect defendant directors and that defendant directors permitted the fraudulent transactions to occur. This establishes a demand-excused situation and sufficiently complies with the procedural requirement of section 55-55(b).

[3] The *Zapata* Court limited its two-step judicial inquiry to cases in which demand upon the corporation was futile and therefore excused. However, we find no justification for such limitation in our statutes. The language of section 55-55(c) is inclusive and draws no distinctions between demand-excused and other types of cases. *Cf.* ALI Principles of Corporate Governance: Analysis and Recommendations § 7.08 & Reporter's Notes 2 & 4 at 135-139 (Council Draft No. 6, Oct. 10, 1986) (issue of demand of minimal importance in determining scope of review; demand-excused/demand-required distinction not determinative). Thus, court approval is required for disposition of *all* derivative suits, even where the directors are not charged with fraud or self-dealing, or where the plaintiff and the board agree to discontinue, dismiss, compromise, or settle the lawsuit.

Another expression of legislative intent may be found in N.C.G.S. § 55-30 relating to a director's adverse interest. It provides, inter alia:

> (b) No corporate transaction in which a director has an adverse interest is either void or voidable, if:
>
> (3) The adversely interested party proves that the transaction was just and reasonable to the corporation at the time when entered into or approved. In the case of compensation paid or voted for services of a director as director or as officer or employee the standard of what is "just and reasonable" is what would be paid for such services at arm's length under competitive conditions.

[4] When N.C.G.S. §§ 55-55 and 55-30(b)(3) are read in pari materia, they indicate that when a stockholder in a derivative action seeks to establish self-dealing on the part of a majority of the board, the burden should be upon those directors to establish that the transactions complained of were just and reasonable to the corporation when entered into or approved. The fact that a special litigation committee, appointed by those directors charged with self-dealing, recommends that the action should not proceed, while carrying weight, is not binding upon the trial court. Rather, the court must make a fair assessment of the report of the special committee, along with all the other facts and circumstances in the case, in order to determine whether the defendants will be able to show that the transaction complained of was just and reasonable to the corporation. If this appears evident from the materials before the court, then in a proper case summary judgment may be allowed in favor of the defendants.

Upon remand plaintiffs shall be permitted to develop and present evidence on this issue, such as: (1) that the committee, though perhaps disinterested and independent, may not have been *qualified* to assess intricate and allegedly false tax and accounting information supplied to it by those within the corporate structure who would benefit from decisions not to proceed with litigation, (2) that, in fact, false and/or incomplete information was supplied to the committee because of the nonadversarial way in which it gathered and evaluated information, and therefore (3) in light of these and other problems which arise from the structural bias inherent in the use of the board-appointed special litigation committees, that the committee's decision with respect to the litigation eviscerates plaintiffs' opportunities as minority shareholders to vindicate their rights under North Carolina law. *Cf.* Dent, *The Power of Directors to Terminate Shareholder Litigations: The Death of The Derivative Suit*, 75 Nw. U.L. Rev. 96 (1981).

The trial court in this case adopted the erroneous

> opinion that the business judgment rule controls the disposition of this case and, therefore, that *the only issues before it are whether the Special Committee was composed of disinterested, independent directors who acted in good faith, and whether the scope of the investigation and the procedures adopted and followed were appropriate.*

(Emphasis added.) By so doing, the trial court failed to fulfill its duties under N.C.G.S. § 55-55(c) and the rationale of *Zapata.*

In view of the foregoing, we withdraw our decision reported in 318 N.C. 289, 349 S.E. 2d 41 (1986). That decision is no longer authoritative and this opinion now becomes the law of the case. *See Investment Properties v. Allen*, 283 N.C. 277, 196 S.E. 2d 262 (1973).

The decision of the Court of Appeals as modified by this opinion is affirmed. This cause is remanded to the Court of Appeals with direction to remand to the Superior Court of Mecklenburg County for further proceedings not inconsistent with this opinion.

Modified and affirmed.

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

Justice MEYER dissenting.

I dissent. My position is accurately reflected in the original opinion of the Court, reported at 318 N.C. 289, 349 S.E. 2d 41 (1986).

Justice WEBB dissenting.

I dissent. I do not disagree with the substantive matter in the majority opinion. This Court, however, has decided this case in a previous opinion which considered all matters discussed in the majority opinion filed today. I believe we are mistaken in changing an opinion so recently filed. I vote not to reconsider the case.

STATE OF NORTH CAROLINA v. RONALD EARL ABBOTT

No. 335A86

(Filed 28 July 1987)

1. **Criminal Law § 15.1— allegedly inflammatory newspaper articles—change of venue denied—no error**

In a prosecution for first degree rape, first degree sexual offense and first degree kidnapping, the trial court did not err by denying defendant's motion for a change of venue or a special venire based on allegedly inflammatory newspaper articles where six of the twelve jurors stated that they had not heard of the case before they came to court; the other six said they could decide the case on the evidence presented and not on what they had heard outside the courtroom; Gaston County is not a small rural county; and there was no evidence of the impact of the newspaper articles on the population other than the evidence of the publication. In light of the holding that defendant had not made a sufficient showing to require a change of venue, there was no prejudice from a statement by the court that the locale in which the crime is alleged to have been committed is material. N.C.G.S. § 15A-957.

2. **Constitutional Law § 60; Jury § 7.1— peremptory challenges—exclusion of blacks—no prima facie showing of racial motivation**

Defendant in a prosecution for first degree rape, first degree sexual offense, and first degree kidnapping, did not make a *prima facie* case of racially motivated peremptory challenges where five blacks were tendered as prospective jurors to the State and the State exercised peremptory challenges to three of them, accepting 40% of the blacks tendered. Sixth Amendment to the Constitution of the United States; Art. I, § 24 of the North Carolina Constitution.

3. **Constitutional Law § 30— incriminating statement—district attorney's open file policy—statement not in file—no discovery motion—admissible**

There was no error in a prosecution for rape, first degree sexual offense and kidnapping in the admission of testimony that defendant had said shortly before he was arrested that he had stayed in the woods for a week because police were looking for him on a rape charge where the State maintained an open file policy but the testimony had not been reduced to writing and was not in the file, and defendant did not make a motion to compel discovery. N.C.G.S. § 15A-903(a)(2).

4. **Criminal Law § 88.5— recross-examination denied—no abuse of discretion**

In a prosecution for rape, first degree sexual offense, and kidnapping, there was no abuse of discretion in not allowing further cross-examination of a witness to whom defendant had made an inculpatory statement where defendant had argued that he had had no opportunity to interview the witness before the first cross-examination.

5. **Criminal Law § 87.1— allegedly hostile witness—leading question denied—no prejudice**

There was no prejudice in a prosecution for rape, first degree sexual offense, and kidnapping in the court's refusal to allow defendant to ask a leading question of a witness whom defendant contended was a hostile witness where the testimony the witness would have given would not have been helpful to defendant. N.C.G.S. § 15A-1443.

6. **Criminal Law § 102.6— rape, first degree sexual offense, kidnapping—prosecutor's jury argument—no error**

There was no error in a prosecution for rape, first degree sexual offense, and kidnapping in the prosecutor's argument to the jury concerning a conversation the prosecuting witness had with defendant prior to the rape where the prosecuting witness had testified that prior to the rape she had had such a conversation.

7. **Criminal Law § 102.6— rape, first degree sexual offense, kidnapping—prosecutor's argument concerning defendant's unemployment—no error**

There was no error in a prosecution for rape, first degree sexual offense, and kidnapping in a prosecutor's argument which referred to defendant's unemployment because the prosecuting attorney was attempting to impress on the jury that, although they might not think or act in a certain way, there are people who think and act as he contended defendant had done in this case.

8. **Constitutional Law § 34— first degree rape, first degree sexual offense, first degree kidnapping—sentenced on all three charges—remanded for resentencing**

A defendant who had been convicted of first degree rape, first degree sexual offense, and first degree kidnapping was erroneously sentenced on all three charges under the particular facts of the case and the case was remanded for resentencing.

APPEAL by defendant from *Sitton, Judge*. Judgments entered 30 January 1986 in Superior Court, GASTON County. Heard in the Supreme Court 12 February 1987.

The defendant was tried for first degree rape, first degree sexual offense and first degree kidnapping. The State presented evidence tending to show the following: On 9 August 1985, the victim arose at approximately 6:10 a.m. and went for a walk in the vicinity of Hunter Huss School in Gastonia, North Carolina. As she approached the school a man grabbed her and pointed a pistol at her face. She struggled initially but soon ceased for fear that he would shoot her. Her assailant forced her at gunpoint to walk approximately 100 yards across a parking lot in front of the school and into a picnic area. Behind the school and out of sight of the road the victim and the assailant sat on a wall and talked. She

attempted to dissuade him from harming her. The defendant then forced the victim to touch his genitals, to perform fellatio on him and to submit to three acts of nonconsensual intercourse. She testified that she obeyed the defendant out of fear for her safety.

The victim and the defendant discussed whether he would injure her further. She assured him that she would not call the police. He asked her for her address, which she gave him. He then left and the victim returned to her home, where she reported the events to her husband and to police. When shown a photographic lineup later that day by police she identified a photograph of the defendant as that of her assailant. She also identified the defendant in court as her assailant.

The defendant presented evidence of an alibi. He was convicted as charged. He was sentenced to life in prison on both the first degree rape and first degree sex offense charges and forty years for kidnapping. The sentences were ordered to run consecutively. He appealed.

Lacy H. Thornburg, Attorney General, by Francis W. Crawley, Assistant Attorney General, for the State.

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

WEBB, Justice.

[1] In his first assignment of error the defendant contends the court should have granted his motion for a change of venue or a special venire because of pretrial publicity which prevented him from having a fair trial in Gaston County. N.C.G.S. § 15A-957 provides in part:

> If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:
>
> (1) Transfer the proceeding to another county in the judicial district or to another county in an adjoining judicial district, or
>
> (2) Order a special venire under the terms of G.S. 15A-958.

This Court has interpreted this section in many cases. *See State v. Moore*, 319 N.C. 645, 356 S.E. 2d 336 (1987); *State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591 (1984); *State v. Watson*, 310 N.C. 384, 312 S.E. 2d 448 (1984); *State v. Corbett*, 309 N.C. 382, 307 S.E. 2d 139 (1983); *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983); *State v. Richardson*, 308 N.C. 470, 302 S.E. 2d 799 (1983); *State v. Dobbins*, 306 N.C. 342, 293 S.E. 2d 162 (1982); and *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).

The above cases establish that the purpose of N.C.G.S. § 15A-957 is to insure that jurors decide cases based on evidence introduced at trial and not on something they have heard outside the courtroom. The burden is on the moving party to show that "due to pretrial publicity, there is a reasonable likelihood that defendant will not receive a fair trial." *Jerrett*, 309 N.C. 239, 254, 307 S.E. 2d 339, 347. If he does so the court should remove the case to another county not so permeated with such publicity or it should order a special venire from such a county. If press accounts are factual and consist of matters which may be introduced at trial, a motion for change of venue should not ordinarily be granted. In most cases a showing of identifiable prejudice to the accused must be made, and relevant to this inquiry is testimony by potential jurors that they can decide the case based on the evidence presented and not on pretrial publicity. If a moving party produces evidence, as was produced in *Jerrett*, however, in the form of uncontradicted testimony from several witnesses that a county is so permeated with a prejudice against him that he cannot receive a fair trial, we have held that the trial should have been moved without a showing of identifiable prejudice among the jurors selected. The size of a county's population is relevant to this issue. Some of our cases have said that it is within the discretion of the trial court as to whether to remove the case or to order a special venire. If the moving party can make a sufficient showing of prejudice, however, the court must grant the motion as a matter of law.

In support of its motion the defendant introduced articles from the *Gastonia Gazette*, a newspaper with a circulation of approximately 40,000 copies a day in a county with a population of approximately 140,000 people. The defendant had been charged with rape and robbery in 1984 and had been extradited from

Ohio to face these charges which were dismissed because the prosecuting witness could not be found. He had received a sentence of 25 years imprisonment on unrelated charges. The crime for which the defendant was charged occurred on 9 August 1985. His trial began 27 January 1986. The defendant introduced nine articles from the *Gastonia Gazette*. Four of them were published in August 1985, one in September, three in November at which time he was indicted by the grand jury, and one on 26 January 1986. These articles mentioned the unrelated rape and robbery with which the defendant had been charged, the prison sentence which he had received for the unrelated charge and said the defendant had been convicted of rape in Ohio. One article quoted a policeman as saying, "We want this guy off the streets real bad. I would say he is extremely dangerous. . . ." Other articles said "because of his prior rape conviction and the local charges in September, police believe he is capable of raping again," and "Police . . . fear the suspect . . . is capable of extreme violence to protect his identity." The court denied the motion but ordered an individual voir dire for each prospective juror. Six of the jurors who determined the case stated they had not read of the case or discussed it prior to the commencement of the trial. The other six stated that they had not formed an opinion as to the defendant's guilt or innocence and would determine the defendant's guilt or innocence from the evidence presented at trial.

We hold the court did not commit error in denying the defendant's motion for a change of venue or a special venire. Six of the twelve jurors stated they had not heard of the case before they came to court. The other six said they could decide the case based on the evidence presented and not on what they had heard of the case outside the courtroom. The defendant has not made a sufficient showing of identifiable prejudice to him to be entitled to the allowance of the motion. Gaston County is not a small rural county as was the case in *Jerrett*. There was no evidence of the impact of the newspaper articles on the population other than the evidence of their publication. This evidence was offset by the testimony of the jurors who were seated that the articles would not influence their verdict.

The defendant argues that the court in making its ruling gave improper weight to the interests of the citizens of Gaston

County in having a person tried in Gaston County who is charged with committing a crime in the county. In making its ruling the court said it took into account "that the locale in which the crime is alleged to have been committed is material. . . ." As the defendant points out, this is not the test in determining whether there should be a change in venue. *Jerrett*, 309 N.C. 239, 307 S.E. 2d 339. In light of our holding that the defendant has not made a sufficient showing to require a change of venue we do not believe the defendant was prejudiced if the court relied on this statement in making its ruling. For the same reason we need not determine whether the newspaper articles were inflammatory and contained matters which could not have been admitted into evidence. The defendant was able to get a jury which was not prejudiced by the articles.

[2] In his second assignment of error the defendant contends an unrebutted prima facie showing of racial discrimination in the selection of the jury was made which entitles him to a new trial. He bases this argument on the fact that of five black jurors tendered the State exercised peremptory challenges to three of them. The defendant successfully challenged for cause one of the black jurors who had been accepted by the State.

In *Batson v. Kentucky*, 476 U.S. ---, 90 L.Ed. 2d 69 (1986), the United States Supreme Court overruled *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759 (1965), and held a defendant can make a prima facie case of purposeful discrimination in the selection of the petit jury on evidence concerning the prosecutor's exercise of peremptory challenges. The Court said:

> To establish such a case, the defendant first must show that he is a member of a cognizable racial group . . ., and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate". . . . Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

In *State v. Jackson*, 317 N.C. 1, 343 S.E. 2d 814 (1986), this Court held that the rule of *Batson* should not be applied retroactively. In *Griffith v. Kentucky*, 479 U.S. ---, 93 L.Ed. 2d 649 (1987), the United States Supreme Court held that *Batson* is retroactively applicable to cases pending on appeal or not yet final. The United States Supreme Court has overruled *Jackson* and we must apply the *Batson* rule to this case.

Batson is grounded on the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The defendant argues that in addition to his equal protection claim he has shown a violation of the Sixth Amendment to the Constitution of the United States and Article I, Section 24 of the North Carolina Constitution which guarantee him a trial by an impartial jury.

In *State v. Belton*, 318 N.C. 141, 347 S.E. 2d 755 (1986), the defendant contended that the pattern of peremptory challenges of blacks showed a violation of his right to an impartial jury as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 24 of the North Carolina Constitution. He argued that these constitutional provisions required that a jury before which he was tried must be comprised of a fair cross section of the community. This Court did not reach the question of whether this was constitutionally required because the pattern of peremptory challenges to blacks did not show the challenges were racially motivated. The defendant argues that the pattern of peremptory challenges in this case does show racial motivation and asks us to determine the question we declined to determine in *Belton*.

In *Belton* twelve black jurors were tendered to the State. It peremptorily challenged six of them. Three black alternate jurors were tendered to the State. It peremptorily challenged two of them. The jury before which the defendant was tried in *Belton* consisted of eight whites and four blacks. There were two alternates, one white and one black. In this case we hold that, as in *Belton*, the defendant has not made a prima facie case of racially motivated peremptory challenges. Five blacks were tendered as prospective jurors to the State. It exercised peremptory challenges to three of them. The State was willing to accept 40% of the blacks tendered. The State in *Belton* accepted 50% of the

blacks tendered. There was not a showing from the State's action in this case that it was determined not to let a black sit as a juror on account of the race of the defendant.

[3] In his third assignment of error the defendant argues that it was error for the State to be allowed to use the testimony of Marvin Wallace. Mr. Wallace testified that he saw the defendant shortly before the defendant was arrested and the defendant told him at that time "that he had stayed in the woods for a week or something like that" because the "police were looking for him for a rape charge." The defendant argues it was a violation of N.C.G.S. § 15A-903(a)(2) for the State not to have provided him with this testimony before trial and because of this the testimony should have been excluded. N.C.G.S. § 15A-903(a)(2) provides that upon motion of the defendant prior to trial the State must divulge to him the substance of any oral statement relevant to the case made by the defendant and within the possession of the State, the existence of which is known to the prosecutor.

In this case the defendant did not make a motion for discovery but relied on what he considered to be an open file policy of the district attorney. The defendant's attorney examined the file of the district attorney but did not find the testimony of Marvin Wallace because it had not been reduced to writing. A defendant is not entitled to discovery of materials in the possession of the State unless he makes a motion to compel discovery. *State v. Keaton*, 61 N.C. App. 279, 300 S.E. 2d 471 (1983) and *State v. Hoskins*, 36 N.C. App. 92, 242 S.E. 2d 900, *disc. rev. denied*, 295 N.C. 469, 246 S.E. 2d 11 (1978). The defendant argues that for the prosecutor to establish an open file policy wherein defense counsel are not to file discovery motions and then to use that policy to conceal discoverable evidence perverts the concept of an open file policy. He contends an "open file policy should be seen as implicitly founded on a standing motion to disclose all discoverable material." We do not believe we should hold that if a district attorney adopts an open file policy that gives all defendants a standing motion for discovery. We cannot say in this case that the State has perverted the open file policy. The defendant did not move for discovery and he cannot now complain that he did not know in advance of trial of the statement of Marvin Wallace.

[4] The defendant argues two questions under his fourth assignment of error. He first says it was error for the court not to give him an opportunity to cross-examine Marvin Wallace. After Wallace testified, the defendant conducted a cross-examination. After this cross-examination the defendant requested the court to have Mr. Wallace remain in the courtroom, which was done. When the State rested its case the defendant requested that Mr. Wallace be recalled for further cross-examination. The court declined this request. The defendant argues that he did not have an opportunity to interview this witness before cross-examining him the first time and he was prejudiced by not being allowed to cross-examine after interviewing the witness. After a party has completed the cross-examination of a witness, it is within the discretion of the court whether he shall be allowed to cross-examine for a second time. *See* 1 Brandis on North Carolina Evidence § 24 (1982). We hold there was not an abuse of discretion in this case by not allowing further cross-examination.

[5] When the defendant put on his evidence he called Marvin Wallace as a witness and the court sustained an objection to a leading question. This is the second question the defendant argues under this assignment of error. He contends it was error to refuse him the right to ask a leading question because Wallace was a hostile witness. The defendant contends that if Wallace had been allowed to answer the question he would have testified that the defendant denied at the time he talked to him that he had raped the prosecuting witness. The defendant was allowed to put in the record what the answer of the defendant would have been. Wallace would have testified as follows:

> All he say is the police were trying to pin a rape case on him. That's all he told me. Then he say he was sleeping in the woods and then he say he was thirsty and needed a soda. And we walk out of the store . . . and, when we come out, we were surrounded by police. That's all I know about that.

This testimony would not have been helpful to the defendant. He has not demonstrated prejudice by its exclusion. N.C.G.S. § 15A-1443.

[6] In his fifth assignment of error the defendant argues the prosecuting attorney made improper jury arguments. The defend-

ant contends the following argument of the prosecuting attorney was improper:

> I ask you to recall what Mr. Abbott asked for first. "What have you got on you? What have you got I can have?" She said, "Nothing, but I have got a card back home, or some money back home." "No, that's not good enough. Can't go back home where your husband is." His motive in taking her off the street, I contend to you, at that time was to rob her. He just wanted money. He was not employed.

A prosecuting attorney may argue facts in evidence as well as reasonable inferences that may be drawn therefrom. *State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (1984). The prosecuting witness testified that prior to the rape she had such a conversation as argued by the district attorney. It was not error for him to argue as he did.

[7] The second part of the prosecuting attorney's argument to which the defendant assigns error is as follows:

> [G]iven what times were involved and you may think, well, gosh, how can somebody do these sick acts for twenty minutes, and be able to just calmly drive home and get there at the normal time and sit in the living room; you just want to shut that out from your mind and not believe it, well, that may be because many of your experiences—at least seven of you selected on this jury have worked at one job at least eighteen years, and many longer. Others have different forms of collective wisdom among you. An individual such as Mr. Abbott is foreign to your families, foreign to your friends and foreign to almost every one of us—

There was evidence that the defendant was unemployed and he argues that the prosecuting attorney called this to the jury's attention by pointing out to them that they were employed. He contends the only purpose of this argument was to dehumanize the defendant. Relying on *Jerrett*, 309 N.C. 239, 307 S.E. 2d 339, in which it was held error for the prosecuting attorney to call the defendant a "conman" and a "disciple of Satan" and on *State v. Smith*, 279 N.C. 163, 181 S.E. 2d 458 (1971), in which we held it was error for the district attorney to say the defendant was "lower than the bone belly of a cur dog" the defendant says this is er-

ror. He argues that the purpose of what he calls this vilification of him as foreign was to call on the jury to align themselves against the defendant.

We hold this argument was not improper. As we read the argument the prosecuting attorney was attempting to impress on the jury that although they might not think or act in a certain way, there are people who could think and act as he contended the defendant had done in this case. This is a proper argument.

[8] In his final assignment of error the defendant argues and the State agrees that under the particular facts of this case he cannot be sentenced on all three charges. He was convicted of first degree kidnapping based on a sexual assault, first degree rape and first degree sexual assault. Judgment must be arrested on one of the charges. *See Belton*, 318 N.C. 141, 347 S.E. 2d 755 and *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35 (1986). We remand the case to the Superior Court of Gaston County. That court may arrest judgment on the charge of first degree kidnapping and enter a judgment of guilty of second degree kidnapping or it may let the judgment of first degree kidnapping stand and arrest judgment on either of the other two charges. The defendant will then be resentenced.

No error in the trial; remanded for resentencing.

CINEMA I VIDEO, INC. D/B/A CINEMA I VIDEO, SUNSHINE VIDEO, INC. D/B/A SUNSHINE VIDEO, HOME VIDEO, INC. D/B/A HOME VIDEO, PHILLIP J. RINK AND DOUGLAS HONEYCUTT D/B/A HOME VIDEO, THE VIDEO GALLERIES, INC. D/B/A THE VIDEO GALLERY, L & J ELECTRONICS, INC., D/B/A L & J ELECTRONICS, PIZZA KEG, INC. D/B/A SHOWBIZ, VIDEO TIME, INC. D/B/A VIDEO TIME, ANDRE, INC. D/B/A AUDIO VIDEO MART, THE VIDEO BAR, INC. D/B/A THE VIDEO BAR, THE VIDEO BAR, INC. AND A & N, INC. D/B/A THE VIDEO BAR, THE VIDEO BAR, INC. AND VIDEO BAR EAST D/B/A THE VIDEO BAR, JIM ALLEN, INC. NORTH CAROLINA VIDEO, INC. D/B/A NORTH CAROLINA VIDEO, MULTI-VIDEO, INC. D/B/A MULTI-VIDEO, VIDEO COUNTRY CORP. D/B/A VIDEO COUNTRY, RONALD CRAMER D/B/A VIDEO 99 AND VIDEO SEARCH, PIC-A-FLICK OF SHELBY, INC. D/B/A PIC-A-FLICK, PIC-A-FLICK OF GASTONIA INC. D/B/A PIC-A-FLICK, JOY GALLYON, RONNIE McLELLAND AND PAUL McLELLAND D/B/A EAST SIDE MOVIES, JOY GALLYON AND TOM FOX D/B/A BROADWAY MOVIES, JOHN D. McLAUCHLIN AND BUTCH LUCAS D/B/A VIDEO STATION OF FAYETTEVILLE, N.C., JOHN D. McLAUGHLIN,

THURMAN LUCAS, E. SCOTT McLAUCHLIN AND JOHN D. McLAUCHLIN, III D/B/A VIDEO STATION OF CLINTON, N.C., C. H. McCUBBIN, J. A. McCUBBIN AND PHYLLIS SMITH D/B/A VIDEO SHOWCASE, LES CAILLOUET D/B/A VIDEO WORLD OF GREENSBORO, CHRISTINE T. BREWER D/B/A BREWER'S MOVIE CLUB, TONY G. McDOWELL D/B/A GREAT ESCAPES VIDEO TAPE CLUB, LEE ROY JOHNSON D/B/A TROUTMAN VIDEO, JIMMY E. HUFF D/B/A STAR VIDEO, JOHN ALLEN D/B/A PRIME TIME VIDEO, BILLY E. OVERMAN D/B/A ALL STAR HOME VIDEO, JIMMY DEAN WRIGHT D/B/A SHOWCASE VIDEO CLUB, CLENTON J. SMITH D/B/A VIDEO WAY, DAVID M. MAGILL D/B/A SILVER SCREEN VIDEO, VIDEO CITY OF RALEIGH, INC. D/B/A VIDEO CITY v. LACY H. THORNBURG, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, ROBERT E. THOMAS, DISTRICT ATTORNEY FOR THE TWENTY-FIFTH JUDICIAL DISTRICT OF NORTH CAROLINA, GEORGE E. HUNT, DISTRICT ATTORNEY FOR THE FIFTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA, JOHN W. TWISDALE, DISTRICT ATTORNEY FOR THE ELEVENTH JUDICIAL DISTRICT OF NORTH CAROLINA, D. LAMAR DOWDA, DISTRICT ATTORNEY FOR THE EIGHTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA, DAVID McFAYDEN, JR., DISTRICT ATTORNEY FOR THE THIRD JUDICIAL DISTRICT OF NORTH CAROLINA, EDWARD W. GRANNIS, JR., DISTRICT ATTORNEY FOR THE TWELFTH JUDICIAL DISTRICT OF NORTH CAROLINA, PETER S. GILCHRIST, III, DISTRICT ATTORNEY FOR THE TWENTY-SIXTH JUDICIAL DISTRICT OF NORTH CAROLINA, PHILLIP WALTERS ALLEN, DISTRICT ATTORNEY FOR THE SEVENTEENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, H. W. ZIMMERMAN, JR., DISTRICT ATTORNEY FOR THE TWENTY-SECOND JUDICIAL DISTRICT OF NORTH CAROLINA, RONALD C. BROWN, DISTRICT ATTORNEY FOR THE TWENTY-EIGHTH JUDICIAL DISTRICT OF NORTH CAROLINA, W. HAMPTON CHILDS, JR., DISTRICT ATTORNEY FOR THE TWENTY-SEVENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, THOMAS D. HAIGWOOD, DISTRICT ATTORNEY FOR THE THIRD JUDICIAL DISTRICT OF NORTH CAROLINA, CARL FOX, DISTRICT ATTORNEY FOR THE FIFTEENTH (B) JUDICIAL DISTRICT OF NORTH CAROLINA, DONALD JACOBS, DISTRICT ATTORNEY FOR THE EIGHTH JUDICIAL DISTRICT OF NORTH CAROLINA, JOE FREEMAN BRITT, DISTRICT ATTORNEY FOR THE SIXTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA, WILLIAM H. ANDREWS, DISTRICT ATTORNEY FOR THE FOURTH JUDICIAL DISTRICT OF NORTH CAROLINA, JOSEPH G. BROWN, DISTRICT ATTORNEY FOR THE TWENTY-SEVENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, JAMES E. ROBERTS, DISTRICT ATTORNEY FOR THE NINETEENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, RONALD L. STEPHENS, DISTRICT ATTORNEY FOR THE FOURTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA, HOWARD S. BONEY, JR., DISTRICT ATTORNEY FOR THE SEVENTH JUDICIAL DISTRICT OF NORTH CAROLINA, J. RANDOLPH RILEY, DISTRICT ATTORNEY FOR THE TENTH JUDICIAL DISTRICT OF NORTH CAROLINA

NORTH AMERICAN VIDEO, LTD. OF DURHAM, D/B/A NORTH AMERICAN VIDEO, NORTH AMERICAN VIDEO, LTD. OF RALEIGH D/B/A NORTH AMERICAN VIDEO, CHARLES H. CROW & ASSOCIATES, INC. D/B/A CROW'S VIDEO CENTER AND COMPUTER & VIDEO CENTER, VERNON S. CHURCH, JR. D/B/A HOME VIDEO OF WILKES, ABELIAN ENTERPRISES, INC., VIDEO WORLD, INC., MELVIN WAYNE CALDWELL D/B/A

VIDEO SHOPPE, MICHAEL MYERS D/B/A U.S.A. VIDEO, BYRON E. TRIPLETT D/B/A VIDEO ONE, FERRELL DENNIS WITTE D/B/A VIDEO SHOWPLACE, PIC-A-FLICK OF ASHEVILLE, INC. D/B/A PIC-A-FLICK, W.S.J., INC. D/B/A VIDEO WORLD, JACK E. ELLIOTT D/B/A CITY NEWS VIDEO AND CITY VIDEO, JACK E. ELLIOTT, JANE STRAUS, RACHEL GUINN AND GLORIA GUINN D/B/A JACKIE'S VIDEO, VIDEO WORLD OF SHELBY, INC. D/B/A VIDEO WORLD, VIDEO WORLD OF CHERRYVILLE, INC. D/B/A VIDEO WORLD, RALPH D. CUNNINGHAM D/B/A HOME MOVIE RENTAL, AMERICAN VIDEO, INC. D/B/A ALL AMERICAN VIDEO, J.J.L. ENTERPRISES, INC. D/B/A VIDEO CONNECTION, THOMAS C. DUNLAP, SR. AND TRACY C. DUNLAP, SR. D/B/A THE VIDEO STATION, BOBBY JOE BRADLEY D/B/A HOME VIDEO CENTER, DUNCOURT, INC. D/B/A THE VIDEO CENTER, VON ENTERPRISES, INC. D/B/A VON'S HOME VIDEO MOVIES, VIDEO WORLD OF GASTONIA, INC. D/B/A VIDEO WORLD v. LACY H. THORNBURG, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, ROBERT E. THOMAS, DISTRICT ATTORNEY FOR THE TWENTY-FIFTH JUDICIAL DISTRICT OF NORTH CAROLINA, JOHN W. TWISDALE, DISTRICT ATTORNEY FOR THE ELEVENTH JUDICIAL DISTRICT OF NORTH CAROLINA, D. LAMAR DOWDA, DISTRICT ATTORNEY FOR THE EIGHTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA, DAVID McFAYDEN, JR., DISTRICT ATTORNEY FOR THE THIRD JUDICIAL DISTRICT OF NORTH CAROLINA, EDWARD W. GRANNIS, JR., DISTRICT ATTORNEY FOR THE TWELFTH JUDICIAL DISTRICT OF NORTH CAROLINA, PETER S. GILCHRIST, III, DISTRICT ATTORNEY FOR THE TWENTY-SIXTH JUDICIAL DISTRICT OF NORTH CAROLINA, PHILLIP WALTERS ALLEN, DISTRICT ATTORNEY FOR THE SEVENTEENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, H. W. ZIMMERMAN, JR., DISTRICT ATTORNEY FOR THE TWENTY-SECOND JUDICIAL DISTRICT OF NORTH CAROLINA, RONALD C. BROWN, DISTRICT ATTORNEY FOR THE TWENTY-EIGHTH JUDICIAL DISTRICT OF NORTH CAROLINA, W. HAMPTON CHILDS, JR., DISTRICT ATTORNEY FOR THE TWENTY-SEVENTH (B) JUDICIAL DISTRICT OF NORTH CAROLINA, CARL FOX, DISTRICT ATTORNEY FOR THE FIFTEENTH (B) JUDICIAL DISTRICT OF NORTH CAROLINA, JOE FREEMAN BRITT, DISTRICT ATTORNEY FOR THE SIXTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA, WILLIAM H. ANDREWS, DISTRICT ATTORNEY FOR THE FOURTH JUDICIAL DISTRICT OF NORTH CAROLINA, JOSEPH G. BROWN, DISTRICT ATTORNEY FOR THE TWENTY-SEVENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, JAMES E. ROBERTS, DISTRICT ATTORNEY FOR THE NINETEENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, RONALD L. STEPHENS, DISTRICT ATTORNEY FOR THE FOURTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA, MICHAEL A. ASHBURN, DISTRICT ATTORNEY FOR THE TWENTY-THIRD JUDICIAL DISTRICT OF NORTH CAROLINA, WILLIAM C. GRIFFIN, JR., DISTRICT ATTORNEY FOR THE SECOND JUDICIAL DISTRICT OF NORTH CAROLINA, GEORGE E. HUNT, DISTRICT ATTORNEY FOR THE FIFTEENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, ALAN LEONARD, DISTRICT ATTORNEY FOR THE TWENTY-NINTH JUDICIAL DISTRICT OF NORTH CAROLINA, J. RANDOLPH RILEY, DISTRICT ATTORNEY FOR THE TENTH JUDICIAL DISTRICT OF NORTH CAROLINA

NORTH CAROLINA ASSOCIATION OF FAMILY ENTERTAINMENT CENTER, INC. v. LACY H. THORNBURG

PARKER NEWS, INC., A NORTH CAROLINA CORPORATION; JESSE F. FRYE, JR., D/B/A L & J NEWSTAND; BRIAR PATCH MOUNTAIN INVESTMENTS, INC., A CORPORATION; SUGAR & SPICE, INC., A NORTH CAROLINA CORPORATION; J & J VIDEO TAPE EXCHANGE, A PARTNERSHIP; SALISBURY VIDEO, A PARTNERSHIP; SALISBURY NEWS, A PARTNERSHIP; ETTA MAE MOTHERSHEAD, D/B/A R & R ENTERTAINMENT CENTER; DANDA ENTERPRISES, INC., A NORTH CAROLINA CORPORATION; ADULT TRADING POST, A PARTNERSHIP; W & S ENTERPRISES, LTD., A NORTH CAROLINA CORPORATION; SHOW BIZ, A PARTNERSHIP; SHARON S. BUNDY, D/B/A VIDEO TRACS; ROBERT T. CADIEU, SR., D/B/A CATHY'S VIDEO, TOO; CATHY'S BOOK SWAP/VIDEO, A PARTNERSHIP; JACK ELLIOTT D/B/A CITY NEWS VIDEO; J, J & B ENTERPRISES, A NORTH CAROLINA CORPORATION; JOHNNY T. ALLEN, JR., D/B/A PRIME TIME VIDEO; EVELYN L. HATCHER, D/B/A L.A. VIDEO RENTALS; EMPIRE VIDEO, INC., A NORTH CAROLINA CORPORATION; W.S.J., INC., A NORTH CAROLINA CORPORATION; PIERRES OF WILMINGTON, INC., A NORTH CAROLINA CORPORATION; H & H ENTERPRISES OF WILMINGTON, INC., A NORTH CAROLINA CORPORATION; MIND'S EYE, INC., A NORTH CAROLINA CORPORATION; CROWN VIDEO UNLIMITED, INC., A NORTH CAROLINA CORPORATION; CAMERA'S EYE, INC., A NORTH CAROLINA CORPORATION; AND BILL WILKERSON D/B/A XXX, INN v. LACY H. THORNBURG, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, JAMES E. ROBERTS, DISTRICT ATTORNEY FOR THE NINETEENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, H. W. ZIMMERMAN, JR., DISTRICT ATTORNEY FOR THE TWENTY-SECOND JUDICIAL DISTRICT OF NORTH CAROLINA, GEORGE E. HUNT, DISTRICT ATTORNEY FOR THE FIFTEENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, LAMAR DOWDA, DISTRICT ATTORNEY FOR THE EIGHTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA, PETER S. GILCHRIST, III, DISTRICT ATTORNEY FOR THE TWENTY-SIXTH JUDICIAL DISTRICT OF NORTH CAROLINA, W. HAMPTON CHILDS, JR., DISTRICT ATTORNEY FOR THE TWENTY-SEVENTH (B) JUDICIAL DISTRICT OF NORTH CAROLINA, EDWARD W. GRANNIS, JR., DISTRICT ATTORNEY FOR THE TWELFTH JUDICIAL DISTRICT OF NORTH CAROLINA, JERRY L. SPIVEY, DISTRICT ATTORNEY FOR THE FIFTH JUDICIAL DISTRICT OF NORTH CAROLINA, WILLIAM H. ANDREWS, DISTRICT ATTORNEY FOR THE FOURTH JUDICIAL DISTRICT OF NORTH CAROLINA, JOE FREEMAN BRITT, DISTRICT ATTORNEY FOR THE SIXTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA, HOWARD S. BONEY, JR., DISTRICT ATTORNEY FOR THE SEVENTH JUDICIAL DISTRICT OF NORTH CAROLINA, DONALD M. JACOBS, DISTRICT ATTORNEY FOR THE EIGHTH JUDICIAL DISTRICT OF NORTH CAROLINA, J. RANDOLPH RILEY, DISTRICT ATTORNEY FOR THE TENTH JUDICIAL DISTRICT OF NORTH CAROLINA, W. DAVID MCFAYDEN, JR., DISTRICT ATTORNEY FOR THE THIRD JUDICIAL DISTRICT OF NORTH CAROLINA, JOHN W. TWISDALE, DISTRICT ATTORNEY FOR THE ELEVENTH JUDICIAL DISTRICT OF NORTH CAROLINA

No. 49A87

(Filed 28 July 1987)

Obscenity § 1— constitutionality of obscenity statutes

Statutes pertaining to the dissemination of obscenity and the sexual exploitation of minors, N.C.G.S. §§ 14-190.1, -190.2, -190.13, and -190.16, while

potentially beyond constitutional bounds if improperly applied, are not so substantially overbroad as to require constitutional invalidation on their face.

ON plaintiffs' appeal as a matter of right pursuant to N.C.G.S. § 7A-30(1) and (2) of a decision of a divided panel of the Court of Appeals, 83 N.C. App. 544, 351 S.E. 2d 305 (1987), affirming a "Judgment and Order" entered by *Bailey, J.*, at the 3 January 1986 Regular Civil Session of Superior Court, WAKE County. Heard in the Supreme Court 9 June 1987.

Kirby, Wallace, Creech, Sarda, Zaytoun & Cashwell, by David F. Kirby and Robert E. Zaytoun, for plaintiff-appellants (Cinema I Video, Inc., et al.; North American Video, Ltd., et al.; North Carolina Association of Family Entertainment Centers, Inc.).

Whitley, Coley and Wooten, by Everette L. Wooten, Jr., for plaintiff-appellants Parker News, Inc., et al.

Lacy H. Thornburg, Attorney General, by Andrew A. Vanore, Jr., Chief Deputy Attorney General, Edwin M. Speas, Jr., Special Deputy Attorney General, and Thomas J. Ziko, Assistant Attorney General, for defendant-appellees.

North Carolina Civil Liberties Union Legal Foundation, by William G. Simpson, Jr. and M. Jackson Nichols, Amicus Curiae.

North Carolina Academy of Trial Lawyers, PHE, Inc., and Philip Harvey, by David S. Rudolf and Bruce J. Ennis, Amici Curiae.

WHICHARD, Justice.

Plaintiffs brought this declaratory judgment action seeking to have amendments to North Carolina's obscenity laws declared facially unconstitutional and further seeking to enjoin defendants from enforcing the statutes against them. These amendments were enacted on 11 July 1985 as House Bill 1171, entitled "AN ACT TO STRENGTHEN THE OBSCENITY LAWS, TO PROTECT MINORS FROM HARMFUL MATERIAL THAT DOES NOT RISE TO THE LEVEL OF OBSCENITY, AND TO STOP THE SEXUAL EXPLOITATION AND PROSTITUTION OF MINORS." This bill amended N.C.G.S. § 14-190.1, repealed N.C.G.S. § 14-190.2, and added N.C.G.S. § 14-190.13, -190.16, and -190.17. These provisions became effective 1 October 1985.

On 30 September 1985 plaintiffs in case 85CVS6750 (Cinema I Video) filed a complaint and motions for injunctive relief from the enforcement of the statutes, naming as defendants North Carolina's Attorney General and the district attorneys for each judicial district of the state. Plaintiffs alleged that because they "are in the business of selling and renting video tapes, including tapes which are sexually explicit, they will be the target of defendants' intended enforcement of N.C.G.S. secs. 14-190.1, 14-190.13, 14-190.16, and 14-190.17." They claimed that these statutes abridge their rights and the rights of their customers under the first, fifth, eighth, ninth, and fourteenth amendments to the United States Constitution and article I, sec. 27 of the Constitution of North Carolina. Plaintiffs further alleged that the amended statutes are vague in their terms and substantially overbroad. Plaintiffs have averred, as irreparable injury, the prospect of severe financial loss or ruin and possible criminal prosecution pending a determination of the case on its merits.

On 2 October 1985 plaintiffs in case 85CVS1796 (Parker News) filed a similar complaint in superior court, Wayne County. Plaintiffs in case 85CVS6850 (North American Video) filed a complaint in superior court, Wake County, on 3 October 1985, and plaintiffs in case 85CVS8071 (North Carolina Family Entertainment Center, Inc.) filed their complaint in superior court, Wake County, on 15 November 1985. These cases also challenged the constitutionality of the statutes cited above.

In an order filed 3 October 1985 the temporary restraining orders prayed for in cases 85CVS6750 and 85CVS6850 were issued, pending a hearing on plaintiffs' motions for preliminary injunctions. The motions for preliminary injunctions were denied, however, on 4 October 1985. Plaintiffs then sought appellate review of the denial of their motions for preliminary injunctions by filing petitions for a writ of certiorari, a writ of supersedeas, and a temporary stay with the Court of Appeals. These petitions were denied, and the actions proceeded in the trial court.

Defendants filed their answers and motions for summary judgment in cases 85CVS6750 and 85CVS6850 on 23 October 1985 and in case 85CVS1796 on 1 November 1985. On 5 November 1985 plaintiff in case 85CVS1796 filed a motion for summary judgment on its prayer for a permanent injunction. This motion was denied.

On 5 December 1985 plaintiffs in case 85CVS1796 made a motion to remove and continue the case in Wake County. The motion was allowed on 20 December 1985. By consent of the parties all four cases were consolidated. In an order filed 13 January 1986, defendants' motions for summary judgment were granted and plaintiffs' complaints were dismissed. Plaintiffs appealed.

The Court of Appeals affirmed the summary judgment holding the statutes constitutional under both the North Carolina and United States Constitutions. *Cinema I Video v. Thornburg*, 83 N.C. App. 544, 351 S.E. 2d 305 (1987). Judge Becton concurred in part and dissented in part. Plaintiffs appeal.

For the reasons stated in the opinion by Johnson, J., the decision of the Court of Appeals is affirmed. As stated in that opinion, "*our opinion is limited to the constitutionality of the statutes as drawn and we have no basis for deciding the constitutionality of the present applications of the statutes in pending cases.*" *Cinema I Video v. Thornburg*, 83 N.C. App. 544, 552, 351 S.E. 2d 305, 311 (1987) (emphasis in original). Fact situations are readily conceivable in which the statutes at issue, if improperly applied, would be unconstitutional. Circumspect application is thus advisable. Mere potential for overbreadth is not dispositive, however; "the overbreadth involved [must] be 'substantial' before the statute involved will be invalidated on its face." *New York v. Ferber*, 458 U.S. 747, 769, 73 L.Ed. 2d 1113, 1130 (1982). The statutes here, while potentially beyond constitutional bounds if improperly applied, are not so *substantially* overbroad as to require constitutional invalidation on their face.

Affirmed.

STATE OF NORTH CAROLINA v. SHERRY BRIGHT

No. 295A86

(Filed 28 July 1987)

1. Criminal Law § 50.1— child abuse—opinion of child psychologist—admissible

In a prosecution for first degree sexual offense, felonious child abuse and assault on a child under twelve, there was no error in allowing a child

psychologist to testify on redirect examination that in his opinion the perpetrator was a woman where defendant had opened the door by asking why the witness had recommended that the child not be returned to her mother's custody.

2. Criminal Law §§ 73.5, 80— child abuse—medical records—admissible

There was no error in a prosecution for first degree sexual offense, felonious child abuse, and assault on a child under twelve from the admission of certain of the victim's medical records where the records were first referred to by defendant on cross-examination of a social worker; the prosecutor on redirect examination of the social worker asked additional questions about the records; the prosecutor later asked a doctor about the records; and defendant's request for a limiting instruction was denied. Defendant did not object to the admission of the records on hearsay grounds; and the trial judge refused to pass the records to the jury out of an abundance of caution and instead permitted both attorneys to argue from the records to the extent that the records were testified to by the witnesses, correctly ruling that they could be considered under an exception to the hearsay rule. Furthermore, defendant opened the door to the admission of the records by questioning the witness for the first time regarding the records on cross-examination. N.C.G.S. § 8C-1, Rule 803(6) (1986).

3. Rape and Allied Offenses § 4— reference to prior juvenile court proceeding—motion to strike denied

In a prosecution for first degree sexual offense, felonious child abuse, and assault on a child under twelve, the trial judge did not err by denying defendant's motions to strike testimony from a social worker that she was aware of a juvenile court determination that defendant had abused the child. Defendant had asked the witness for the basis of her opinion that the victim had been abused, and the reference to the prior proceeding was properly admitted as forming the basis of the witness's opinion.

4. Criminal Law §§ 166, 53— child abuse—basis of psychologist's opinion—statements of victim—admissible

In a prosecution for first degree sexual offense, felonious child abuse, and assault on a child under twelve, where defendant's motion to strike a psychologist's testimony that the victim had told him that she had been sexually abused was denied, defendant waived her exception to the ruling by offering neither argument nor authority to support her contention that the trial court had erred. Moreover, the testimony was admissible because it formed the basis of the psychologist's expert opinion as to the existence of sexual abuse, the statement was made to the doctor during the course of his diagnosis and treatment of the victim, and the statement was corroborative of the victim's own testimony that she had been sexually abused. N. C. Rules of App. Procedure, Rule 28(b), N.C.G.S. § 8C-1, Rules 705 and 803(4).

5. Criminal Law § 99.8— child abuse—questions posed by court to psychologist—no error

There was no error in an action arising from the sexual abuse of a child where the court posed questions to a psychologist who had treated the child.

The questions were intended merely to establish the foundation for the admissibility of his opinion in the face of defendant's objections and there was nothing in the questions to indicate a bias in favor of the State or against defendant. N.C.G.S. § 8C-1, Rule 614(a) (1986).

6. **Criminal Law § 99.5— child abuse—court's instruction of counsel—no error**

In an action arising from the sexual abuse of a child, there was no basis for defendant's complaints that the trial judge assisted the district attorney during bench conferences and in front of the jury.

7. **Criminal Law § 99.1— child abuse—expression of opinion as to age of victim by court—no prejudice**

There was no prejudice in an action for first degree sexual offense, felonious child abuse, and assault on a child under twelve from the court's statement during his introductory remarks that the judge understood the child to be six years old. Although age was an element in these crimes, defendant herself testified to the victim's age and there was no dispute on that point.

8. **Criminal Law § 53— child abuse—psychologist's testimony based on medical records—admissible**

There was no abuse of discretion in a prosecution arising from the sexual abuse of a child in admitting a psychologist's opinion which was based on medical records prepared by the Developmental Evaluation Center of Duke Hospital (DEC) where a doctor testified that psychologists typically relied upon such reports and the records themselves were properly admitted under an exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(6).

BEFORE *Brannon, J.*, at the 10 November 1985 Criminal Session of Superior Court, DURHAM County, defendant was convicted of first-degree sexual offense, felonious child abuse, and assault on a child under twelve. Defendant was sentenced to life imprisonment for the sexual offense, five years for the felony child abuse, and two years for the assault. Defendant's motion to bypass the Court of Appeals on the felony child abuse and assault convictions was allowed on 25 November 1986. Defendant appeals the life sentence as of right pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court on 9 June 1987.

Lacy H. Thornburg, Attorney General, by Philip A. Telfer, Assistant Attorney General, for the State.

Darryl G. Smith for defendant-appellant.

MEYER, Justice.

The prosecuting witness in this case was the five-year-old daughter[1] of defendant. On 28 November 1983, she was living with her mother, father, and baby brother in her paternal grandmother's house. On that day, her school principal and her grandmother noticed bruising and scratching under her left eye. The victim told her principal that her mother had punished her because she did not know the days of the week. The principal notified the Durham County Department of Social Services (DSS) of the possibility of child abuse. Two social workers met with defendant and her husband. The child was temporarily placed in foster care, and defendant was advised regarding various social services available to help with the emotional, domestic, and financial problems she was experiencing.

While the victim was in foster care, Dr. Mary Vernon conducted a routine physical examination on her. This examination revealed bruises on the child's thighs, redness in the vaginal area, and a dilated hymen.

The victim told her foster mother, social worker Mary Sue Cherney, and psychologist Mark Everson that her mother had put a vibrator in her vagina and had beaten her.

Defendant was indicted on 4 June 1984 for first-degree sexual offense, indecent liberties, felony child abuse, and assault on a child under twelve. The date of these offenses was alleged to be 21 November 1983. Dr. Vernon testified at trial that, in her opinion, the victim's vagina had been penetrated, although not recently. Dr. Vernon also testified that the vagina could have been penetrated by a vibrator.

[1] Defendant first argues that the trial judge erred in allowing certain testimony from child psychologist Mark Everson. Dr. Everson was called to testify for the State and was qualified by the court as an expert on child psychology. Dr. Everson testified that he had examined the victim while she was in temporary foster care and had formed the opinion that she had been sexually

1. Although all references to the victim's age in the record, briefs, and transcript have her as six years old, she had actually not yet reached her sixth birthday at the time of the offenses charged.

abused, based upon his own examination and the medical records provided him, as well as upon his knowledge of prior proceedings against defendant in the juvenile court. Dr. Everson further testified that he had recommended that the child not be returned to her mother. He also testified that in cases of child sexual abuse, the identity of the perpetrator is important in determining the course of treatment and prevention of further episodes of abuse.

On cross-examination, defendant asked Dr. Everson if he had not assumed from the start of his examination that defendant had been the perpetrator of the abuse. Defendant also asked Dr. Everson to explain why he had recommended that the child not be returned to her mother's custody.

On redirect, the prosecutor asked Dr. Everson for his opinion as to the identity of the person who had sexually abused the victim. Defendant objected, and Dr. Everson was not allowed to answer. The district attorney then asked Dr. Everson to explain further why he had recommended permanent foster care for the victim. Dr. Everson responded that his recommendation was based in part on his belief that a woman had sexually abused the victim and that her father had done nothing to prevent it. Defendant's objection to this answer was overruled and her motion to strike denied.

Defendant argues that the trial court erred in allowing Dr. Everson to testify that, in his opinion, "in this case the perpetrator is a woman." She relies on *State v. Keen*, 309 N.C. 158, 305 S.E. 2d 535 (1983), a case decided before the new Rules of Evidence went into effect. In *Keen*, a psychiatrist was asked whether a sexual assault related to him by the prosecuting witness had in fact happened or whether it was the product of the prosecuting witness' fantasy. The psychiatrist opined that the sexual assault had in fact happened. We held that this testimony amounted to an opinion as to the guilt of the defendant and constituted reversible error.

Keen is not apposite here. During cross-examination, defendant had asked Dr. Everson why he had made his recommendations. Thus, defendant "opened the door" to the complained-of elaboration on redirect examination. *State v. McKinney*, 294 N.C. 432, 241 S.E. 2d 503 (1978). This assignment of error is overruled.

[2] Defendant next argues that the trial judge erred in refusing to grant her request for an instruction limiting the admissibility of certain medical records prepared by the Developmental Evaluation Center (DEC) of Duke Hospital. Defendant contends that the records should only have been considered as forming the basis for actions by the witnesses, rather than for their truth. We find no error in the judge's rulings.

Prior to jury selection, defendant objected to the State introducing the medical records. The trial judge withheld ruling until trial. The first time thereafter that the medical records were referred to was by defendant during her cross-examination of social worker Sue Cherney. The prosecutor, on redirect, asked additional questions about the records. Later in the trial, Dr. Everson also was asked by the prosecutor about the records. Defendant requested a limiting instruction to the effect that the records could only be admitted as forming the basis of the doctor's opinion as to whether the victim had been abused. The court denied this instruction, admitting the records as substantive evidence to prove their content.

Defendant argues that the medical records were inadmissible as hearsay. However, it appears that when the State moved to introduce the records into evidence, defendant did not object on hearsay grounds. Her only objection was that documents other than those specifically referred to by the witness were included in the report. Defendant conceded that all of the records were of a medical nature and were medical records of the victim. We note that, in an abundance of caution, the trial judge refused to pass the records to the jury. Instead, he permitted both attorneys to argue from the records, to the extent that the records were testified to by the witnesses. As to those portions the trial judge correctly ruled that they could be considered under an exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(6) (1986). *See State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974).

We also note that defendant opened the door to the admission of these medical records. In *State v. McKinney*, 294 N.C. 432, 241 S.E. 2d 503 (1978), a State witness was questioned upon defense cross-examination about a conversation with another person. We held that this questioning opened the door for the State to ask about the substance of that conversation, notwithstanding

a hearsay objection. Here, defendant questioned the witness for the first time regarding the DEC records on cross-examination, opening the door for the district attorney's questions on redirect. This assignment of error is overruled.

[3] Defendant next argues that the trial judge erred in denying her motions to strike testimony that she contends was nonresponsive. Defendant cross-examined social worker Sue Cherney about bias against defendant, asking if Cherney did not have a preconceived notion that defendant had abused her daughter. In response, the witness said that she was aware of a juvenile court determination that defendant had abused the child. The trial judge overruled defendant's motion to strike the reference to the juvenile court proceedings. Defendant argues that this was error. We disagree.

Defendant asked the witness for the basis of her opinion that the victim had been abused. The reference to the prior proceeding was properly admitted as forming the basis of the witness' opinion. *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979).

[4] Defendant next complains that the trial judge improperly denied her motion to strike the response of Dr. Everson to a question by the district attorney. The district attorney asked Dr. Everson if the victim had told him anything in the course of his treatment of her that had formed the basis of his opinion that defendant had abused her. Dr. Everson testified that the child had told him that she had been sexually abused. Defendant moved to strike on the ground that the answer was unresponsive, went to the ultimate issue, and was hearsay. The trial court denied the motion. Defendant offers neither argument nor authority to support her contention before this Court that the trial judge erred in this ruling. She has therefore waived her exception to this ruling. N.C.R. App. P. 28(b). We note, however, that there are at least three grounds for the admissibility of Dr. Everson's response. First, the victim's statement to Dr. Everson formed the basis of his expert opinion as to the existence of sexual abuse. N.C.G.S. § 8C-1, Rule 705 (1986). *See State v. Allison*, 307 N.C. 411, 298 S.E. 2d 365 (1983); *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407. Second, the statement was made to Dr. Everson during the course of his diagnosis and treatment of the victim. N.C.G.S. § 8C-1, Rule 803(4) (1986). *See State v. Franks*, 300 N.C. 1, 265

S.E. 2d 177 (1980). Third, it was merely corroborative of the victim's own testimony that she had been sexually abused. *See State v. Burns*, 307 N.C. 224, 297 S.E. 2d 384 (1982). This assignment of error is overruled.

Defendant next argues that the trial judge was biased in favor of the prosecution in this case and that this bias was communicated to the jury in violation of N.C.G.S. § 15A-1222. We disagree.

[5] Defendant argues that the trial judge's personal interrogation of Dr. Everson was an attempt by the judge to assist the district attorney. Having carefully reviewed the transcript, we conclude that this argument has no merit. The questions posed to Dr. Everson were intended merely to establish the foundation for the admissibility of his opinion in the face of defense objections. Our Rules of Evidence permit the trial judge to question witnesses. N.C.G.S. § 8C-1, Rule 614(a) (1986). *See State v. Staley*, 292 N.C. 160, 232 S.E. 2d 680 (1977). We see nothing in the questions posed by the judge to indicate a bias in favor of the State or against the defendant.

[6] Defendant argues further that the trial judge assisted the district attorney during bench conferences and in front of the jury. We have examined the transcript carefully and can find no basis for the defendant's complaints. Where the trial judge instructed counsel, he did so without expressing, directly or indirectly, his opinions as to the merits of the case.

[7] Next, the defendant argues that the trial judge improperly expressed an opinion as to the age of the prosecuting witness. This argument is without merit.

During his introductory remarks to the jury, the trial judge read out the allegations against defendant. During the course of this introduction, the judge identified the child and said that he "understands [she was] then six years old." While defendant is correct that the age of the victim was an element in these crimes, we see no prejudice to her by the judge's comment. There was no dispute as to the victim's age, this being testified to by the defendant herself. Even assuming, *arguendo*, that the trial judge erred in noting the victim's age, we hold that any such error was harmless beyond a reasonable doubt. *See State v. Silhan*, 302 N.C.

223, 275 S.E. 2d 450 (1981) (*lapsus linguae* during instructions harmless error). This assignment of error is overruled.

[8] Finally, defendant argues that she was unfairly prejudiced by the expert testimony of Dr. Everson. Defendant concedes, *arguendo*, that the records upon which Dr. Everson relied were admissible. Defendant argues, however, that Dr. Everson was not reasonable in relying upon the DEC records and that the trial judge should have so found. We disagree.

An expert may base his opinion upon information reasonably relied upon by those in his field. *State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974). Dr. Everson testified that psychologists typically relied upon reports such as the one prepared by the DEC. The trial judge was fully justified in admitting Dr. Everson's opinion based upon those records. Moreover, the records themselves were properly admitted under an exception to the hearsay rule. *See* N.C.G.S. § 8C-1, Rule 803(6) (1986). The question of whether Dr. Everson was reasonable in relying on the records, like the question of whether Dr. Everson was qualified to testify as an expert, was within the discretion of the trial judge. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). We find no abuse of that discretion here.

We hold that the defendant received a trial free of prejudicial error.

No error.

CARLOS L. DILLINGHAM, EMPLOYEE-PLAINTIFF v. YEARGIN CONSTRUCTION COMPANY, EMPLOYER, AND AETNA CASUALTY AND SURETY CO., CARRIER, DEFENDANTS

No. 638PA86

(Filed 28 July 1987)

Master and Servant §§ 55.1, 67— workers' compensation—heat-related heart attack—injury by accident

Plaintiff's cardiac arrest occurred by accident within the meaning of the Workers' Compensation Act where plaintiff was employed as an instrumentation fitter at the Brunswick Nuclear Power Plant, the job sometimes required

plaintiff to enter the reactor building while it was in operation, plaintiff was required on those occasions to wear a radiation suit which covered his entire body and caused him to sweat heavily, all openings in the suit were sealed with tape, and both medical experts implicated the wearing of the suit and plaintiff's consequent inability to dissipate heat as a cause of his cardiac arrest.

ON plaintiff's petition for discretionary review of the decision of the Court of Appeals, 82 N.C. App. 684, 348 S.E. 2d 143 (1986), which affirmed the opinion and award of the Industrial Commission, filed 10 January 1986, denying plaintiff's claim for compensation. Heard in the Supreme Court 12 May 1987.

Murchison, Taylor, Kendrick, Gibson & Davenport, by Vaiden P. Kendrick, Michael Murchison, and Reid G. Hinson, for plaintiff.

Marshall, Williams, Gorham & Brawley, by Ronald H. Woodruff, for defendants.

MARTIN, Justice.

The sole issue presented for review is whether plaintiff-employee's cardiac arrest occurred "by accident" within the meaning of the Workers' Compensation Act. We hold that plaintiff's injury was accidental and accordingly reverse the Court of Appeals.

Plaintiff was employed by defendant construction company as an instrumentation fitter at the Brunswick Nuclear Power Plant. The job sometimes required plaintiff to enter the reactor building while it was in operation to repair control valves which were part of the reactor's cooling system. On those occasions, plaintiff was required to dress in special clothing designed for radiation protection. The outfit consisted of a heavy radiation suit, including coveralls, plastic boots, rubber boots, cotton gloves, surgical gloves, work gloves, and a hood. Duct tape was wrapped tightly around the neck, wrist, and ankle areas to seal any seams or gaps.

On 20 June 1984, plaintiff and a co-worker were assigned to work on a control valve in the HPIC room, an area located directly beneath the reactor. Plaintiff donned protective garb and entered the HPIC room. After working on the valve and sweating profusely for about thirty minutes, plaintiff stood up and struck his head on a pipe. He stopped sweating and began experiencing chills and dizziness. Plaintiff alerted his co-worker, and they went to the first aid area, where plaintiff lost consciousness. He was

then transported to the hospital emergency room and treated for cardiac arrest.

At the hearing before the deputy commissioner, plaintiff testified that it was 90 degrees outside on 20 June, that the indoor temperature was higher because heat builds up inside, that he began to sweat heavily as soon as he dressed in the radiation suit, that it was miserably hot in the HPIC room, and that there was inadequate ventilation in the work area.

Plaintiff's co-worker, Robert Harrelson, testified that it was hot in the HPIC room but not abnormally hot for a June day, that the indoor temperature was possibly the same as the outdoor temperature, and that the HPIC room had an air conditioning duct off to the side rather than directly over the work area. He acknowledged that a number of employees had sought first aid for heat-related problems and that some had been sent to the hospital emergency room because of heat exhaustion.

Dr. William F. Credle, Jr., who treated plaintiff in the hospital emergency room, testified that the history he had received indicated that plaintiff had been working in temperatures of 85 degrees or more in a very confining radiation suit. He stated that plaintiff had suffered cardiac arrest precipitated by the heat exhaustive conditions present on the job. Cardiovascular tests showed no evidence of significant coronary artery disease. He further testified that plaintiff would not have suffered cardiac arrest had he not been working under the conditions present at the job site.

Dr. William J. Grossman, who administered cardiovascular tests to plaintiff, corroborated Dr. Credle's diagnosis. He testified that plaintiff's cardiac arrest resulted from heat stroke due to a hot environment and a confining radiation suit that would not allow effective dissipation of heat. His tests revealed no underlying heart disease.

The deputy commissioner made the following pertinent findings:

> 2. [Plaintiff] was required, when entering the reactor building, to dress out in radioactive protection clothing. This included a suit, two pairs of plastic boots, coveralls, cotton

gloves and work gloves. Plaintiff was also required to wear a hood which covered his head as a part of this equipment.

. . . .

4. Prior to going to his assigned work area, plaintiff dressed out in his radiation protection suit. When plaintiff completed putting on the suit he began to perspire heavily, as he had done on each occasion he had worn the suit prior to this day. The outside temperature on the date in question was approximately 90 degrees. The interior temperature of the HPIC area at that time was approximately 85 degrees and the area was ventilated by conditioned air.

. . . .

7. On the date in question, plaintiff sustained an injury which arose out of and in the course of his employment with the defendant employer. Plaintiff's injury did not however occur as the result of any interruption of his normal work routine. Plaintiff was not exposed to extreme heat nor did his injury result from extreme exertion.

8. Plaintiff was not at an increased risk of developing heat exhaustion or cardiac arrest as a result of his work in the HPIC area, than the general public not so employed.

From these findings the commissioner concluded that plaintiff's injury had not occurred as the result of an accident and denied compensation. The full Commission and the Court of Appeals affirmed. Our inquiry on appeal is limited to a consideration of whether the evidence supports the findings of fact and whether the findings of fact justify the conclusions of law. *McLean v. Roadway Express*, 307 N.C. 99, 296 S.E. 2d 456 (1982). Findings of fact which are essentially conclusions of law will be treated as such upon review. *See Perkins v. Insurance Co.*, 274 N.C. 134, 161 S.E. 2d 536 (1968). We deem paragraph 8 to be a conclusion of law and hold that it is not supported by the findings of fact.

We have stated that an injury does not arise by accident if it occurs when the claimant is carrying on his normal work routine, performing his customary duties in the usual way. *Lawrence v. Mill*, 265 N.C. 329, 144 S.E. 2d 3 (1965). We have also held that injuries caused by a heart attack must be precipitated by unusual

or extraordinary exertion in order to be compensable. *Lewter v. Enterprises, Inc.*, 240 N.C. 399, 82 S.E. 2d 410 (1954). It seems clear that the commissioner had these well-settled rules in mind when finding the facts as stated in paragraph 7. However, these findings are not relevant to a determination of this case, as an exception to the above-stated rules has been carved out by *Fields v. Plumbing Co.*, 224 N.C. 841, 32 S.E. 2d 623 (1945).

Fields states the rule to be applied when the injury is sustained through occupational exposure to heat or cold:

> [W]here the employment subjects a workman to a special or particular hazard from the elements, such as excessive heat or cold, likely to produce sunstroke or freezing, death or disability resulting from such cause usually comes within the purview of the compensation acts. . . . The test is whether the employment subjects the workman to a greater hazard or risk than that to which he otherwise would be exposed.

Id. at 842-43, 32 S.E. 2d at 624 (citations omitted). *Fields* represents the majority rule in this country. Other jurisdictions hold, with virtual unanimity, that when the conditions of employment expose the claimant to extreme heat or cold, injuries such as heatstroke, heat exhaustion, heat prostration, sunstroke, freezing, and frostbite are considered accidental. 1B A. Larson, *The Law of Workmen's Compensation* § 38.40 (1987); 99 C.J.S. *Workmen's Compensation* § 187 (1958); 83 A.L.R. 234 (1933).

We note that the deputy commissioner correctly recognized the applicability of *Fields* to the present case—his conclusion of law cites *Fields* as the controlling authority, and paragraph 8 addresses increased risk of heat exhaustion, the crucial issue under *Fields*. Based upon our examination of the record, however, we hold that the conclusion of law in paragraph 8 is supported neither by the findings of fact nor by the evidence.

Contrary to the conclusion in paragraph 8, the evidence unequivocally demonstrates that plaintiff was exposed to an increased risk of heat-related illness because of his employment. As noted in paragraphs 2 and 4 of the commissioner's findings, plaintiff was required to wear a radiation suit when inside the reactor building which covered his entire body and caused him to sweat heavily. All openings in the suit were sealed with tape. Both

medical experts implicated the wearing of the suit, and plaintiff's consequent inability to dissipate heat, as a cause of the cardiac arrest. We have held that the type of clothing worn in employment can create the increased risk contemplated by *Fields*. *See Pope v. Goodson*, 249 N.C. 690, 107 S.E. 2d 524 (1959) (the wearing of wet clothing and a nail apron by reason of his employment exposed claimant to greater risk of being struck by lightning; death held compensable). Significantly, uncontradicted evidence showed that other employees at the plant had suffered heat-related illnesses leading to emergency room treatment.

It is clear that the type of heavy clothing required by his employment exposed plaintiff to a greater danger of overheating than that to which he otherwise would have been subjected. Members of the public not so employed would not ordinarily wear heavy layers of clothing such as coveralls, boots, gloves, and a hood in an enclosed space with temperatures reaching 85 degrees. *Fields v. Plumbing Co.*, 224 N.C. 841, 32 S.E. 2d 623.

It was not necessary that plaintiff present evidence as to the exact temperature inside the radiation suit in order to show an increased risk of overheating. *Cf. McCuiston v. Addressograph-Multigraph Corp.*, 308 N.C. 665, 303 S.E. 2d 795 (1983) (claimant need not measure noise level to support claim for hearing loss); *Gay v. J. P. Stevens & Co.*, 79 N.C. App. 324, 339 S.E. 2d 490 (1986) (claimant need not measure concentrations of dust and toxins to support claim for occupational disease due to dust and fume inhalation); *Lake v. Midwest Packing Company*, 301 S.W. 2d 834 (Mo. 1957) (claimants need not establish exact temperature in workplace to support heatstroke claim). Evidence that the room temperature was 85 degrees and that plaintiff suffered heat exhaustion while wearing a radiation suit which inhibited his body's ability to radiate heat is sufficient.

We are not persuaded by the Court of Appeals' attempt to distinguish *Fields*. The Court of Appeals places great reliance upon the fact that the claimant in *Fields* labored an entire day in temperatures measuring as high as 104 degrees. A thermometer reading alone is not dispositive in cases of heat-related illness. It is the province of the medical experts, not the appellate courts, to determine whether a room temperature of 85 degrees may be a factor in causing heat exhaustion when all circumstances, in-

cluding the type of clothing worn, are considered. *Cf. T. J. Moss Tie Co. v. Rollins*, 191 Tenn. 577, 235 S.W. 2d 585 (1951) (claimant suffered heat prostration when temperatures 85 or 86 degrees; death compensable under test similar to that in *Fields*).

We therefore reverse the Court of Appeals and remand to that court for further remand to the Industrial Commission for reconsideration on the present record in a manner consistent with this opinion.

Reversed and remanded.

CHARLES L. FAIRCLOTH AND LONNIE VANCE MICHAEL v. HUGH JOSEPH BEARD, McDANIEL LEWIS BEARD, BEARD FABRICS, INC., BEARD PROPERTIES, LIMITED, A PARTNERSHIP, AND HJB PROPERTIES, LIMITED, A PARTNERSHIP

No. 682PA86

(Filed 28 July 1987)

1. **Appeal and Error § 6.9— order granting jury trial—right of appeal**

The trial court's interlocutory order ruling that plaintiffs are entitled to a jury trial affects a substantial right of defendants and is immediately appealable. N.C.G.S. §§ 1-277 and 7A-27.

2. **Jury § 1— shareholders' derivative action—right to jury trial**

Although a shareholders' derivative action may be an action in equity, it is a civil action for which Art. IV, § 13 of the N. C. Constitution guarantees the right to a jury trial.

ON appellants Hugh Joseph Beard, McDaniel Lewis Beard, Beard Properties Limited and HJB Properties' petition for discretionary review of the Court of Appeals, reported at 83 N.C. App. 235, 349 S.E. 2d 609 (1986), dismissing their appeal from *McLelland, Judge*, at the 23 January 1986 Session of Superior Court, ALAMANCE County. Heard in the Supreme Court 13 May 1987.

The appellants are defendants in a shareholders' derivative action brought by plaintiffs on behalf of Beard Fabrics, Inc. In their complaint the plaintiffs alleged self-dealing and requested relief in the form of damages, the imposition of a constructive trust or equitable lien upon any real property owned by the cor-

poration, court supervised liquidation and dissolution of the corporation. In an amended complaint the plaintiffs alleged the defendant officers had breached their fiduciary duties to the corporation and prayed for punitive damages. In the original complaint the plaintiffs prayed for a jury trial.

The appellants made a motion in which they said that no right to a jury trial exists in this case and asked the court to rule "that all demands for a jury trial of any issues in this action are invalid and of no effect." The court denied this motion. The Court of Appeals held that the order denying the motion did not deprive the defendants of a substantial right which they would lose absent a review prior to a final determination of the action and dismissed the appeal. We allowed discretionary review.

Hemric, Hemric and Hemric, P.A., by H. Clay Hemric, Jr. and Nancy G. Hemric, for plaintiff appellees.

Ridge and Associates, by Paul H. Ridge and Daniel Snipes Johnson, for defendant appellants.

WEBB, Justice.

[1] The Court of Appeals held that the denial of the defendants' motion that the plaintiffs' demand for a jury trial be invalidated is an interlocutory order which does not affect a substantial right. For this reason the appeal was dismissed by the Court of Appeals. The rule that there may be no appeal as of right pursuant to N.C.G.S. §§ 1-277 and 7A-27 from an interlocutory order unless such order deprives the appellant of a substantial right which he would lose absent a review prior to final determination has been stated in many cases. *See Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1978); *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978); and *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976). The Court of Appeals recognized that an order denying a motion for jury trial is appealable. *See In re McCarroll*, 313 N.C. 315, 327 S.E. 2d 880 (1985) and *In re Ferguson*, 50 N.C. App. 681, 274 S.E. 2d 879 (1981). The Court of Appeals said that all the superior court did was refuse to invalidate the plaintiffs' demand for a jury trial and did not determine whether the plaintiffs were entitled to a jury trial. For this reason the Court of Appeals reasoned the appellants had not been injured. There is logic in the Court of Appeals' reading of the ap-

pellants' motion and the court's order. We believe, however, that a fair reading is that the court has ruled that the plaintiffs are entitled to a jury trial. If, as we held in *McCarroll* and the Court of Appeals held in *Ferguson*, an order denying a jury trial is appealable, an order requiring a jury trial should be appealable. If a denial of a jury trial affects a substantial right which would be lost absent a review prior to final determination the requirement that a case will be tried by a jury should have the same effect. We hold that the denial of the appellants' motion is appealable.

[2] The right to jury trials is covered by two sections of the Constitution of North Carolina. Article I, Sec. 25 says:

> In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.

Article IV, Sec. 13 provides in part:

> There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action, and in which there shall be a right to have issues of fact tried before a jury.

There is not a conflict between these two sections but Article IV, Sec. 13 is more comprehensive. We believe it determines this case. This is an action for the protection of private rights and the redress of private wrongs. It is a civil action under Article IV, Sec. 13 of the Constitution of North Carolina. The plaintiffs are guaranteed under this section that the facts in the case shall be tried before a jury.

The defendant, relying on *In re Huyck Corp. v. Mangum, Inc.*, 309 N.C. 788, 309 S.E. 2d 183 (1983); *N.C. State Bar v. Dumont*, 304 N.C. 627, 286 S.E. 2d 89 (1982); *In re Clark*, 303 N.C. 592, 281 S.E. 2d 47 (1981); *In re Wallace*, 267 N.C. 204, 147 S.E. 2d 922 (1966); *Utilities Commission v. Trucking Co.*, 223 N.C. 687, 28 S.E. 2d 201 (1943); *Belk's Department Store v. Guilford County*, 222 N.C. 441, 23 S.E. 2d 897 (1943); *Railroad v. Parker*, 105 N.C. 246, 11 S.E. 328 (1890); *Phillips v. Phillips*, 73 N.C. App. 68, 326 S.E. 2d 57 (1985); *Ferguson*, 50 N.C. App. 681, 274 S.E. 2d 879; *In re Foreclosure of Sutton Investments*, 46 N.C. App. 654, 266 S.E. 2d 686 (1980); *In re Taylor*, 25 N.C. App. 642, 215 S.E. 2d 789 (1975);

State v. Carlisle, 20 N.C. App. 358, 201 S.E. 2d 704 (1974); and *In re Bonding Co.*, 16 N.C. App. 272, 192 S.E. 2d 33 (1972), argues that the right to a jury trial in this state is governed by Article I, Sec. 25 of the Constitution and a jury trial may only be had as a matter of right if such a right existed when the 1868 Constitution was adopted. They argue further that a stockholders' derivative action is an action in equity and a right to a jury trial in equitable actions did not exist prior to the adoption of the Constitution of 1868. We do not believe the above cited cases hold that Article I, Sec. 25 governs exclusively the right to a jury trial. They mention only Article I, Sec. 25 in discussing the right to a jury trial but none of them are factually similar to this case. If we were to say that these cases hold Article IV, Sec. 13 does not apply in determining a right to a jury trial we would be amending the Constitution by eliminating this section. This we cannot do. Although stockholders' derivative suits may be equitable actions they are actions to protect private rights and to redress private wrongs. They are civil actions under Article IV, Sec. 13 and this section of the Constitution guarantees that parties to such actions may have questions of fact tried by juries.

For the reasons stated in this opinion we reverse the Court of Appeals and hold that the superior court was correct in denying the defendants' motion that the plaintiffs' demand for a jury trial be invalidated.

Reversed and remanded.

STATE OF NORTH CAROLINA)
)
v.) ORDER
)
WILLIE B. MELVIN)

No. 482A86

(Filed 28 July 1987)

THIS case was heard on 12 May 1987 on defendant's appeal from a judgment of life imprisonment entered at the 7 April 1986 Criminal Session of Superior Court, CUMBERLAND County, *Johnson, J.*, presiding.

Defendant contends on appeal that two of the principal witnesses against him, James Rhone and Anthony Rhone, were so intimidated by the prosecutor into giving their testimony that defendant's constitutional rights to present a defense and to due process have been violated to his prejudice.

At defendant's trial the witnesses James and Anthony Rhone both testified that they, with the defendant, Willie Melvin, conspired to and did rob the victim in this case, Joseph Panzullo, at Panzullo's residence on 1 July 1985. Both witnesses also testified, however, that they had initially planned to testify that defendant, who was their cousin, had nothing to do with the robbery and had so advised an investigator for the defendant.

Anthony Rhone testified that when the prosecutor learned of his planned testimony, the prosecutor in the hall of the courthouse exchanged harsh words with him, pushed him and used profanity toward him. Gregory Rhone testified that after the prosecutor learned he intended to testify in favor of the defendant, the prosecutor explained to him what the penalties for perjury were, reminded him of an earlier statement he had given to the state inculpating the defendant in the crime, and told him that if he testified differently from that statement, he would be prosecuted for perjury.

At trial after the testimony of Anthony Rhone defendant moved for a mistrial on the grounds of prosecutorial misconduct. At the close of all of the evidence defendant moved for dismissal of all charges on the ground of prosecutorial misconduct. Both motions were summarily denied.

On appeal defendant contends that the charges against him should be dismissed or that he should be awarded a new trial at which the testimony of Anthony and Gregory Rhone would not be admitted on the ground of improper prosecutorial intimidation of these witnesses.

The Court is of the opinion that before determining this issue, the matter should be remanded to the Superior Court in Cumberland County for a factual determination of the prosecutor's conduct with regard to the witnesses Anthony and James Rhone. As yet, no such factual determination has been made and

the Court has merely the testimony of these witnesses at trial before it.

It is, therefore, ORDERED, in the exercise of the Court's supervisory powers over the trial divisions, that the case be remanded to the Superior Court, Cumberland County. There the court shall conduct a hearing in the nature of a hearing on a post trial Motion for Appropriate Relief. Both the state and defendant, duly represented, shall be present. Both the state and defendant shall be given opportunity to offer evidence relevant to the issue of the trial prosecutor's conduct toward the witnesses James Rhone and Anthony Rhone in connection with their testimony given at defendant's trial. Based upon this evidence the trial court shall make findings of fact and conclusions of law regarding the prosecutor's conduct and shall have the Clerk of Superior Court certify these findings and conclusions to this Court with reasonable dispatch. See *State v. Richardson*, 313 N.C. 505, 329 S.E. 2d 404 (1985); *State v. Sanders*, 319 N.C. 399, 354 S.E. 2d 724 (1987).

Done by the Court in Conference this 28th day of July 1987.

WHICHARD, J.
For the Court

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

ARMSTRONG v. ARMSTRONG

No. 235PA87.

Case below: 85 N.C. App. 93.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 28 July 1987.

BROWN v. BROWN

No. 74P87.

Case below: 85 N.C. App. 602.

Petition by defendants for writ of supersedeas denied 28 July 1987. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

BROWN v. TURRENTINE

No. 270P87.

Case below: 85 N.C. App. 348.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

CAROLINA TEL. & TEL. CO. v. MCLEOD

No. 310PA87.

Case below: 85 N.C. App. 538.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 28 July 1987.

CHRISMON v. GUILFORD COUNTY

No. 232PA87.

Case below: 85 N.C. App. 211.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 28 July 1987.

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

CRAFTIQUE, INC. v. STEVENS

No. 267PA87.

Case below: 85 N.C. App. 348.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 28 July 1987.

DULL v. MUT. OF OMAHA INS. CO.

No. 291P87.

Case below: 85 N.C. App. 310.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

GLYNN v. STONEVILLE FURNITURE CO., INC.

No. 243P87.

Case below: 85 N.C. App. 166.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

HALL v. POST

No. 340PA87.

Case below: 85 N.C. App. 610.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 28 July 1987.

HATFIELD v. JEFFERSON STANDARD LIFE INS. CO.

No. 311P87.

Case below: 85 N.C. App. 438.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

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

IN RE CONDEMNATION OF LEE

No. 290P87.

Case below: 85 N.C. App. 302.

Petition by Becker Sand and Gravel Company, Inc. for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

JOHNSON v. BROWN

No. 279P87.

Case below: 85 N.C. App. 170.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

LYNCH v. SHERRILL PAVING CO.

No. 321P87.

Case below: 86 N.C. App. 111.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

MEDINA v. TOWN AND COUNTRY FORD

No. 338A87.

Case below: 85 N.C. App. 650.

Petition by defendant (Town and Country Ford) for discretionary review pursuant to G.S. 7A-31 and App. Rule 16(b) as to additional issues allowed 28 July 1987.

MELLOTT v. PINEHURST, INC.

No. 233PA87.

Case below: 85 N.C. App. 170.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 28 July 1987.

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

MOORE v. N. C. DEPT. OF JUSTICE

No. 216P87.

Case below: 85 N.C. App. 171.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 28 July 1987.

MURROW v. DANIELS

No. 294A87.

Case below: 85 N.C. App. 401.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 28 July 1987.

STATE v. ABRAMS

No. 198P87.

Case below: 84 N.C. App. 701.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

STATE v. BUTLER

No. 244P87.

Case below: 85 N.C. App. 171.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

STATE v. CARROLL

No. 330P87.

Case below: 85 N.C. App. 696.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

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

STATE v. HALL

No. 312P87.

Case below: 85 N.C. App. 447.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

STATE v. HARRIS

No. 245P87.

Case below: 85 N.C. App. 172.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

STATE v. HUTCHINS

No. 356P87.

Case below: 85 N.C. App. 721.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 28 July 1987.

STATE v. LEA

No. 334A87.

Case below: 85 N.C. App. 721.

Motion by Attorney General to dismiss appeal for failure to show a substantial constitutional question allowed 28 July 1987.

STATE v. MCRAE

No. 351P87.

Case below: 86 N.C. App. 233.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

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

STATE v. MABE

No. 299P87.

Case below: 85 N.C. App. 500.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

STATE v. PLATT

No. 239P87.

Case below: 85 N.C. App. 220.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

STATE v. RIDDLE

No. 375P87.

Case below: 86 N.C. App. 112.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 28 July 1987.

STATE v. SINGLETON

No. 242P87.

Case below: 85 N.C. App. 123.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 28 July 1987.

STATE v. TAYLOR

No. 317A87.

Case below: 85 N.C. App. 549.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 and App. Rule 16(b) as to additional issues allowed 28 July 1987.

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

STATE v. WILLIAMS

No. 280P87.

Case below: 85 N.C. App. 539.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

STATE v. WINSTEAD

No. 333P87.

Case below: 85 N.C. App. 722.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

STATE ex rel. UTILITIES COMM. v. THORNBURG

No. 160P87.

Case below: 84 N.C. App. 482.

Petition by plaintiff (CP&L) for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

WILES v. N. C. FARM BUREAU INS. CO.

No. 236P87.

Case below: 85 N.C. App. 162.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1987.

STATE OF NORTH CAROLINA EX REL. JAMES G. MARTIN AS GOVERNOR OF THE STATE OF NORTH CAROLINA AND AS A CITIZEN OF THE STATE OF NORTH CAROLINA v. ROBERT ARTHUR MELOTT, DIRECTOR, OFFICE OF ADMINISTRATIVE HEARINGS OF THE STATE OF NORTH CAROLINA

No. 61PA87

(Filed 3 September 1987)

1. **Constitutional Law §§ 5, 9— Director of Office of Administrative Hearings—appointment by Chief Justice—constitutionality of statute**

The statute providing that the Chief Justice of the N. C. Supreme Court shall appoint the Director of the Office of Administrative Hearings, N.C.G.S. § 7A-752, does not violate Art. III, § 5(8) of the N. C. Constitution, which authorizes the Governor to appoint "all officers whose appointments are not otherwise provided for." The phrase "whose appointments are not otherwise provided for" does not mean "whose appointments are not otherwise provided for by the Constitution itself," and appointment of the Director is "otherwise provided for" within the meaning of Art. III, § 5(8).

2. **Constitutional Law §§ 5, 9— Director of Office of Administrative Hearings—appointment by Chief Justice—constitutionality of statute**

The statute providing that the Chief Justice of the N. C. Supreme Court shall appoint the Director of the Office of Administrative Hearings, N.C.G.S. § 7A-752, does not violate the separation of powers provision of Art. I, § 6 of the N. C. Constitution or the provision of Art. III, § 1 vesting executive power in the Governor since the appointment of the Director of the Office of Administrative Hearings is not an exercise of executive power.

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

Justice MEYER concurring in result.

Justice WHICHARD joins in this concurring opinion.

Justice MARTIN dissenting.

APPEAL by plaintiff from *Preston, Judge,* at the 1 December 1986 term of Superior Court, WAKE County. A petition pursuant to N.C.G.S. § 7A-31 and Rule 15(a) of the North Carolina Rules of Appellate Procedure to bypass the Court of Appeals prior to its determination of the case was allowed. Heard in the Supreme Court 13 May 1987.

The plaintiff, who is the Governor of North Carolina, brought this declaratory judgment action challenging the constitutionality of N.C.G.S. § 7A-752, which provides that the Chief Justice of the

Supreme Court of North Carolina shall appoint the Director of the Office of Administrative Hearings of the State of North Carolina. The plaintiff alleged that this provision violates Article I, Sec. 6 of the Constitution of North Carolina, providing for the separation of powers, Article III, Sec. 1, providing that the executive power shall be vested in the Governor, and Article III, Sec. 5(8) of the Constitution of North Carolina, providing for appointment duties of the Governor. The plaintiff also challenged on the same grounds the constitutionality of N.C.G.S. § 7A-753, which provides the Director shall appoint five additional hearing officers.

The plaintiff joined to the action a claim for a remedy in the nature of quo warranto, Article 41, Chapter 1 of the North Carolina General Statutes. The plaintiff alleged that the defendant, who was appointed Director of the Office of Administrative Hearings of the State of North Carolina by the Honorable Joseph Branch, Chief Justice of the Supreme Court of North Carolina, and was sworn into office on 1 January 1986, holds his office unconstitutionally.

The defendant filed answer and the action was tried without a jury by Judge Preston at the 20 October 1986 Civil Session of Superior Court, Wake County. On 1 December 1986, Judge Preston entered a judgment in which he held that N.C.G.S. §§ 7A-752 and 753 do not violate Article I, Sec. 6, or Article III, Sec. 1 and Sec. 5(8) of the Constitution of North Carolina. He also held that the General Assembly can constitutionally delegate to the Chief Justice of the Supreme Court of North Carolina the power to fill the office of the Director of the Office of Administrative Hearings and that the defendant lawfully holds the public office of Director of the Office of Administrative Hearings. The relief prayed for by the plaintiff in the nature of quo warranto to oust the defendant from office was denied. The plaintiff appealed.

Moore and Van Allen, by Arch T. Allen, III and Sarah Wesley Fox, for plaintiff appellant.

Lacy H. Thornburg, Attorney General, by Andrew A. Vanore, Jr., Chief Deputy Attorney General and Thomas F. Moffitt, for defendant appellee.

WEBB, Justice.

[1] This case brings to the Court the question of whether the General Assembly may delegate to the Chief Justice of the Supreme Court of North Carolina the power to appoint the Director of an agency created by the General Assembly. The appellant contends the Constitution of North Carolina places this power of appointment in the Governor. We believe the resolution of this question depends to a large extent on the interpretation of Article III, Sec. 5(8) of the Constitution of North Carolina which provides:

> *Appointments.* The Governor shall nominate and by and with the advice and consent of the majority of the Senators appoint all officers whose appointments are not otherwise provided for.

In interpreting a constitution, as in interpreting a statute, if the meaning is clear from reading the words of the Constitution, we should not search for a meaning elsewhere. *Elliott v. Gardner*, 203 N.C. 749, 166 S.E. 918 (1932) and *Reade v. Durham*, 173 N.C. 668, 92 S.E. 712 (1917).

As we read Article III, Sec. 5(8), it is clear that it means the Governor has the power to appoint an officer of the State with the advice and consent of a majority of the Senators, unless there is some other provision for the appointment. In this case there is another provision. The General Assembly has provided for the appointment of the Director of the Office of Administrative Hearings by the Chief Justice of the Supreme Court of North Carolina. We hold that the plain meaning of Article III, Sec. 5(8) does not give the Governor the appointment power under these circumstances.

The appellant argues that the phrase "whose appointments are not otherwise provided for" has a settled judicial construction which is "whose appointments are not otherwise provided for by the Constitution itself." The power to appoint the Director of the Office of Administrative Hearings is not provided for in the Constitution. The appellant says that for this reason only the Governor may appoint the Director of the Office of Administrative Hearings. The appellant relies on *Salisbury v. Croom*, 167 N.C. 223, 83 S.E. 354 (1914); *Ewart v. Jones*, 116 N.C. 570, 21 S.E. 787 (1895); and *People of North Carolina ex rel. Cloud v. Wilson*, 72

N.C. 155 (1875), for this proposition. There is language to this effect in these cases, however, the language is not necessary to the holding in any of them. In *Salisbury*, while holding that the plaintiff was not the rightful holder of the office of Director of the State Hospital because his appointment had not been confirmed by the Senate as required by statute, the Court said that under the Constitution of 1868 "the term, 'unless otherwise provided for' meant unless otherwise provided for by the Constitution itself." The Court pointed out that this interpretation was not satisfactory to the people of the state and this provision of the Constitution was amended in 1875. In *Ewart*, the Court used this same language in discussing the Constitution of 1868, but said this provision of the Constitution had been amended in 1875. *Cloud* deals with the appointment by the Governor of a superior court judge under the Constitution of 1868. This Court said "the words 'otherwise provided for' meant otherwise provided for by the Constitution," but the Court was interpreting a provision of the 1868 Constitution which is not a predecessor provision to the provision at issue in this case. We cannot say that the phrase "whose appointments are not otherwise provided for" has such a well settled judicial construction that we must use it in this case.

If we study the development of the present Article III, Sec. 5(8), we believe it strengthens our interpretation of it. Article III, Sec. 10 of the Constitution of 1868 said:

> . . . The Governor shall nominate, and by and with the advice and consent of a majority of the Senators elect, appoint all officers whose offices are established by this Constitution, or which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly.

It is apparent that this section of the 1868 Constitution gave the Governor a broad power to make appointments. The General Assembly was forbidden from making appointments. In 1875 this section was amended radically to strike the clauses "or which shall be created by law" and "and no such officer shall be appointed by the General Assembly" so that the section read as follows:

> . . . The Governor shall nominate, and by and with the advice and consent of a majority of the Senators elect, ap-

> point all officers whose offices are established by this Constitution, and whose appointments are not otherwise provided for.

It is apparent that this amended section greatly diminished the Governor's appointment power. It limited the Governor's appointment power to offices established by the Constitution and even then he could not make such appointments if the appointments were otherwise provided for. In 1970 this section was again amended and became the present Article III, Sec. 5(8) of the Constitution. The amendment deleted the word "elect" and the clause "whose offices are established by this Constitution" so that the section now reads as set forth above. If the revisers of the Constitution had intended to give the Governor the power to appoint all officers whose appointments were not provided for in the Constitution, they could have easily done so. They did not and we believe it is only reasonable to conclude they intended to increase the Governor's power from making appointments of constitutional officers to all officers whose appointments are not otherwise provided for.

[2] The appellant also contends the statute violates Article I, Sec. 6 of the Constitution of North Carolina which says:

> The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

The appellant further contends the statute violates Article III, Sec. 1 which says:

> The executive power of the State shall be vested in the Governor.

The appellant argues that in our state government we have a separation of powers and relies on the writings of some of our founding fathers and others to say that this is one of the bedrocks of our liberty. He relies on *Wallace v. Bone*, 304 N.C. 591, 286 S.E. 2d 79 (1982), which held that the General Assembly cannot constitutionally create an administrative agency of the executive branch and retain some control over it by appointing legislators to the governing body of the agency. He argues that this principle should extend to prevent legislative control over an executive of-

ficer by providing for his appointment by one other than the Governor.

Wallace dealt with an appointment of legislators to the Environmental Management Commission. This Court held that it violated the separation of powers provision of the State Constitution for the General Assembly to appoint its own members to an agency of the executive branch. It does not hold that only the Governor may make appointments to the Commission. *Wallace* is not authority for this case.

We have determined that under Article III, Sec. 5(8) of the Constitution, the General Assembly may provide that someone other than the Governor may appoint the Director of the Office of Administrative Hearings. The question remains as to whether the General Assembly may provide that the Chief Justice of the Supreme Court may make this appointment. The dissent in this case says that the General Assembly may not so provide. This conclusion in the dissent is based on Article I, Sec. 6 of the Constitution, which provides for the separation of powers. The dissent goes to great lengths to prove that the Director of the Office of Administrative Hearings is in the executive branch and concludes that the appointment of the Director may not be made by the Chief Justice. We do not believe it is necessary to resolve this case to determine whether the Director is in the executive branch. Assuming that he is and assuming that Article I, Sec. 6 proscribes the Chief Justice from exercising an executive branch function, the question is whether the appointment of the Director is the exercise of executive power.

We hold that the appointment of a Director of the Office of Administrative Hearings is not an exercise of executive power. The dissent says, "The appointment power is not exclusively legislative in nature and may be delegated." We conclude from this sentence that the dissent does not believe the appointment power is necessarily executive in nature. Article III, Sec. 1 of the Constitution provides that "The executive power shall be vested in the Governor" but it does not define executive power. We believe it means "the power of executing laws." *See Advisory Opinion In re Separation of Powers*, 305 N.C. 767, 774, 295 S.E. 2d 589, 593 (1982). The appointment of someone to execute the laws does not require the appointing party to execute the laws. Article

III, Sec. 5 of the Constitution lists the duties of the Governor. Subsection (4) of this section provides that "The Governor shall take care that the laws be faithfully executed." Subsection (8) provides for the appointment power of the Governor. This indicates that the appointment power is not the same as taking care that the laws are executed. We hold that it is not a violation of the separation of powers provision of our Constitution for the General Assembly to provide that the Chief Justice of the Supreme Court shall appoint the Director of the Office of Administrative Hearings.

The citizens of this state have the right to distribute the governmental power among the various branches of the government, *Lanier v. Vines*, 274 N.C. 486, 164 S.E. 2d 161 (1968), and we do not understand that the appellant contends otherwise. The United States Constitution does not limit this power. *See Hughes v. Superior Court of California*, 339 U.S. 460, 94 L.Ed. 985 (1950) and *Colegrove v. Green*, 328 U.S. 549, 90 L.Ed. 1432 (1946). In this case, we hold that the people have, by the Constitution of North Carolina, authorized the General Assembly to place appointment power in someone other than the Governor. The General Assembly has placed this appointment power in the Chief Justice of the Supreme Court of North Carolina. The Constitution of North Carolina and the Constitution of the United States do not prohibit this.

The judgment of the superior court is

Affirmed.

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

Justice MEYER concurring in result.

As Martin, J., states in his dissent in this case, the dispositive issue here is whether such a legislative delegation of appointment power violates the constitutional principles of separation of powers. The dissent makes a good case for the proposition that this legislative delegation of appointment power to the Chief Justice is unwise. It does not convince me that such delegation is *unconstitutional.*

The scope of judicial review of challenges to the constitutionality of legislation enacted by the General Assembly is well settled. As this Court stated in *Glenn v. Board of Education*, 210 N.C. 525, 187 S.E. 781 (1936):

> It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.

Id. at 529-30, 187 S.E. at 784.

I agree with the majority that the legislature can constitutionally delegate to the Chief Justice the power to appoint the Director of the Office of Administrative Hearings. I write separately because of my belief that the analysis employed by the majority in reaching this result is flawed.

The majority reasons that the separation of powers issue turns on the nature of the Chief Justice's appointment of the Director as an exercise of executive power granted to the Governor in our constitution. My reasoning, however, dictates that the determination of the separation of powers issue turns, not on the nature of the appointment power, but on the nature of the *powers and duties exercised by the person appointed.* If the nature of the powers and duties to be exercised by the appointee are primarily executive in nature, the separation of powers provision of our constitution is violated. If they are primarily judicial in nature, the separation of powers provision is not violated.

In *State ex rel. Wallace v. Bone and Barkalow v. Harrington*, 304 N.C. 591, 286 S.E. 2d 79 (1982), plaintiff sued two members of the North Carolina House of Representatives, challenging the constitutionality of their appointment as members of the North Carolina Environmental Management Commission (EMC). In holding their appointment to the Commission to be an unconstitutional violation of separation of powers, our Court stated: "It is crystal clear to us that the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws." *Id.* at 608, 286 S.E. 2d at 88.

N.C.G.S. § 7A-752 specifically provides that the Chief Justice of the North Carolina Supreme Court shall appoint the Director of the Office of Administrative Hearings for the State of North Carolina. N.C.G.S. § 7A-752 (1986).

The dissent concedes that the role played by the Director of the Office of Administrative Hearings is "quasi-judicial." In fact, contrary to what is stated in the dissenting opinion, it is *predominantly* judicial. Of the Director's twelve statutory powers and duties, two comprise the bulk of his activity. First, he is the chief administrative law judge in the State of North Carolina. N.C.G.S. § 7A-751 (1986). Second, as such, he may hear testimony, apply rules of evidence, regulate discovery, issue stays, and make findings of fact and conclusions of law. N.C.G.S. § 150B-33 (Cum. Supp. 1985). These judicial functions are the heart of his job and far outweigh the administrative- or executive-type powers and duties also provided for in the statute. Because I find that the statutory powers and duties of the Director of the Office of Administrative Hearings are primarily judicial in nature, I do not find that the delegation to the Chief Justice of the power to appoint him violates the separation of powers.

The majority's reasoning requires that whenever a question of this nature arises, a labeling of the delegated appointment power as legislative, executive, or judicial be made. This unnecessarily creates a continuing possibility of conflict between sections of our state constitution. This is contrary to our longstanding policy that, in the construction of the North Carolina Constitution, all cognate provisions are to be considered and construed together. *Thomas v. Board of Elections*, 256 N.C. 401, 124 S.E. 2d 164 (1962). The reasoning I adopt herein is consistent with this traditional policy in that it allows potentially conflicting constitutional provisions to be construed as valid.

While I agree with the dissent that the delegation here is unwise, it is not the role of this Court to pass judgment on the wisdom and expediency of a statute. As this Court has recognized:

> The members of the General Assembly are representatives of the people. The wisdom and expediency of a statute are for the legislative department, when acting entirely within constitutional limits. The courts will not disturb an act

> of the law-making body unless it runs counter to a constitutional limitation or prohibition.

McIntyre v. Clarkson, 254 N.C. 510, 515, 119 S.E. 2d 888, 891-92 (1961).

> The presumption is that an act passed by the Legislature is constitutional, and it must be so held by the courts unless it appears to be in conflict with some constitutional provision. The legislative department is the judge, within reasonable limits, of what the public welfare requires, and the wisdom of its enactments is not the concern of the courts. As to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts —it is a political question. The mere expediency of legislation is a matter for the Legislature, when it is acting entirely within constitutional limitations, but whether it is so acting is a matter for the courts.

State v. Warren, 252 N.C. 690, 696, 114 S.E. 2d 660, 666 (1960) (citations omitted).

I do not mean to say that, under different circumstances, the principles of separation of powers would not render similar legislation unconstitutional. On the contrary, North Carolina, for more than two hundred years, has strictly adhered to these vital principles. Their importance to our system of government is fundamental and unquestioned. As the United States Supreme Court stated in *O'Donoghue v. United States*, 289 U.S. 516, 77 L.Ed. 1356 (1933):

> This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer v. Philippine Islands*, 277 U.S. 189, 201, [72 L.Ed. 845, 849 (1928),] namely, to preclude a commingling of these essentially different powers of government in the same hands.

Id. at 530, 77 L.Ed. at 1360. Where the legislature passes a statute which creates such commingling, this Court will not hesitate to hold that the statute violates the separation of powers provision of our state constitution.

In sum, I agree with the majority that the legislature can constitutionally delegate to the Chief Justice of the North Carolina Supreme Court the power to appoint the Director of the Office of Administrative Hearings; however, I do so for reasons different than those relied upon by the majority.

Justice WHICHARD joins in this concurring opinion.

Justice MARTIN dissenting.

Believing as I do that the grant by the legislature to the Chief Justice of the power to appoint the Director of the Office of Administrative Hearings violates the constitutional principles of separation of powers, I respectfully dissent.

A few preliminary observations are appropriate:

(1) No federal constitutional issues arise in this appeal. *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 81 L.Ed. 835 (1937).

(2) The Constitution of North Carolina is a limitation of the powers of the General Assembly, not a grant of power to it. *Mitchell v. Financing Authority*, 273 N.C. 137, 159 S.E. 2d 745 (1968). The General Assembly possesses all political power of the state not prohibited it or delegated to another branch of the government by the constitution. The Office of Governor has no such prerogative powers but is confined to the exercise of the powers conferred upon it by the constitution and statutes.

(3) The General Assembly has the authority to appoint the Director of the Office of Administrative Hearings. The Governor's power of appointment is limited to officers whose appointments are not otherwise provided for. N.C. Const. art. III, § 5(8). The appointment of the Director of the Office of Administrative Hearings *is* otherwise provided for.

(4) The General Assembly has the power to delegate to another the authority to appoint the Director of the Office of Administrative Hearings. *Motsinger v. Perryman*, 218 N.C. 15, 9 S.E. 2d 511 (1940); *Cunningham v. Sprinkle*, 124 N.C. 638, 33 S.E. 138 (1899); 16 C.J.S. *Constitutional Law* § 135, at 439.

(5) The General Assembly has the power to delegate to the Attorney General the authority to appoint the Director of the Office of Administrative Hearings. The Attorney General is a member of the executive branch of government. The appointment power is not exclusively legislative in nature and may be delegated. The delegation of appointive powers to officers of the executive branch is generally proper. *In re Community Association*, 300 N.C. 267, 266 S.E. 2d 645 (1980); *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 249 S.E. 2d 402 (1978); *Jernigan v. State*, 279 N.C. 556, 184 S.E. 2d 259 (1971). Upon such delegation, it would be appropriate for the Attorney General to appoint the Director of the Office of Administrative Hearings.

I turn now to the question of whether the legislature can constitutionally delegate to the Chief Justice the power to appoint the Director of the Office of Administrative Hearings. In my view, the Director is an executive officer and constitutional principles of separation of powers proscribe the Chief Justice from making this appointment.

The statute in question purports to empower the Chief Justice of the North Carolina Supreme Court to appoint the Director of the Office of Administrative Hearings.

The Director has the following statutory powers and duties:

(1) He is the head of the Office of Administrative Hearings. N.C.G.S. § 7A-751 (1986).

(2) He is the chief administrative law judge. *Id.*

(3) He shall appoint additional administrative law judges. N.C.G.S. § 7A-753 (1986).

(4) He may designate and assign certain administrative law judges to preside over specific types of contested cases. *Id.*

(5) He shall take an oath of office. N.C.G.S. § 7A-754 (1986).

(6) He may remove an administrative law judge for just cause. *Id.*

(7) He can administer oaths in any pending or potential contested case. N.C.G.S. § 7A-756 (1986).

(8) He can sign and issue subpoenas to witnesses. *Id.*

(9) He can apply to a judge of superior court for orders necessary to enforce powers conferred by Article 60 of Chapter 7A of the General Statutes of North Carolina. *Id.*

(10) He may contract with qualified persons to serve as hearing officers for specific assignments. N.C.G.S. § 7A-757 (1986).

(11) He may, at the request of an agency, provide a hearing officer to preside at hearings of public bodies not otherwise authorized to utilize a hearing officer from the Office of Administrative Hearings. N.C.G.S. § 7A-758 (1986).

(12) He may hear testimony, apply rules of evidence, regulate discovery, issue stays, and make findings of fact and conclusions of law. N.C.G.S. § 150B-33 (Cum. Supp. 1985).

While some of the powers and duties of the Director may properly be described in part as being "quasi-judicial," they are not unique to the judiciary. They include administering oaths to witnesses, issuing subpoenas, hearing testimony, applying rules of evidence, regulating discovery, issuing stays, making findings of fact and conclusions of law, and recommending decisions. Various executive officers and members of the legislature can perform each of these functions, with the possible exception of regulating discovery.

Legislators in committee hearings subpoena witnesses and documents and administer oaths, N.C.G.S. §§ 120-14, -15 (1986); hear testimony, apply rules of evidence, N.C.G.S. §§ 120-19.1, .2 (1986); apply to judges of superior court for orders necessary to enforce powers of the legislature, N.C.G.S. § 120-19.4(b) (1986).

Agents in the executive branch likewise can exercise these powers. The Employment Security Commission has statutory authority to so do, N.C.G.S. § 96-4 (1985); likewise, the Industrial Commission, N.C.G.S. §§ 97-79, -80 (1985). Consider the myriad of other state commissions and boards, for example, commissions and boards of architects, barbers, certified public accountants, contractors, dentists, morticians, nurses, opticians, pharmacists,

physicians, real estate brokers, and sanitarians, all of which have the authority to exercise these same powers in various ways.

Surely, the majority would not approve the legislature delegating to the Chief Justice the power to appoint the chairman or members of any of these executive agencies.

It is not enough to say that the Director of the Office of Administrative Hearings exercises some quasi-judicial powers and therefore this is a sufficient nexus to the judicial branch of government to allow the Chief Justice to make this appointment. Most of the duties and powers of the Director set out above are not quasi-judicial in nature but are purely administrative in character. Although the Director utilizes some quasi-judicial methods of dispute resolution, the issues before the Director and the Office of Administrative Hearings are administrative issues. It is only on appeal before the General Court of Justice that the legality of the actions is resolved. The courts are involved with judicial decisions while the Director and the Office of Administrative Hearings are concerned with administrative decisions.

Of course, it is well recognized that the legislature cannot create a court not authorized by the constitution. N.C. Const. art. IV, § 1. Nor does the legislature purport to do so in this instance; the body created is an administrative agency, a part of the executive branch of government, not a part of the judicial branch. The legislature can delegate to the Chief Justice the power to appoint officers of the judicial branch, for example, Director and Assistant Director of the Administrative Office of the Courts, N.C.G.S. §§ 7A-341, -342 (1986); chief district court judges, N.C.G.S. § 7A-141 (1986); appellate defender, N.C.G.S. § 7A-486.2 (1986); the Chief Judge of the Court of Appeals, N.C.G.S. § 7A-16 (1986). The clerk of the Supreme Court is appointed by the Supreme Court, N.C.G.S. § 7A-11 (1986), and the clerk of the Court of Appeals by the Court of Appeals, N.C.G.S. § 7A-20 (1986). Senior resident superior court judges appoint their public defenders, N.C.G.S. § 7A-466 (1986), magistrates, N.C.G.S. § 7A-171 (1986), and court reporters, N.C.G.S. § 7A-95 (1986).

The appointments above noted are to offices that are within the judicial branch of government; the Director of the Office of Administrative Hearings is within the executive branch of gov-

ernment. Our constitution provides: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. This provision must be strictly construed by the Court. *State ex rel. Wallace v. Bone and Barkalow v. Harrington*, 304 N.C. 591, 286 S.E. 2d 79 (1982). (This opinion contains an excellent exposition on the doctrine of separation of powers.) One of the primary objectives of the doctrine of separation of powers is to preserve and protect the independence of the judiciary.

The reasoning of the Massachusetts court in *Opinion of the Justices*, 365 Mass. 639, 309 N.E. 2d 476 (1974), is compelling. The legislature of Massachusetts created an electronic data commission and provided for appointment of two members of the commission by the Chief Justice of the Supreme Judicial Court of Massachusetts. In an advisory opinion, the Massachusetts court held that the legislation would be unconstitutional as a violation of the doctrine of separation of powers. The court reasoned that although the legislature could delegate the appointive power, it could not confer the power of appointment upon the judicial branch of government with respect to officials not exercising a judicial function or one incidental to the exercise of judicial powers. The people of Massachusetts have removed the judiciary from political influences of every kind. *See also Nelson et al. v. City of Miller*, 83 S.D. 611, 163 N.W. 2d 533 (1968).

I view the Massachusetts case as applying equally to the present controversy. Our Chief Justice can appoint officers whose duties are closely connected with the judicial work of the Court, for example, the Director of the Administrative Office of the Courts, but cannot appoint officers such as the Director of the Office of Administrative Hearings, whose work would affect the functioning of the other two branches of government. While the Director's duties may be in some sense incidental to the function of the courts, it is in reality much broader than that. It is plain that the Director does not exercise judicial powers; the constitution prohibits such. N.C. Const. art. IV, § 1. Likewise, the powers of the Director are not incidental to the exercise of judicial powers by the courts. The actions of the Office of Administrative Hearings *create* additional legal issues properly to be resolved by the judicial branch, but its actions are not otherwise incidental to the exercise of judicial power by the courts.

The article establishing the Office of Administrative Hearings itself states that its purpose is to provide "a source of independent hearing officers . . . [to] thereby prevent the commingling of legislative, executive, and judicial functions in the administrative process." N.C.G.S. § 7A-750 (1986). By conferring the power to appoint the Director upon the Chief Justice, the legislature has defeated the very purpose of its statute by commingling the legislative and judicial functions.

In summary, I find that the Governor has no authority to appoint the Director of the Office of Administrative Hearings unless it is granted to him by the General Assembly. The General Assembly can delegate the appointment of the Director to another official. In so doing, it must not violate the constitutional principles of separation of powers. Conferring this power of appointment upon the Chief Justice violates the constitutional principles of separation of powers, and that portion of the statute is unconstitutional.

By placing the yoke of this appointive power upon the Chief Justice, the judicial branch has been cast adrift upon uncharted waters amid the rocky shoals of political influence. The genius of the doctrine of separation of powers is to prevent such result.

JAMES G. MARTIN, GOVERNOR OF THE STATE OF NORTH CAROLINA, AND GRACE J. ROHRER, SECRETARY OF ADMINISTRATION v. LACY H. THORNBURG, AS ATTORNEY GENERAL AND AS A MEMBER OF THE COUNCIL OF STATE; ROBERT B. JORDAN, III, LIEUTENANT GOVERNOR OF THE STATE OF NORTH CAROLINA; THAD EURE, SECRETARY OF STATE; EDWARD RENFROW, STATE AUDITOR; HARLAN E. BOYLES, STATE TREASURER; DR. A. CRAIG PHILLIPS, SUPERINTENDENT OF PUBLIC INSTRUCTION; JAMES A. GRAHAM, COMMISSIONER OF AGRICULTURE; JOHN C. BROOKS, COMMISSIONER OF LABOR; JAMES E. LONG, COMMISSIONER OF INSURANCE, AS MEMBERS OF THE COUNCIL OF STATE; AND LOIS CARLYLE BERRY

No. 729PA86

(Filed 3 September 1987)

1. Constitutional Law § 9; State § 1— lease agreements with State—authority of Council of State

All lease agreements entered into by the Department of Administration on behalf of the State must be submitted to the Council of State for approval

or disapproval; where the lowest proposal has not been presented to the Council of State, the Council of State's authority is not limited to approval or disapproval, and the Council of State may require a statement of justification and examine all proposals. However, nothing in the statutory framework authorizes the Council of State to require the Department of Administration to negotiate and enter any lease other than the lease proposed to it by the Department of Administration. N.C.G.S. § 146-25.

2. **Constitutional Law § 9; State § 1— lease of property for State—Council of State action without authority**

Where lease specifications issued by the Department of Administration for the Employment Security Commission contained a cutoff date of 17 May and required that the costs include utilities and janitorial services, or provide an acceptable method of determining the costs of those items, the trial court properly found that the lowest rental proposed within the meaning of N.C.G.S. § 146-25.1(c) was the LOBB proposal of $6.25 per square foot with services since the next lowest proposal was $4.84 per square foot (plus an average figure furnished by the State of $1.80 per square foot for services), and defendant Berry's revised proposal of $3.95 per square foot without services was submitted on 12 June. The Council of State was therefore limited to approving or disapproving the LOBB proposal and was without statutory authorization to direct the Department of Administration to negotiate with and enter into a lease with defendant Berry.

3. **Attorney General § 1— duty of Attorney General to defend State**

The duty of the Attorney General to appear for and defend the State or its agencies in actions in which the State may be a party or interested is not in derogation of or inconsistent with the executive power vested by the Constitution in the Governor. Art. III, § 1 of the North Carolina Constitution, N.C.G.S. § 114-2(1), N.C.G.S. § 114-1.1.

4. **Attorney General § 1; Constitutional Law § 9— power of Governor to employ special counsel—no certification by Attorney General**

When N.C.G.S. § 147-17(a) is construed as a whole, the last sentence gives the Governor the unrestricted right to "employ such special counsel as he may deem proper or necessary," so that the Governor may employ special counsel to represent the State without first being advised by the Attorney General that it is impracticable for the latter to represent the interest of the State.

ON discretionary review prior to a determination by the Court of Appeals granted by this Court pursuant to N.C.G.S. § 7A-31(a) and Rule 15(e)(1) of the North Carolina Rules of Appellate Procedure. Plaintiffs appealed from the entry of summary judgment in favor of defendants by *Preston, J.*, at the 26 August 1986 Session of Superior Court, WAKE County. Heard in the Supreme Court 14 May 1987.

Brooks, Pierce, McLendon, Humphrey & Leonard by Hubert Humphrey, and Smith, Helms, Mulliss & Moore, by Stephen P. Millikin and Alan W. Duncan, for plaintiff-appellants.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, and McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard Wiggins for defendant-appellees.

FRYE, Justice.

The factual situation presented in this case requires determination of the following questions: (1) Once the Department of Administration has submitted to the Council of State the lowest lease proposal in accordance with requirements set forth in lease specifications, does the Council of State have the authority to examine all lease proposals and to require the Department of Administration to negotiate and enter a lease other than the lease proposal submitted by the Department of Administration; (2) does the duty of the Attorney General to appear for the State in any court proceeding in which the State may be a party as provided in N.C.G.S. § 114-2(1) violate Art. III, § 1, of the North Carolina Constitution; and (3) may the Governor, pursuant to N.C.G.S. § 147-17(a), employ special counsel in a proceeding in which the State is interested without first being advised by the Attorney General that it is impracticable for the latter to represent the interest of the State? We answer the first two questions in the negative while giving an affirmative answer to the third question.

Plaintiffs brought this declaratory judgment action to determine the rights and duties of the Governor and Council of State with respect to the entry of leases on behalf of the State and the rights and duties of the Governor and Attorney General in connection with lawsuits filed against the State.

The trial judge's findings of fact are summarized as follows:

Defendant Lois Carlyle Berry is the owner of a building and parking area located in Lumberton, North Carolina. For some time prior to 1980 the Employment Security Commission [ESC], through the Department of Administration [DOA], leased the building and parking area from defendant Lois Carlyle Berry [lessor]. During the period of time between 1980 and 1985, the

manager of the Lumberton ESC office experienced considerable difficulty with both the location of the office and his dealings with the lessor. In early 1985, prior to the end of the 1980 lease, the ESC advised the DOA that it was dissatisfied with the Berry lease location in the downtown area adjacent to the courthouse, because of inadequate parking, parking and traffic congestion, and other problems. The ESC requested that a new lease be entered into for a more desirable facility at a better location. Pursuant to the provisions of N.C.G.S. § 146-25.1, DOA obtained information and specifications from the ESC as to its needs in Lumberton and investigated relevant aspects of the matter. The DOA prepared a public advertisement, which the ESC properly ran in the Lumberton newspaper, soliciting proposals and stating, "Cut off time for receiving proposals is 2:00 p.m., Friday, May 17th, 1985." The DOA received proposals from four prospective lessors by the deadline. They were from Mrs. Berry, J. D. Herring, Biggs-Baker, and LOBB. On 12 June 1985, Mrs. Berry submitted a proposal to DOA revising her previously submitted bid. After due consideration, the DOA state property officials concluded, in good faith, that because of the lower proposed leasing cost, including utilities and janitorial services of $6.25 per square foot, and the preferable location, the LOBB proposal best served the public interest and the interest of the ESC in Lumberton.

The recommended LOBB proposal, along with several other recommended acquisitions by lease, was submitted by the DOA to the Council of State and was on the agenda for the 2 July 1985 meeting of the Council of State for its decision. The Governor did not attend the 2 July 1985 meeting of the Council of State due to his absence from Raleigh and presence in other cities within the state on state business. The Chief of the Property Section of DOA, Charles Holliday, his assistant, Mr. Rupert Conyers, and the Lumberton representatives, Mr. Singleton and Mr. Bittle, were all present at the 2 July meeting to answer questions and to explain DOA's recommendations as to all lease acquisitions recommended by them. After some questioning by its members, the Council of State disapproved the DOA's recommendation to award the Lumberton ESC contract to the LOBB partnership. Immediately thereafter, a discussion was had by the Council of State regarding the Berry proposal. Mrs. Berry's agent (her husband) was present and he was asked if he would re-lease the building to

the ESC at $6.25 per square foot and he responded by nodding his head in the affirmative. A motion was made by the Attorney General to the Council of State that the current lease with defendant Berry "be renegotiated at a cost of $6.25 per square foot," which was the same figure as the low proposal of LOBB including utilities and janitorial services. This motion was unanimously approved by the Council of State. The Council of State notified DOA's representatives present at the meeting that DOA should renegotiate the State's acquisition by lease of its office space requirements for the Lumberton ESC office with Mr. Berry at $6.25 per square foot.

After the 2 July 1985 meeting, no final action was taken by the DOA regarding the Lumberton ESC lease.

The Governor did not attend the 6 August 1985 meeting of the Council of State because of his absence from the State on State business. While the Lumberton ESC lease matter was not on the agenda, the DOA representative present at the meeting was questioned about the progress DOA was making toward execution of the contract with Mrs. Berry for the Lumberton ESC office pursuant to the 2 July action of the Council of State. Mr. Pugh advised the Council of State that the Governor's office and DOA had received some information about the lease which they believed the Council of State would want to take into consideration. At the 3 September 1985 Council of State meeting the Governor was present and stated he wanted to discuss the matter concerning a lease for the ESC in Lumberton. During the course of the meeting, the Governor expressed his position that (1) statutory authority given to the Council of State was to approve or disapprove a lease transaction that was recommended and submitted by the DOA; (2) statutory authority given to the Council of State did not go so far as to allow the Council to initiate a new lease transaction or to direct the DOA to cause a lease transaction not submitted by the Department to be implemented; (3) the approval of both the Governor and Council of State was statutorily required for the lease transaction to be implemented after submission by the DOA; and (4) the Governor did not approve the Berry proposal or any negotiation of a lease with Berry to the exclusion of other parties who had submitted bids. There ensued a lengthy discussion during which the majority of the members of the Council of State disagreed with the positions stated by the

Governor. A motion to reconsider the Council's 2 July action was defeated.

On 6 September 1985, Mr. Charles Holliday, Deputy Director of the State Property Office with DOA, requested new proposals from each of the four parties who had previously submitted a proposal for the Lumberton ESC offices. On 13 September 1985, Mrs. Berry notified the Governor and other State officials that she had formally accepted the offer by the State through the Council of State's action at its 2 July meeting. On 17 September 1985, Mrs. Berry filed an action in the Superior Court of Cumberland County alleging she had been awarded the contract with the State for the Lumberton ESC office lease and obtained a temporary restraining order against Secretary Rohrer restraining her from soliciting or receiving additional bid proposals for the Lumberton ESC office lease. Having discussed the respective positions of the Governor and the other members of the Council of State with a representative of the Governor, the Attorney General unilaterally determined he should enter his appearance in Mrs. Berry's action in Cumberland County; move for an extension of time to file answer or otherwise plead; and take such action as necessary to maintain the status quo between the State and Mrs. Berry for sixty days to enable him to advise and consult with the Council of State members, including the Governor. However, the Governor opened the 1 October 1985 Council of State meeting by announcing that he had commenced this action before the Attorney General could advise and consult with the Council of State (which includes the Governor) regarding the Berry action. With the knowledge and consent of the Governor and the Secretary of Administration, through counsel, the Attorney General on 2 December 1985 obtained a second extension of time for filing answer in the Cumberland County action. An order allowing a motion made by the Governor and the Secretary of Administration was filed and entered on 6 January 1986, staying proceedings in the Cumberland County action until the Wake County action has been finally determined, and providing that the temporary restraining order earlier entered should expire by its own terms on 6 January 1986. Pursuant to this order, there has been no further activity in the Cumberland County action since 6 January 1986. Pursuant to agreement, neither the Governor nor the Secretary of Administration has taken any steps to terminate the existing rela-

tionship and occupancy of the Berry property by the ESC in Lumberton, although the Governor and the Secretary of Administration have reserved the right, upon notice, to take such action regarding this matter as may be appropriate for the best interests of the public and the State of North Carolina.

The trial court held *inter alia* that: (1) the Governor did not have the authority separate and apart from his single vote as a member of the Council of State to approve or disapprove a lease of real property by the Department of Administration for the use of a state agency; (2) when the Department of Administration has presented and recommended to the Council of State a proposed lease which is the "lowest rental proposed," the Council of State has the authority to examine proposals submitted by other proposers; (3) the Council of State, after disapproving the Department of Administration's recommendation regarding the awarding of a lease, has the authority to direct the Department of Administration to negotiate with and to lease real property on behalf of the State at a rental and on terms determined by the Council of State; (4) the Attorney General has the authority to appear and defend any civil action filed against the State or department head without first obtaining the permission of the Governor or department head, and in the course thereof, to unilaterally determine the procedural steps necessary to defend the State's interest in the action; and (5) that the Governor does not have the authority to select independent legal counsel without first obtaining a statement from the Attorney General that it is impracticable for the Attorney General to represent the State. Plaintiffs appealed and this Court granted plaintiffs' motion to bypass the Court of Appeals.

[1] We first address the question of whether the Council of State was authorized to examine proposals other than the lowest rental proposed and to direct the Department of Administration to negotiate and enter into a lease on terms and with a lessor specified by the Council of State.

N.C.G.S. § 143-341(4)(d) gives the Department of Administration the power and duty to lease buildings for State agencies. N.C.G.S. § 146-22 provides that "every acquisition of land on behalf of the State or any State agency, whether by purchase, condemnation, lease, or rental, *shall be made by the Department*

of Administration and approved by the Governor and Council of State." (Emphasis added.) Under N.C.G.S. § 146-25.1(a), "if . . . the rental is estimated to exceed twelve thousand dollars ($12,000) per year or the term will exceed three years, the Department shall require the State agency desiring to rent land to prepare and submit for its approval a set of specifications for its needs. Upon approval of specifications, the Department shall prepare a public advertisement. The State agency shall place such advertisement in a newspaper of general circulation . . . . The advertisement . . . shall provide that proposals shall be received . . . in the State Property Office of the Department." N.C.G.S. § 146-25 provides that, "[i]f, after investigation, *the Department of Administration* determines that it is in the best interest of the State that land be leased or rented for the use of the State or of any State agency, *the Department shall proceed to negotiate* with the owners for the lease or rental of such property. All lease and rental agreements *entered into by the Department* shall be promptly submitted to the Governor and Council of State for approval or disapproval." (Emphasis added.) N.C.G.S. § 146-25.1(c) provides that, "[t]he Department of Administration shall present the proposed transaction to the Council of State for its consideration as provided by this Article. In the event the *lowest rental proposed is not presented to the Council of State, that body may require a statement of justification, and may examine all proposals.*"

These statutes clearly indicate that it is the role of the Department of Administration to investigate and negotiate lease proposals on behalf of the State and where applicable to require and approve specifications for such proposals. All lease agreements entered into by the Department of Administration on behalf of the State must be submitted to the Council of State for approval or disapproval. The authority of the Council with respect to lease proposals, however, is broadened in instances where the lowest lease proposal has not been presented to the Council of State. In such situations, the Council of State's authority is not limited merely to approving or disapproving lease agreements entered into by the Department of Administration, but rather the Council of State may *require a statement of justification* and also *examine all proposals*. Thus, to determine whether the Council of State had the additional authority in the

instant case to examine a lease which had not been submitted to it by the Department of Administration for approval or disapproval, we must determine whether the lease presented to the Council of State by the Department of Administration was the "lowest rental proposed." If so, the Council of State is authorized by the statute merely to approve or disapprove the proposal. If the lease was not the "lowest rental proposed," the Council of State is authorized to require a statement of justification and to examine all proposals. In either event, nothing in the statutory framework authorizes the Council of State to require the Department of Administration to negotiate and enter any lease other than the lease proposed to it by the Department of Administration. In an analogous situation, in *Commr. of Insurance v. North Carolina Automobile Rate Office*, 292 N.C. 1, 231 S.E. 2d 867 (1977), this Court, in construing a statute which provided that insurance rates "shall be submitted to the Commissioner of Insurance for approval," held that the Commissioner's authority was limited to approval or disapproval and that he was not authorized by this statute to fix rates himself or to order the rate office to revise rates.

We turn then to the question of whether the lease proposed by the Department of Administration to the Council of State was the "lowest rental proposed."

[2] The following facts are undisputed. The Employment Security Commission prepared and submitted lease specifications for approval by the Department of Administration. These specifications were reviewed and revised in the State Property Office of the Department of Administration and sent back to the Lumberton Employment Security Commission office, along with an advertising package and memorandum instructing it to run the advertisement. Both the memorandum and the advertisement provided that the cutoff time for receiving proposals was 2 p.m., Friday, 17 May 1985. The advertisement for office space for the Lumberton ESC office was published in the *Robesonian* newspaper. It instructed prospective lessors to contact the manager of the ESC office in Lumberton for specifications, proposals, and additional information. Paragraph XII of the specifications established by the Department of Administration for the Lumberton Employment Security Commission office provides in pertinent part as follows:

A. It is required that the following services be furnished and included in the per square foot cost to the satisfaction of the State.

1. All utilities, except telephone.

2. Daily janitorial and cleaning services and supplies.

3. Maintenance of building and grounds including lawn, shrubbery, sidewalks and parking areas should be performed as needed.

4. Elevator service, if applicable.

B. Alternate proposals which do not include utilities and/or janitorial services will be considered. (There must be an acceptable method of determining the State's share of costs).

Thus, the specifications for lease proposals *required* that the services contained in paragraph A be included in the per square foot cost of the lease proposals. In addition, the specifications indicated that alternate proposals which did not include utilities and/or janitorial services, though not required, would be considered, provided that there was an acceptable method of determining the State's share of the costs. The trial judge made the following finding of fact, based on the evidence presented before the court:

21. Plaintiff Grace J. Rohrer, Secretary, Department of Administration, through the State Property employees of her department, properly: established the specifications for the Lumberton ESC office; caused appropriate advertising for proposals to lease; reviewed the various prices of the four proposals received; visited the four sites offered; met with and reviewed the proposals with each of the bidders; reviewed and considered the ESC personnel's various complaints about their contentions as to the inadequacies of the Berry location and services provided for the period of the 1980 lease; and, after giving due consideration to all of the above factors, recommended to the Council of State that the contract for the lease of office space be awarded to the LOBB partnership.

The question of whether the "lowest rental proposed" was in fact submitted to the Council of State in the instant case requires a determination first of whether "lowest rental proposed" included the alternate proposals which did not include utilities and/or janitorial services. If such proposals are included, we must then determine whether the rental bids alone are sufficient to determine the "lowest rental proposed" or whether the cost to the State of providing the required services not included in the alternate proposal must be included in this determination. We believe that since the specifications specifically indicate that alternate proposals which do not include utilities and/or janitorial services will be considered, such proposals may be included in the determination of the "lowest rental proposed." However, because the specifications mandate that there be an acceptable method for determining the State's share of the costs, we hold that costs of providing the required services which are not included in the proposals must be added to the alternate proposal in determining the "lowest rental proposed." Thus, the "lowest rental proposed" is determined from those proposals which include the required services in the bid and those alternate proposals after factoring in the costs to the State of providing those services not included in the alternate proposals. The trial court made the following finding of fact:

> 13. Prior to the July 2, 1985 Council of State meeting, the lowest proposal, including utilities and janitorial services, was from LOBB, a partnership composed of four individuals, at $6.25 per square foot per annum. . . .

The purpose of requiring that the trial judge make findings of fact is to enable the reviewing court to determine "from the record whether the judgment—and the legal conclusions that underlie it—represent a correct application of law." *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E. 2d 593, 595 (1986). The findings should be sufficient to indicate the evidence relied on by the trial court. *Id.* The evidence in the record revealed the following: The cutoff time for receiving proposals was 2 p.m. on 17 May 1985. Four proposals were submitted by this deadline. The Biggs-Baker proposal was $9.50 per square foot including all services; there was no proposal made based on no utilities or janitorial services. The Herring proposal was $9.20 per square foot with all required services provided and $5.50 per square foot with no janitorial or

utility services provided. The Berry proposal was $7.39 per square foot with all required services provided and $4.84 per square foot with no janitorial services provided. The LOBB proposal was $6.25 per square foot with all required services provided; the LOBB proposal did not include figures based on no utilities or janitorial services.

The only evidence in the record of the cost to the State of supply utilities and janitorial services for leased property appears in the Department of Administration's Recommendation Section of the Acquisition of Property Form (Plaintiff's Exhibit 78). The Department of Administration form discloses that the average cost of utilities and janitorial services is $1.80 per square foot. Using this figure, simple calculations reveal that the LOBB proposal is the lowest rental proposed, when the cost of utilities and janitorial services is included. The LOBB proposal, which is the lowest proposal that factors in the cost of such services, is $6.25 per square foot. The Berry proposal of $4.84 per square foot, which is the lowest proposal that does not factor in utilities or janitorial services, is increased to $6.64 per square foot once the average cost of utilities and janitorial services ($1.80 per square foot) is added. Thus, the trial court's finding that, "prior to the July 2, 1985 Council of State meeting the lowest proposal, including utilities and janitorial services, was from LOBB . . . at $6.25 per square foot per annum" was supported by the evidence.

Plaintiffs excepted to the trial court's finding of fact Number 12, which was as follows:

> 12. Depending on which choice was chosen by the State, the price per square foot cost of the four proposals received by the State Property Office varied from a low of $3.95 submitted by Berry without utilities and janitorial services to a high of $9.50 submitted by Biggs-Baker with utilities and janitorial services.

In finding of fact Number 9, the trial court found that the advertisement soliciting proposals stated that, "cut off time for receiving proposals is 2:00 p.m. Friday May 17, 1985." The Berry bid of $3.95 per square foot without utilities or janitorial services, however, was contained in a revised proposal which the trial court found was submitted on 12 June 1985. Thus, the revised Berry proposal was not received by the Department of Adminis-

tration prior to the deadline for receiving proposals. We conclude therefore that the LOBB proposal of $6.25 per square foot, found by the trial court to be the lowest proposal including utilities and janitorial services prior to 2 July 1985, was the "lowest rental proposed" within the meaning of N.C.G.S. § 146-25.1(c). Since the Department of Administration presented the "lowest rental proposed" to the Council of State at the 2 July 1985 meeting, the authority of the Council of State was limited to either approving or disapproving the proposal. The Council of State's further action in directing the Department of Administration to negotiate with and enter into a lease with Mrs. Berry was therefore without statutory authorization.

[3] Next we consider whether the duty of the Attorney General to appear for the State in any proceeding in which the State may be a party as provided for in N.C.G.S. § 114-2(1) violates Article III, § 1, of the North Carolina Constitution.

Article III, § 1, of the North Carolina Constitution provides that "[t]he executive power of the state shall be vested in the Governor." Article III, § 7(1), provides for the election of additional State officers within the executive branch, including an Attorney General. Article III, § 7(2), provides that the duties of the Attorney General and the other elective State officers "shall be *prescribed by law.*" (Emphasis added.)

The North Carolina Constitution does not prescribe the duties of the Attorney General. The general duties assigned to the Attorney General are set forth in N.C.G.S. § 114-2, which establishes that it shall be the duty of the Attorney General to appear for the State in any court in which the State may be a party and to represent all State departments, agencies, and commissions. In addition, N.C.G.S. § 114-1.1 provides that the "Attorney General has had and continues to be vested with those powers of the Attorney General that existed at the common law, that are not repugnant to or inconsistent with the Constitution or laws of North Carolina." The term "common law" as used in North Carolina statutes refers to the common law of England, *State ex rel. Bruton v. Flying "W" Enterprises, Inc.*, 273 N.C. 399, 160 S.E. 2d 482 (1968), more specifically, "the common law of England as of the date of the signing of the Declaration of Independence." *Steelman v. City of New Bern*, 279 N.C. 589, 592,

184 S.E. 2d 239, 241 (1971). The duties of the Attorney General in England included the duty to prosecute all actions necessary for the protection and defense of the property and revenue of the Crown. Morgan, *The Office of the Attorney General*, 2 N.C. Cent.L.J. 165 (1970). *See also Tice v. Dept. of Transportation*, 67 N.C. App. 48, 312 S.E. 2d 241 (1984). In North Carolina the sovereign power no longer resides in the Crown but rather is vested in and derived from the people. N.C. Const. Art. I, § 2. Therefore, the Attorney General of this State has the common law duty to prosecute all actions necessary for the protection and defense of the property and revenue of the sovereign people of North Carolina. The word "prosecute" has been defined to mean "to follow up; to carry on an action or other judicial proceeding." *Black's Law Dictionary* 5th ed., p. 1099 (1979). That the common law duty of the Attorney General to prosecute actions includes a duty to defend actions instituted against the interest of the sovereign power finds support in the following general statement of law:

> In the absence of explicit legislative expression to the contrary, the attorney general possesses entire dominion over every civil suit instituted by him in his official capacity . . ., and his authority extends as well to control of defense of civil suits against the state, its agencies, and officers.

7A C.J.S. Attorney General § 12 (1980). We conclude therefore that the duties of the Attorney General in North Carolina as prescribed by statutory and common law include the duty to appear for and to defend the State or its agencies in all actions in which the State may be a party or interested.

The independent executive offices of Governor and Attorney General with their differing functions and duties under the constitution create a clear potential for conflict. *Tice v. Dept. of Transportation*, 67 N.C. App. 48, 312 S.E. 2d 241. However, such is not the case here since the duty of the Attorney General to appear for and defend the State or its agencies in actions in which the State may be a party or interested is not in derogation of or inconsistent with the executive power vested by the constitution in the Governor.

[4] Lastly we address the question of whether the Governor, pursuant to N.C.G.S. § 147-17(a), may employ special counsel as

he may deem proper and necessary to represent the State without first being advised by the Attorney General that it is impracticable for the latter to represent the interest of the State.

N.C.G.S. § 147-17(a) provides as follows:

> No department, officer, agency, institution, commission, bureau or other organized activity of the State which receives support in whole or in part from the State shall employ any counsel, except with the approval of the Governor. The Governor shall give his approval only if the Attorney General has advised him, as provided in subsection (b) of this section, that it is impracticable for the Attorney General to render the legal services. In any case or proceeding, civil or criminal, in or before any court or agency of this State or any other state or the United States, or in any other matter in which the State of North Carolina is interested, the Governor may employ such special counsel as he may deem proper or necessary to represent the interest of the State, and may fix the compensation for their services.

Defendants contend that the second sentence in this statute limits the power of the Governor to employ special counsel to only those cases where the Attorney General certifies that it is impracticable for the Attorney General to render legal services. We cannot agree.

The first sentence of this statute provides *inter alia* that no officer of the State shall employ any counsel except with the approval of the Governor. The second sentence provides that the Governor shall give his approval only if the Attorney General has advised him that representation by the Attorney General would be impracticable. The Governor is clearly an officer of the State, and therefore if read alone the first two sentences of this statute would limit power of the Governor to employ special counsel to only those cases where the Attorney General has made the requisite certification. If this were the intended meaning of N.C.G.S. § 147-17(a), the third sentence would be mere surplusage. It is well settled, however, that in interpreting the meaning of a statute, all parts of a single statute will be read and construed as a whole to carry out the legislative intent. 12 Strong's N.C. Index 3d *Statutes* § 5.1 (1978). "In seeking to discover and give effect to the legislative intent, an act must be considered as a whole, and

none of its provisions shall be deemed useless or redundant if they can reasonably be considered as adding something to the act which is in harmony with its purpose." *State v. Harvey*, 281 N.C. 1, 19-20, 187 S.E. 2d 706, 718 (1972). The last sentence in N.C.G.S. § 147-17(a) states that "In *any case or proceeding, civil or criminal*, in or before any court or agency of this State or any other state or the United States, or in any other matter in which the State of North Carolina is interested, the Governor may employ such special counsel *as he may deem proper or necessary* to represent the interest of the State, and may fix the compensation for their services." (Emphasis added.) Therefore construing the statute as a whole, we conclude that the last sentence of Section 147-17(a) gives the Governor the unrestricted right to "employ such special counsel as he may deem proper or necessary." Thus it is unnecessary to consider plaintiffs' contention that such authority exists by virtue of the executive power vested in the Governor by the North Carolina Constitution.

While the parties argue other grave constitutional and statutory questions which may arise in the event of continued differences between the various executive officers of the State, we decline to decide them on this state of the record. This is in keeping with the rule in this State that appellate courts will not "pass upon constitutional questions, even when properly presented, if there be also present some other ground upon which the case may be made to turn." *Reed v. Madison*, 213 N.C. 145, 147, 195 S.E. 620, 622 (1938). We thus modify and affirm the trial court's holding that the Attorney General has the authority to appear and defend actions on behalf of the State; we reverse the holdings limiting the Governor's authority under N.C.G.S. § 147-17(a) and authorizing the Council of State to direct the Department of Administration to execute a lease; and we vacate that portion of the judgment below which decides other questions not reached herein.

Modified in part; reversed in part; vacated in part and remanded.

Cheape v. Town of Chapel Hill

KATHLEEN S. H. CHEAPE, JOHN W. DIXON, JR., VIVIAN S. DIXON, JAMES EDER, MARY EDER, DANA FOWLKES, JOHN B. GRAHAM, SCOTT HERMAN-GIDDENS, LAWRENCE F. LONDON, EMILY DEWEY LONDON, SUSAN LORD, EVA McKENNA, ROSALIE MASSENGALE, GEORGE V. TAYLOR, MARGARET E. TAYLOR, JAMES M. WEBB v. TOWN OF CHAPEL HILL, A MUNICIPAL CORPORATION, JAMES C. WALLACE, MAYOR, JULIE ANDRESEN, COUNCILMEMBER, DAVID GODSCHALK, COUNCILMEMBER, JONATHAN HOWES, COUNCILMEMBER, DAVID PASQUINI, COUNCILMEMBER, NANCY PRESTON, COUNCILMEMBER, R. D. SMITH, COUNCILMEMBER, BILL THORPE, COUNCILMEMBER, ARTHUR WERNER, COUNCILMEMBER AND FRASER DEVELOPMENT COMPANY OF NORTH CAROLINA

No. 96PA87

(Filed 3 September 1987)

1. **Pleadings § 38.4; Rules of Civil Procedure § 12— judgment on the pleadings—matters considered**

Although the trial court's order states that it allowed defendants' motion for summary judgment as well as their motion for judgment on the pleadings, the judgment was technically on the pleadings only where the trial judge recited in the order that he considered the pleadings, briefs and arguments of the parties.

2. **Constitutional Law § 4; Declaratory Judgment Act § 6— standing to contest validity of local act—no issue after judgment on pleadings**

Where plaintiffs alleged facts sufficient to show their standing to bring a declaratory judgment action to determine the validity of a local act, their standing did not remain an issue after the court's entry of judgment on the pleadings for defendants since (1) for the purpose of defendants' motion for judgment on the pleadings, defendants are deemed to have admitted the allegations in question, leaving no factual issues to be resolved, and (2) although the trial court did not explicitly determine the question of subject matter jurisdiction, the court is presumed to have found jurisdictional facts in accordance with plaintiffs' allegations.

3. **Statutes § 2.2— town's participation in economic development—local act—not unconstitutional act regulating trade**

A local act allowing the Town of Chapel Hill to participate in economic development projects with private developers is not an act regulating trade in violation of Art. II, § 24(j) of the N.C. Constitution.

4. **Joint Ventures § 1; Municipal Corporations § 22.2— development agreement between town and developer—no joint venture for nonpublic purpose**

A development agreement between the Town of Chapel Hill and a development company did not create a joint venture since each party to the agreement did not have the right in some measure to direct the conduct of the other through a necessary fiduciary relationship. Therefore, the development agreement did not establish a joint venture not for a public purpose in violation of Art. V, § 2 of the N.C. Constitution.

5. Estates § 1— town's conveyance of air rights—validity

The Town of Chapel Hill could properly convey air rights in fee simple since (1) ordinary landowners can convey air rights independent of the land beneath; (2) N.C.G.S. § 63-13 does not prohibit a conveyance of air rights independent of the land beneath but merely subjects common law rights recognized and described therein to the right of flight; and (3) the statute permitting municipalities to convey air rights, N.C.G.S. § 160A-273, applies to all municipalities and is thus not a "special act" regulating trade in violation of Art. II, § 24(j) of the N.C. Constitution.

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

APPEAL by plaintiffs from an award of summary judgment and judgment on the pleadings for defendants entered by *Lee, J.*, after a hearing at the 17 November 1986 Civil Session of Superior Court, ORANGE County. Judgment entered 3 December 1986. Defendants' motion to bypass the Court of Appeals was allowed 7 April 1987. Heard in the Supreme Court 8 June 1987.

Thomas S. Erwin and Hall, Hill, O'Donnell, Taylor, Manning & Shearon, by Raymond M. Taylor, for plaintiff-appellants.

Womble, Carlyle, Sandridge & Rice, by G. Eugene Boyce and Elizabeth L. Riley, and Adams, McCullough & Beard, by Robert W. Spearman, Blair S. Levin, and Douglas Q. Wickhorn, for defendant-appellees.

Lacy H. Thornburg, Attorney General, by Douglas A. Johnston, Assistant Attorney General, amicus curiae.

Fred P. Baggett, General Counsel, and S. Ellis Hankins, Associate General Counsel, for North Carolina League of Municipalities, and Henry W. Underhill, Jr., City Attorney, and H. Michael Boyd, Deputy City Attorney, for The Office of the City Attorney, Charlotte, North Carolina, amici curiae.

FRYE, Justice.

Plaintiffs raise four issues before this Court. Initially, they contend that the case should be remanded to the Superior Court, Orange County, for a determination of their standing to bring the instant action. On the merits, they argue that Chapter 961, Session Laws of 1984, is unconstitutional because it is a local act regulating trade and because it permits the Town of Chapel Hill

to engage in a joint venture not for a public purpose, acts prohibited by the North Carolina Constitution. Plaintiffs also specifically attack the sale of air rights by defendant Town to Fraser Development Company of North Carolina as being an invalid transaction. We hold:

1) plaintiffs' contention that their standing remains an issue is without merit;

2) Chapter 961, Session Laws of 1984, does not regulate trade in violation of Article II, section 24(j) of the North Carolina Constitution;

3) the agreement between the Town of Chapel Hill and Fraser Development Company does not create a joint venture;

4) the Town of Chapel Hill has the power to convey air rights as discussed herein.

On 22 June 1984, the General Assembly ratified House Bill 1563, which accordingly became Chapter 961, Session Laws of 1984. This act (hereinafter called "The Chapel Hill Act") provides as follows:

AN ACT TO ALLOW THE TOWN OF CHAPEL HILL TO PARTICIPATE IN ECONOMIC DEVELOPMENT PROJECTS.

The General Assembly of North Carolina enacts:

Section 1. Chapter IV of the Charter of the Town of Chapel Hill, being Chapter 473, Session Laws of 1975, is amended by adding a new Article to read:

"Article 4.
"Economic Development Projects.

"Sec. 4.20. Definition. As used in this Article "economic development project" means an economic capital development project within a certain defined area or areas of the Town as established by the Town Council, comprised of one or more buildings or other improvements and including any public and/or private facilities. Said project may include programs or facilities for improving downtown development, "pocket of poverty" or other federal or State assistance programs which the Town Council determines to be in need of

economic capital development or revitalization and which qualify for capital assistance under applicable federal or State programs.

"Sec. 4.21 Authorization.

(a) In addition to any other authority granted by law, the Town of Chapel Hill may accept grants, expend funds, make grants or loans, acquire property and participate in capital economic development projects, which the Town Council determines will enhance the economic development and revitalization of the Town in accordance with the authority granted by this Article. Such project may include public and/or private buildings or facilities, financed in whole or in part by federal or State grants (including but not limited to urban development action grants), and may include any capital expenditures which the Town Council finds necessary or desirable to complement the project and improve the public tax base and general economy of the Town. By way of illustration, but not limitation, such a project may include the construction or renovation of any one or combination of the following projects:

(1) Privately owned hotel.

(2) Privately owned office building.

(3) Housing.

(4) Parking facilities.

Such project may be partially financed with Town funds received from federal or State sources and being granted or loaned to the private owner for said construction or renovation; in addition, other Town funds from any sources may be used for acquisition, construction, leasing and/or operation of facilities by the town for the general public and for capital improvements to public facilities which will support and enhance the private facilities and the general economy of the Town.

(b) When the Town Council finds that it will promote the economic development or revitalization in the Town, the Town may acquire, construct and operate or participate in the acquisition, construction, ownership and operation of an

economic development project or of specific buildings or facilities within such a project and may comply with any State or federal government grant requirements in connection therewith. The Town may enter into binding contracts with one or more private parties or governmental units with respect to constructing, owning or operating such a project. Such a contract may, among other provisions, specify the responsibilities of the Town and the developer or developers and operators or owners of the project, including the financing of the project. Such a contract may be entered into before the acquisition of any real property necessary to the project by the Town or the developer or other parties.

"Sec. 4.22. Property Acquisition. An economic development project may be constructed on property acquired by the developer or developers, or on property directly acquired by the Town, or on property acquired by the redevelopment commission while exercising the powers, duties and responsibilities pursuant to G.S. 160A-505.

"Sec. 4.23. Property Disposition. In connection with an economic development project, the Town may convey interests in property owned by it, including air rights over public facilities, as follows:

(1) If the property was acquired under the urban redevelopment law, the property interests may be conveyed in accordance with that law.

(2) If the property was acquired by the Town directly, the Town may convey property interests by any procedure set forth in this charter, or the general law or by private negotiation or sale.

"Sec. 4.24. Construction of the Project. A contract between the Town and the developer or developers may provide that the developer or developers shall be responsible for the construction of the entire economic development project. If so, the contract shall include such provisions as the Town Council deems sufficient to assure that any public facilities included in the project meet the needs of the Town and are constructed at a reasonable price. Any funds loaned by the Town pursuant to this paragraph to a private developer or

developers and used by said developer or developers in the construction of a project hereunder on privately owned property shall not be deemed to be an expenditure of public money.

"Sec. 4.25. Operation. The Town may contract for the operation of any public facility or facilities included in an economic development project by a person, partnership, firm or corporation, public or private. In addition, the Town, upon consideration, may contract through lease or otherwise whereby it may operate privately constructed parking facilities to serve the general public. Such a contract shall include provisions sufficient to assure that any such facility or facilities are operated for the benefit of the citizens of the Town."

Sec. 2. This act is effective upon ratification.

1984 N.C. Sess. Laws ch. 961.

Pursuant to this Act, the Town of Chapel Hill (hereinafter "Town") passed a resolution on 30 January 1985 finding, *inter alia*, that a parking shortage existed in downtown Chapel Hill and that the Town had negotiated an agreement with codefendant Fraser Development Company (hereinafter "Fraser") for the development of certain property owned by the Town, located in the heart of downtown Chapel Hill, as an economic capital development project. The resolution declared this area an economic capital development project area. The area in question is located on Rosemary Street at the intersection of Rosemary and Henderson Streets, behind the shops fronting Franklin Street (Chapel Hill's main street).

The "agreement" between the Town and Fraser is actually two agreements, the development agreement itself and a garage lease agreement. Both are long and complex. Essentially, the development agreement provides for the construction of a four-level public/private parking garage with 516 parking spaces, to be surmounted by a "private section" consisting of a condominium inn with 188 units, a restaurant, shops, offices, and a "plaza" area. Fraser was to have title to 188 spaces in the parking garage; the Town was to own the rest. In very basic terms, the Town agreed to deed to Fraser the air rights for the private section and the

188 parking spaces, to give Fraser a ground lease of the site for $100 per year in rent, to pay a pro-rata share of the costs of constructing the garage through issuance of bonds, and to designate Fraser "construction administrator" in return for a fee. Fraser, for its part, agreed to pay the Town $200,000 for landscaping, $400,000 for design costs, $325,000 toward the construction of the Town's part of the garage, and twenty percent of any profits in excess of $1,000,000 received for the sale of the private section units. Fraser also agreed to pay its pro-rata share of the costs of constructing the parking garage and the entire cost of the private section. Fraser would act as "construction advisor" and procure design plans and a general contractor. Various provisions were included to ensure that Fraser met its financial commitments for the project. The second agreement, the garage lease agreement, is a relatively straightforward lease. Basically, the Town agreed to operate the parking garage, to lease from Fraser its 188 spaces in return for a pro-rata share of the operation's "profits," and to reserve 188 spaces in the garage at no charge for owners/guests of the private section, except between 10 a.m. and 2 p.m. on business days, when the number of spaces reserved fell to 72. Fraser agreed to pay its pro-rata share of the costs of operating the garage.

Plaintiffs, who describe themselves in this complaint as residents, citizens and taxpayers of Chapel Hill, brought this action on 27 August 1986 for a declaratory judgment that the Chapel Hill Act was unconstitutional and therefore both it and the agreements were void. Defendants answered, denying most of plaintiffs' allegations. On 27 October 1986, defendants filed a joint motion for judgment on the pleadings, pursuant to N.C.R. Civ. P. 12(c), and for summary judgment. Following a hearing on 17 November 1986, the trial judge, Lee, J., entered an order allowing defendants' motion.

Plaintiffs appealed to the Court of Appeals. Defendants petitioned this Court for leave to bypass the Court of Appeals. This Court granted defendants' petition on 7 April 1987.

I.

[1] Plaintiffs contend that the trial court erred in granting defendants' motion for judgment on the pleadings and summary judgment because a genuine issue of material fact remained to be

resolved. As a preliminary matter, we note that the trial judge recited in his order that he considered the pleadings, briefs, and arguments of the parties. Therefore, as plaintiffs note, although the order states that it allowed defendants' motion for summary judgment as well as their motion for judgment on the pleadings, the judgment was technically on the pleadings only. *See Town of Bladenboro v. McKeithan*, 44 N.C. App. 459, 261 S.E. 2d 260, *appeal dismissed*, 300 N.C. 202, 282 S.E. 2d 228 (1980); *see also Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974), and *Wilson v. Development Co.*, 276 N.C. 198, 171 S.E. 2d 873 (1970). To prevail on a motion for judgment on the pleadings, the movant must show that no material issue of fact exists and that the movant is entitled to judgment in his or her favor. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E. 2d 494, 499. A judgment on the pleadings is a final judgment on the merits. *Id.*

[2] N.C.G.S. § 1-254 (1983) allows "[a]ny person . . . whose rights, status or other legal relations are affected by a statute . . ." to seek a declaratory judgment on the construction or validity of that statute. We have interpreted this section to mean that " '[o]nly those persons may call into question the validity of a statute who have been injuriously affected thereby in their persons, property or constitutional rights.' " *Stanley v. Department of Conservation and Development*, 284 N.C. 15, 28, 199 S.E. 2d 641, 650 (1973). A person who is not thus "injuriously affected" lacks standing to bring the action. *Id. See also Jernigan v. State*, 279 N.C. 556, 184 S.E. 2d 259 (1971); *Greensboro v. Wall*, 247 N.C. 516, 101 S.E. 2d 413 (1958). In their complaint, plaintiffs alleged that the Rosemary Square project, if constructed, would increase pollution, traffic, danger to pedestrians, and crime in their neighborhood and would decrease their property values. Defendants denied both allegations in their answers. Plaintiffs argue that these allegations are necessary to their standing to bring the action. They contend that defendants' denial of their allegations called their standing into question, and thereby the jurisdiction of the trial court to hear the action. *See Greensboro v. Wall*, 247 N.C. 516, 101 S.E. 2d 413. Because the question is both material and unresolved, or so plaintiffs argue, judgment on the pleadings was improper.

Plaintiffs' argument is feckless. For the purpose of a motion for judgment on the pleadings, pursuant to N.C.R. Civ. P. 12(c),

the movant is deemed to have admitted all factual allegations in the non-movant's pleadings except those which are legally impossible and those not admissible in evidence. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E. 2d 494, 499. Thus, for the purpose of defendants' motion, defendants are deemed to have admitted the allegations in question, leaving no factual issues to be resolved.

To the extent that plaintiffs intend by their argument to attack the power of the court to hear the defendants' motion without first explicitly determining the question of its subject matter jurisdiction, their argument also fails. Plaintiffs do not appear from the record before us to have raised this issue before the trial court. The record reflects no request by either party that the trial judge make findings of jurisdictional facts. The judge was therefore not required *ex mero motu* to set out his findings on the preliminary questions necessary for his disposition of defendants' motion. *See* N.C.R. Civ. P. 52. In the absence of such findings, we presume that the judge found facts to support his ruling. *Donovant v. Hudspeth*, 318 N.C. 1, 347 S.E. 2d 797 (1986). Although the question of subject matter jurisdiction may be raised at any time, even in the Supreme Court, *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965); *Richards v. Nationwide Homes*, 263 N.C. 295, 139 S.E. 2d 645 (1965), where the trial court has acted in a matter, "every presumption not inconsistent with the record will be indulged in favor of jurisdiction . . . ." *Dellinger v. Clark*, 234 N.C. 419, 424, 67 S.E. 2d 448, 452 (1951). The plaintiffs, having alleged facts sufficient to show their standing to bring the instant action, will not be heard to complain where the trial judge is presumed to have found jurisdictional facts in accordance with their allegations. We disapprove of such attempts by any party to "play fast and loose with the judicial machinery." *DiFrischia v. New York Central Railroad Co.*, 279 F. 2d 141, 144 (3rd Cir. 1960). *But see Rubin v. Buckman*, 727 F. 2d 71 (3rd Cir. 1984).

II.

[3] Plaintiffs next contend that the Chapel Hill Act violates Article II, section 24 of the North Carolina Constitution. That section of the constitution provides:

> The General Assembly shall not enact any local, private, or special act or resolution:
>
> . . . .
>
> (j) Regulating labor, trade, mining, or manufacturing . . . .

N.C. Const. art. II, § 24. The Chapel Hill Act expressly authorizes the Town to participate with private developers in "economic development projects." Plaintiffs contend that, as a necessary corollary, the statute also allows private developers to participate with the Town in such projects. They argue that this indirect authorization renders the Chapel Hill Act a local act impermissibly "regulating . . . trade."

We may concede, as the parties do, that the Chapel Hill Act is a local act. *See Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E. 2d 67 (1972); *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E. 2d 888 (1961). However, an act is not constitutionally invalid merely because it is local; it must first violate some constitutional provision. *State v. Smith*, 265 N.C. 173, 179, 143 S.E. 2d 293, 298 (1965). The question for our review, then, is whether by indirectly authorizing private developers to participate with the Town in economic development projects, the Chapel Hill Act "regulates trade" as plaintiffs contend. We conclude that the answer is "no."

Plaintiffs argue that the scope of the constitutional prohibition in Article II, section 24(j) should be the same as the scope of the federal government's power to regulate commerce under the Commerce Clause of the United States Constitution. However, we have previously held that the word "trade" is narrower than the word "commerce." *Johnson v. Insurance Co.*, 300 N.C. 247, 261, 266 S.E. 2d 610, 620 (1980); *Edmisten, Attorney General v. Penny Co.*, 292 N.C. 311, 316, 233 S.E. 2d 895, 899 (1977). Thus, the phrase "regulate trade" necessarily has a narrower meaning than the phrase "regulate commerce." Accordingly, we do not find the federal cases cited by the plaintiffs to be persuasive in this instance.

In interpreting the meaning of Article II, section 24(j), this Court has previously defined the word "trade" to mean "a business venture for profit and includes any employment or business embarked in for gain or profit." *Smith v. County of Mecklenburg*, 280 N.C. at 508, 187 S.E. 2d at 74. *See also Surplus Co. v.*

Pleasants, Sheriff, 264 N.C. 650, 655-56, 142 S.E. 2d 697, 702 (1965). The verb "to regulate" has been defined as meaning " 'to govern or direct according to *rule*, . . . to bring under *control* of law or constituted authority.' " *State v. Gulledge*, 208 N.C. 204, 208, 179 S.E. 883, 886 (1935) (emphasis added). Before a local act will fall under the prohibition of Article II, section 24(j), its provisions must fairly be said to "regulate trade" as defined herein. Conceding that the Chapel Hill Act may have some impact upon "trade" as defined herein, we nevertheless do not believe it "regulates" trade, because it sets no rules for nor establishes any control over any activity that could fairly be called "trade."

First, we note that the Act does not impose any rules or restrictions on the activities of any private party. Nor does it impose any on the Town that relate to "trade"; the Act itself imposes only two minor, contingent restrictions upon the Town (in sections 4.24 and 4.25) that are designed solely to protect the public interest in the outcome of two specific types of projects. Nor does the Act confer on the Town any power or authority to regulate the activities of any private party that the Town does not already possess under existing legislation. Nor does it provide for the enforcement of any existing rules. *See* 1984 N.C. Sess. Laws ch. 961.

These factors clearly distinguish the Chapel Hill Act from the legislation found unconstitutional in *Taylor v. Racing Association*, 241 N.C. 80, 84 S.E. 2d 390 (1954), a case relied upon by the plaintiffs. The legislation in *Taylor* was found unconstitutional on three separate grounds, one of which was the violation of Article II, section 24(j). *Id.* As plaintiffs correctly contend, this Court's decision in *Taylor* centered around the scope of the word "trade." *See id.* The Court did not discuss whether the act in that case "regulated" trade. *Id.* A reading of the case discloses that that act established a racing commission with rule-making authority and also fixed the amount of several fees that had to be paid by licensees under the act to the municipality involved. *Id.* We have no doubt that the Court believed that the act establishing the racing commission was so obviously regulatory as not to need any discussion of that question.

Second, the Chapel Hill Act cannot be said to "regulate trade" for the reason primarily advanced by the plaintiffs. All the

Act does is to empower the Town of Chapel Hill to engage in "economic development projects." Absent some restraint, private parties already possess the capacity to engage in such projects, both with and without other parties. A municipality, in contrast, being merely a creature of the General Assembly with the ability to exercise only those powers expressly conferred upon it and those necessarily implied thereby, *Surplus Co. v. Pleasants, Sheriff*, 264 N.C. 650, 142 S.E. 2d 697, may require a specific grant of power before it has the capacity to engage in otherwise permissible activities. By merely declaring that the Town of Chapel Hill has the *capacity* to engage in economic development projects, with or without private parties, the General Assembly was not regulating the projects themselves or the actions of any party in connection with them, including the Town. Therefore, even if one effect of the Act is, as plaintiffs contend, an indirect authorization for private parties to participate with the Town, this indirect authorization, standing alone, cannot be held to "regulate" trade.

Accordingly, we hold that the Chapel Hill Act does not violate Article II, section 24(j) of the North Carolina Constitution because it does not "regulate trade" as required by that Article.

III.

[4] Plaintiffs next contend that the development agreement[1] between the Town and Fraser created a joint venture not for a public purpose and thereby violates Article V, section 2 of the North Carolina Constitution. After carefully reviewing the record on appeal and the relevant law, we do not believe that this agreement created a joint venture.

All of the aspects of the law of joint ventures are not completely settled, either in North Carolina or in other jurisdictions. *Cf., e.g.*, Comment, *Joint Adventures—The Sharing of Losses Dilemma*, 18 U. Miami L. Rev. 429 (1963); Jaeger, *Partnership or Joint Venture*, 37 Notre Dame L. Rev. 138 (1961); Taubman, *What Constitutes a Joint Venture*, 41 Cornell L.Q. 640 (1956); Nichols, *Joint Ventures*, 36 Va. L. Rev. 425 (1950); Comment, *The Joint*

1. Although plaintiffs included the garage lease in their assignment of error, they have elected to argue only the development agreement. Accordingly, any issue with respect to the garage lease, which appears to be a straightforward lease, is deemed waived. N.C. R. App. P. 28.

Venture: Problem Child of Partnership, 38 Calif. L. Rev. 860 (1950); Comment, *Joint Venture or Partnership*, 18 Fordham L. Rev. 114 (1949); Mechem, *The Law of Joint Adventures*, 15 Minn. L. Rev. 644 (1931). There is, however, a growing consensus on certain points of the law of joint ventures. In *Pike v. Trust Co.*, 274 N.C. 1, 161 S.E. 2d 453 (1968), this Court quoted with approval from *In re Simpson*, 222 F. Supp. 904, 909 (M.D.N.C. 1963), as follows:

> " 'A joint venture is an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill, and knowledge, but without creating a partnership in the legal or technical sense of the term.
>
> . . .
>
> " 'Facts showing the joining of funds, property, or labor, in a common purpose to attain a result for the benefit of the parties in which each has a right in some measure to direct the conduct of the other through a necessary fiduciary relation, will justify a finding that a joint adventure exists.'
>
> " 'To constitute a joint adventure, the parties must combine their property, money, efforts, skill, or knowledge in some common undertaking. The contributions of the respective parties need not be equal or of the same character, but there must be some contribution by each coadventurer of something promotive of the enterprise.' "

Pike v. Trust Co., 274 N.C. at 8-9, 161 S.E. 2d at 460. This Court went on to say:

> We find these definitions in Black's Law Dictionary, Fourth Edition: Venture: "An undertaking attended with risk, especially one aiming at making money; business speculation." Adventure: "A hazardous and striking enterprise, a bold undertaking in which hazards are to be met and issue hangs upon unforeseen events." Joint Adventure: ". . . A special combination of two or more persons, where, in some specific adventure, a profit is jointly sought, without any actual partnership or corporate designation."

Id. at 10, 161 S.E. 2d at 461.

One of the elements of a joint venture on which most, if not all, jurisdictions agree is that each party to a joint venture has a right in some measure to direct the conduct of the other *through a necessary fiduciary relationship*. Stated differently, "each joint venturer [must] stand in the relation of principal, as well as agent, as to each of the other coventurers . . . ." 46 Am. Jur. 2d *Joint Ventures* § 1 (1969 and Cum. Supp. 1986). Plaintiffs contend that this requirement is satisfied in the instant case.

We do not agree. We have carefully reviewed the development agreement, and we find little therein to indicate that the agreement established a principal/agent relationship between the Town and Fraser, and nothing to suggest the existence of this relationship between Fraser and the Town. We have previously defined an agent to be "one who acts for or in the place of another by authority from him." *Julian v. Lawton*, 240 N.C. 436, 440, 82 S.E. 2d 210, 213 (1954). *Cf. Lumber Co. v. Motor Co.*, 192 N.C. 377, 135 S.E. 115 (1926) (distinguishing independent contractor from servant or agent). Under the development agreement, Fraser alone controls the means for constructing the private improvements; the Town has a limited right to approve the final plans. Fraser agreed to procure plans for the public improvements and to select a general contractor to build the parking garage, subject to the Town's approval. In its capacity as construction administrator, Fraser has a limited right to approve minor change orders, but the agreement specifically states that Fraser has no authority to agree to any other changes. Conversely, the agreement gives Fraser no right to exercise any control over those portions of the public improvements that are performed by the Town's Public Works Department, and does not require the Town to undertake any action on Fraser's behalf. Accordingly, while the agreement *might* establish Fraser as an agent of the Town for the limited purpose of authorizing minor change orders, there is nothing in the agreement that establishes the Town as an agent of Fraser. *See Julian v. Lawton*, 240 N.C. 436, 82 S.E. 2d 210; *Lumber Co. v. Motor Co.*, 192 N.C. 377, 135 S.E. 115. Thus, the agreement fails to place the Town and Fraser "in the relation of principal, as well as agent, as to each [other]," 46 Am. Jur. 2d *Joint Ventures* § 1. Having failed to show the existence of an essential element in a joint venture, a right on the part of each party in some measure to direct the conduct of the other through

a necessary fiduciary relationship, plaintiffs' argument that the development agreement creates a joint venture not for a public purpose also fails.

IV.

[5] Plaintiffs argue lastly that the Town lacks the power to convey air rights in fee simple. We do not find any merit in this argument.

At common law, the holder of a fee simple also owned the earth beneath and the air above—"*cujus est solum, ejus usque ad coelum et ad inferos.*" *Jones v. Loan Association*, 252 N.C. 626, 637, 114 S.E. 2d 638, 646 (1960). This law applies in North Carolina. *See* N.C.G.S. § 4-1 (1986). Plaintiffs concede that air rights are thus a part of land ownership, but they argue that absent specific authority, the holder of a fee simple may not divide his fee horizontally. Nevertheless, they cite no law requiring such specific authority. It appears to be the general rule that absent some specific restraint, the holder of a fee simple may divide his fee in any manner he or she chooses. 23 Am. Jur. 2d *Deeds* § 10 (1983). Accordingly, we find no merit in this argument.

Plaintiffs also argue that N.C.G.S. § 63-12 positively prohibits a conveyance of air rights independent of the land beneath. That statute provides, "The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in G.S. 63-13." N.C.G.S. § 63-12 (1985). However, the purpose of the statute was to subject the common law rights recognized and described therein to the right of flight established in N.C.G.S. § 63-13, not to prohibit a conveyance of air rights independent of the land beneath. Accordingly, we also find no merit in this argument.

Municipalities are permitted by N.C.G.S. § 160A-273 (1982) to convey air rights. Plaintiffs contend that this statute is void as being a special act regulating trade in violation of Article II, section 24(j) of the North Carolina Constitution. They argue that the act is a special act because municipalities cannot be meaningfully distinguished in this respect from ordinary landowners, who cannot—according to plaintiffs—convey air rights independent of the

land beneath. *See State v. Dixon*, 215 N.C. 161, 1 S.E. 2d 521 (1939).

N.C.G.S. § 160A-273, however, is not a special act. We have already found no merit in plaintiffs' argument that ordinary landowners cannot convey air rights independent of the land beneath. We have also discussed previously in this opinion the special nature of municipalities; as a creature of the General Assembly, a municipality has only those powers expressly conferred upon it or necessarily implied therefrom. *Surplus Co. v. Pleasants, Sheriff*, 264 N.C. 650, 142 S.E. 2d 697. By enacting N.C.G.S. § 160A-273, the legislature merely conferred upon municipalities a power already held generally by the holder of a fee simple. The statute applies to all municipalities. It is not a special act. *See State v. Dixon*, 215 N.C. 161, 1 S.E. 2d 521.

For the reasons stated herein, the judgment of the trial court is affirmed.

Affirmed.

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

STATE OF NORTH CAROLINA v. GRAYLING McLAUGHLIN

No. 40A86

(Filed 3 September 1987)

1. **Constitutional Law § 32; Criminal § 101.4— sending message to jury via bailiff —no constitutional violation**

The trial court's sending of a message to the jury via the bailiff did not violate either the unanimity provision or the open court provision of Art. I, § 24 of the N.C. Constitution.

2. **Criminal Law §§ 101.4, 122.1— denial of jury's request via bailiff—violation of statute—failure to show prejudice**

The trial judge erred when he denied the jury's request to review certain testimony by sending a message to the jury through the bailiff rather than addressing the jury as a whole in open court as required by N.C.G.S. § 15A-1233 (a). However, defendant failed to meet his burden of showing prejudice under N.C.G.S. § 15A-1443(a) and is not entitled to a new trial.

Justice MARTIN concurring in the result.

State v. McLaughlin

APPEAL by defendant from judgments of *Preston, J.*, entered at the 19 November 1985 Criminal Session of Orange County Superior Court upon defendant's conviction of first degree murder and assault on a law enforcement officer with a deadly weapon. Heard in the Supreme Court on 15 April 1987.

Lacy H. Thornburg, Attorney General, by Jane P. Gray, Special Deputy Attorney General, for the state.

James R. Glover for defendant-appellant.

EXUM, Chief Justice.

The sole question presented by this appeal is whether the trial judge committed reversible error when he responded to the jury's request to review certain testimony by sending a message to the jury through the bailiff rather than by addressing the jury as a whole in open court. We hold that the trial court's actions, though erroneous, did not prejudice defendant. We therefore find no reversible error in defendant's convictions and the judgments entered against him.

I.

The state's evidence tended to show that defendant lived in Caswell County with Angela Stone and their two-year-old daughter, Patrice Stone. On the afternoon of 18 June 1985, defendant, Angela, Patrice, and Grayling, Jr., defendant's son by another woman, went to the home of Angela's mother, Mary Stone, in Graham, North Carolina. Earlier in the day Angela had informed defendant that she and Patrice were going to move in with her mother because she was tired of defendant's constant arguing. While at Mary Stone's house, defendant and Angela argued about Angela's refusal to go to work. Defendant attempted to stick Angela with a sewing needle and later threw a knife at her, cutting her upper left thigh. Defendant left the house with Patrice and Grayling, Jr. at approximately 4 p.m. A few minutes later he called Angela and told her he was going to kill Patrice and then kill Angela. Defendant called back every five or ten minutes and repeated this message.

Officer Doug Nelson of the Graham Police Department testified that he went to a residence on Ray Street and spoke with Angela Stone just before 5 p.m. She told him about the assault on

her by defendant. Nelson later spoke with Angela at police headquarters around 7:30 p.m. She told him she had taken out a warrant for assault with a deadly weapon and informed him of defendant's threats to kill her and Patrice. Nelson advised Angela to talk with the magistrate about charging defendant with communicating threats. Angela left. She returned to the police station about thirty minutes later and told Officer Nelson that defendant had called to say he was bringing Patrice home. Nelson drove to Mary Stone's house on Ray Street, where he was told by Mrs. Stone's sister that defendant had called and threatened to kill Patrice and Angela if he saw any police officers or vehicles. Other officers were alerted and they parked their patrol cars out of sight. At about 9 p.m. defendant turned his Toyota into Ray Street, made a U-turn, and began traveling away on Gilbert Street.

Officer Nelson, who had been parked on Gilbert Street, pursued defendant to a Texaco station, where defendant stopped next to a pay phone. Nelson pulled his vehicle to a stop directly in front of defendant's car, and Captain Perdue pulled in directly behind. As these officers began to approach defendant's vehicle, Sgt. Gordon Madden arrived and stopped his patrol car parallel to and just to the right of the Toyota. Defendant put his car in reverse and slammed into Captain Perdue's vehicle. Defendant then pointed a rifle at the police officers, who retreated to their vehicles and drew their weapons.

Sgt. Madden called to defendant, who was screaming at the officers, in an attempt to calm him down. Defendant fired his rifle at Sgt. Madden, hitting him in the right hand. None of the officers was able to return fire for fear of hitting Patrice. Defendant maneuvered his car out of the Texaco station and drove away.

Officers from the Graham Police Department and the North Carolina Highway Patrol chased defendant east toward Chapel Hill. On several occasions Trooper Tim Collins of the Highway Patrol attempted to pass defendant's vehicle in an effort to slow him down. Defendant twice pointed his rifle out the car window at Collins, who was forced to take evasive action. Finally, Trooper Collins managed to pass defendant on the right, pull out in front, and slow the Toyota to a stop. Defendant, finding himself sur-

rounded, then backed his car into a Graham police vehicle driven by Officer James Cooley.

Officer Cooley could see the inside of defendant's vehicle very clearly because of the headlights shining into it. Cooley and his partner, auxiliary officer Steve Foust, got out of their car and yelled to defendant to exit his vehicle with his hands up. Defendant looked over his right shoulder and smiled at Cooley. He then raised what appeared to be a rifle and Cooley heard several popping noises. Moments later defendant got out of his car with his hands raised, saying "shoot me, kill me." Several officers immediately took him into custody.

Officer Foust, who was an emergency medical technician, removed Patrice Stone from defendant's vehicle and discovered six bullet wounds in her chest. The child was still conscious at this point; she turned to look at the officers assisting her but said nothing. Shortly thereafter, as officers were driving her to meet an ambulance, Patrice stopped breathing. Efforts to revive her were unsuccessful. Dr. John Butts, the state's assistant chief medical examiner, testified that Patrice died of bullet wounds that passed through both lungs, her right ventricle, her liver, her aorta, her stomach and her spinal column.

Defendant put on no evidence during the guilt phase. The jury found defendant guilty of first degree murder and assault on a law enforcement officer with a firearm. Following a sentencing hearing the jury recommended life imprisonment on the first degree murder conviction, and judgment was entered accordingly. Judgment on the assault conviction was consolidated with the murder conviction for sentencing purposes.

II.

Closing arguments in the guilt phase of this trial were made on Monday morning, 18 November 1985. The trial court delivered its charge after lunch, and the jury retired to deliberate at 2:20 p.m. At 4:33 p.m., the jury sent the trial judge a note requesting that the testimony of Angela Stone and Sgt. Madden be reread. Both the state and defendant agreed that the testimony should not be reread. The trial judge sent a message to the jury, through the bailiff, denying the jury's request. The record does not indicate whether the judge's message was in written form or trans-

mitted orally by the bailiff. At 4:45 p.m. the jury returned to the courtroom and asked to be reinstructed on the definitions of malice, premeditation and deliberation. These definitions were reread, the jury again retired, and at 5:16 p.m. the verdicts against defendant were returned.

N.C.G.S. § 15A-1233(a) (1983) states that "jurors must be conducted to the courtroom" if, after retiring for deliberation, they request a review of testimony or other evidence.[1] Article I, section 24 of the North Carolina Constitution states that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." Defendant, relying on this Court's decision in *State v. Ashe*, 314 N.C. 28, 331 S.E. 2d 652 (1985), contends that he is entitled to a new trial because the trial judge's failure to address the entire jury in open court in responding to the jury's request violated the provisions of both N.C.G.S. § 15A-1233(a) and Article I, section 24 of the state constitution. We agree that the trial judge erred as defendant contends by not adhering to the requirements of the statute, but we find no error of constitutional dimension and hold that a new trial is unnecessary because there is no showing that the error prejudiced defendant. N.C.G.S. § 15A-1443(a) (1983); *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35 (1986).

In *Ashe*, defendant was accused of being one of several persons who had murdered a Cherokee County man. The principal witness against defendant was an admitted participant in the crime who testified pursuant to a plea bargain with the state. Defendant's defense was alibi, and he produced two witnesses who testified that he was with them and could not have been present at the time and place of the murder. After the jury retired to deliberate, the foreman returned alone to the courtroom, where the following exchange took place:

> THE COURT: Mr. Foreman, the bailiff indicates that you request access to the transcript?
>
> FOREMAN: We want to review portions of the testimony.

1. The statute also requires the trial judge to exercise his or her discretion in determining how to treat the jury's request. N.C.G.S. § 15A-1233(a). Defendant does not contend that the trial judge failed to exercise discretion in denying the jury's request to have the testimony of Ms. Stone and Sgt. Madden reread. Both defendant and the state agreed that the jury's request should be denied.

> THE COURT: I'll have to give you this instruction. There is no transcript at this point. You and the other jurors will have to take your recollection of the evidence as you recall it and as you can agree on that recollection in your deliberations.

State v. Ashe, 314 N.C. at 33, 331 S.E. 2d at 655-56. The foreman then returned to the jury room and defendant was convicted of first degree murder. We held in *Ashe* that the trial court's addressing only the foreman in explanation of its denial of the jury's request violated N.C.G.S. § 15A-1233(a) and Article I, section 24 of the state constitution. We explained this decision as follows:

> Our jury system is designed to insure that a jury's decision is the result of evidence and argument offered by the contesting parties under the control and guidance of an impartial judge and in accord with the judge's instructions on the law. All these elements of the trial should be viewed and heard simultaneously by all twelve jurors. To allow a jury foreman, another individual juror, or anyone else to communicate privately with the trial court regarding matters material to the case and then to relay the court's response to the full jury is inconsistent with this policy. The danger presented is that the person . . . may through misunderstanding, inadvertent editorialization, or an intentional misrepresentation, inaccurately relay the jury's request or the court's response, or both, to the defendant's detriment.

314 N.C. at 36, 331 S.E. 2d at 657. We said, further:

> Both Art. I, § 24 of the North Carolina Constitution and N.C.G.S. § 15A-1233(a) require the trial court to summon all jurors into the courtroom before hearing and addressing a jury request to review testimony and to exercise its discretion in denying or granting the request.

314 N.C. at 40, 331 S.E. 2d at 659.

Our reference to the state constitution in *Ashe* must be understood in light of the facts with which we were then faced. The reference was intended to convey no more than the seemingly obvious proposition that for a trial judge to give explanatory instructions to fewer than all jurors violated only the unanimity requirement imposed on jury verdicts by Article I, section 24.

The Court gave no consideration to the "open court" provision of this section because the actions of the trial court in *Ashe* occurred in open court. This constitutional provision also has nothing to do with the requirement that the trial court exercise its discretion in determining a jury's request for a review of testimony. Only the statute speaks to this requirement. Thus the sense of the sentence is that when both the constitutional section referred to and the statute are considered together, the dual requirements of addressing the entire jury and exercising discretion in determining the request arise.

[1] In the case at bar no instructions were given by the trial court to fewer than all jurors. Whatever instructions the bailiff conveyed were conveyed to the entire jury assembled. There was, therefore, no violation of the unanimity provision of Article I, section 24.

Neither do we find a violation of the "open court" provision. This provision clearly has reference only to the manner in which the verdict itself is received. The trial court's sending a message to the jury via the bailiff did not run afoul of this aspect of Article I, section 24.

[2] The trial court did err by failing to comply with N.C.G.S. § 15A-1233(a) when it did not conduct the jury into the courtroom to hear and determine its request to review some of the testimony. Defendant's failure to object at trial to this procedure, moreover, does not preclude him from raising this issue on appeal. *State v. Ashe*, 314 N.C. at 39-40, 331 S.E. 2d at 659.

Defendant is not, however, entitled to a new trial. A new trial may be granted only if the trial court's error was such that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached." N.C.G.S. § 15A-1443(a); *see State v. Loren*, 302 N.C. 607, 276 S.E. 2d 365 (1981). The burden of showing such prejudice is on the defendant. *Id.*

Defendant has not met this burden. There is, of course, some chance that the note from the jury to the trial judge inaccurately conveyed the jury's request. The possibility of this kind of mistake was minimal, however, given that the jury's request was in writing. Indeed, defendant acknowledges in his brief that

> the real danger in private communication outside the courtroom is in the message received by the jury from the trial judge in response to the request. . . . By interposing a third party [i.e., the bailiff] between the trial judge and the jurors, the risk that the response might carry unwanted meaning is increased.

Defendant suggests, for example, that the jury in this case might have been given the impression that the testimony of Ms. Stone and Sgt. Madden was "unimportant or not worthy of further consideration." *State v. Ashe*, 314 N.C. at 39, 331 S.E. 2d at 659.

Assuming for the sake of argument that this was the impression conveyed to the jury, defendant still was not prejudiced. The testimony of both Ms. Stone and Sgt. Madden was overwhelmingly favorable to the state, not defendant, and there was little or no challenge to its credibility. In *Ashe* we concluded the testimony sought to be reviewed by the jury must have been related to defendant's alibi defense, much of which was, on its face, favorable to defendant and some of which was, while on its face unfavorable to defendant, subject to doubts regarding its credibility.

Defendant here, unlike the defendant in *Ashe*, proffered no defense in the guilt phase of his trial. Indeed he has not denied that he shot Patrice Stone and Sgt. Madden. The evidence that he did is overwhelming and uncontradicted. The issue at trial, he contends, was his state of mind when these acts were committed. Defendant claims that part of Sgt. Madden's testimony—that defendant was shouting incoherently and making sudden, jerky movements at the Texaco station—could have led the jury to believe that defendant shot Sgt. Madden unintentionally, or without the specific intent to harm him. Similarly, defendant points to Angela Stone's statement that he was a good father who had a caring and loving relationship with Patrice. He argues that this testimony might have led the jury to find that he acted without malice when he shot his daughter. Defendant concludes that he would be prejudiced by any suggestion that the testimony of Sgt. Madden and Ms. Stone was unimportant or not worthy of consideration.

We disagree. Sgt. Madden testified that as he approached defendant's Toyota from the passenger side, defendant pointed a rifle at him, pinning Patrice Stone to the back of the front seat in

the process. Madden attempted to calm defendant down. "He began lowering the rifle barrel," Madden testified, "and as it went down behind the door frame, he hollered something, jerked it up and fired." There is no suggestion in this testimony that defendant had no intent to shoot and harm Sgt. Madden. Rather it is entirely supportive of defendant's conviction of assault on a law enforcement officer with a deadly weapon. Any suggestion that Sgt. Madden's testimony was unimportant or not worthy of consideration would tend to *benefit* defendant, not prejudice him.

Angela Stone testified on cross-examination that defendant was a good father to Patrice. She and other witnesses also testified that on the day of the alleged murder defendant argued with Angela, assaulted her with a knife, and repeatedly threatened to kill both her and Patrice. Additional testimony indicated that defendant used Patrice as a shield when confronting police at the Texaco station in Graham[2], and turned to smile at officers before shooting his daughter six times in the chest. In light of this testimony concerning defendant's actions on the day he killed Patrice, much of which was provided by Angela Stone, her testimony that defendant might have previously been a good father to his victim hardly amounts to evidence showing a lack of malice at the time of the killing. If the trial judge's error somehow had the effect of denigrating Ms. Stone's testimony, it could only have benefited defendant and could not have harmed him.

The possibility of prejudice to defendant in this case is far less than it was to the defendant in *Ashe*, the decision upon which defendant relies. First of all, the evidence in *Ashe* was considerably more equivocal than the evidence in this case. In *Ashe*, the principal witness against defendant was an admitted murderer whose testimony was refuted by two alibi witnesses. Here the state presented strong evidence of defendant's guilt, defendant presented no evidence at all during the guilt phase of his trial, and defendant's cross-examination of the state's witnesses did little, if anything, to impeach their credibility.

2. Sgt. Madden, recounting what happened after he had been shot by defendant, testified as follows: "I tried to position myself where I could take a shot at him, [but] was unable to do so in fear of hitting Patrice. As I aimed at him, he looked at me and leaned back behind Patrice where I could not fire at him."

In *Ashe*, moreover, the trial judge communicated with the jury through the jury foreman, from whom he received an oral request and to whom he gave oral, explanatory instructions. In this case, the request to have the testimony of Sgt. Madden and Ms. Stone reread came in a written note, both parties agreed that the testimony should not be reread, and the judge conveyed his denial of the jury's request through the bailiff without explanation. While this sequence of events does not completely eliminate the concerns that led this Court to its decision in *Ashe*, we are considerably more confident than we were in *Ashe* that they had no effect on the outcome of this trial.

In summary, we hold that the trial court erred when it failed to hear and respond to the jury's request for a review of the testimony of Sgt. Madden and Ms. Stone in open court with the jury fully assembled as required by N.C.G.S. § 15A-1233(a). Defendant has not, however, met his burden of showing prejudice under N.C.G.S. § 15A-1443(a) and is not entitled to a new trial.

No error.

Justice MARTIN concurring in the result.

Believing as I do that the principles of my dissenting opinion in *State v. Ashe*, 314 N.C. 28, 331 S.E. 2d 652 (1985), apply equally to this case, I concur in the result.

BETSY BRACY BRITT AND ROBERT DIXON BRITT v. BILLY B. BRITT AND PEGGY G. BRITT, JOINTLY AND SEVERALLY, AND MAGNOLIA HILL INC.

No. 566PA86

(Filed 3 September 1987)

1. Quasi Contracts and Restitution §§ 1.2, 5— operation of farm—recovery for value of services—mortgage payments, improvements

In an action for restitution and fraud arising from the operation by plaintiffs of a farm owned by defendants, plaintiff Betsy Britt introduced evidence which, if believed, entitles her to restitution for any damages she might prove. The trial court erred in admitting evidence of the reasonable value of plain-

tiff's services where there was evidence of two contracts between the parties, so that plaintiff was either operating the farm as her own business or had made an express contract for her pay. However, plaintiff would be entitled to compensation for payments made by her on the indebtedness of the farm if the jury should find that it was not part of the contract between the parties that the payments should be made from the gross income of the farm, but would not be entitled to compensation for payments made after she was told to leave the farm. Moreover, plaintiff is entitled to recover for expenditures for improvements to the farm if the jury should find that the expenditures were made not as normal business expenses in running the farm but were made by plaintiff from her own funds or from funds she should have been allowed to keep from the operation of the farm.

2. Fraud § 12— operation of farm—evidence insufficient

The Court of Appeals correctly ruled that there was insufficient evidence to support a claim for fraud arising from the operation by plaintiffs of a farm owned by defendant where the evidence did not show that a promise by defendant to put stock in a corporation in plaintiff Betsy Britt's name if she stayed on the farm was a misrepresentation of a material fact; plaintiff did not show a loss to herself by staying on the farm; and there was no evidence that plaintiff was damaged by not receiving stock because the evidence did not show the purpose for which the corporation was to be organized or that it was ever organized, and did not show the value of the stock.

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

ON discretionary review of a decision of the Court of Appeals, 82 N.C. App. 303, 346 S.E. 2d 259 (1986), reversing a judgment for plaintiff entered at the 6 February 1985 session of Superior Court of ORANGE County, *Bowen (Wiley F.), Judge*, presiding. Heard in the Supreme Court 11 May 1987.

The plaintiff Betsy Britt brought this action, seeking to impose a parol trust on certain real property or for restitution for benefits bestowed by her on the defendants and for damages, including punitive damages, for fraud. Robert Dixon Britt was made a party plaintiff after the action was filed.

The plaintiffs' evidence showed that in 1977 the two plaintiffs were working as Amway distributors for Billy Britt. Robert or Bobby Britt and Billy Britt are brothers. In August 1977, Billy Britt purchased a farm in Orange County known as Magnolia Hill Farm which had been operated as a horse farm since 1972. It was agreed that Bobby and Betsy Britt would occupy the farm. Billy Britt promised Betsy and Bobby that when they "hit the diamond

level" of Amway sales, he would convey the farm to them if they would repay to him his investment in the farm. It was agreed that Bobby and Betsy would "repair and maintain the farm . . . and operate the stable business to carry the farm." They were to live on the farm and retain any surplus income as compensation. Shortly after the plaintiffs went on the farm, Billy Britt delivered to Betsy Britt a payment book of the Orange Savings and Loan Association. According to the payment book monthly payments of $378.63 were due on a note secured by a deed of trust on the farm. Billy told Betsy that the payments on this debt were to be paid from the income from the farm. He also told her that she was to pay from the farm income $1,033.63 per month on a purchase money note secured by a second deed of trust on the farm.

After the plaintiffs had worked on the farm for approximately eighteen months, Betsy asked Billy to put their agreement in writing. She testified as follows:

> [H]e said that that wasn't necessary, he was a man of his word and that wasn't going to happen; and he said well maybe, I said, "I'm putting so much money in the farm and all and I'd like some kind of protection." He said, "Maybe we'll just make you an employee or something." And at that point, I had already put money in the farm and I didn't really want to be an employee from that point on; and I knew that the farm based on what the mortgage payments there was no way that I could be paid because everything I was making, I was putting back into the farm. So I said, "No, I don't want to do that." And he said, "Well we'll work it out." And I said, "How will we work it out?" He said, "Well," he said, "I'm forming a corporation and how would you feel about having accruing stock in the corporation each time you made a mortgage payment, then you would be accruing more stock?" So I thought well stock is paper, you know, and I assumed though that the stock was relative to the property, relative to the actual real estate. And I didn't know much about stock or anything; but I know there would be something on paper; and so I was satisfied with that.
>
> . . .
>
> Q. Did you trust him at that point?
>
> A. Yes.

Q. Okay. So what did you do as a result of that conversation?

A. I just kept making the mortgage payments and kept putting more, you know, money into the farm and just going about my usual routine.

No stock was issued to Betsy Britt. There was evidence that the plaintiffs made mortgage payments of $98,126.00. There was also evidence that they expended $40,469.95 in repairs and maintenance of the property. An expert witness was allowed to testify that the reasonable value of the personal labor and services that Betsy performed for the business ranged from $224,415.00 to $338,833.00. There was also evidence that during Betsy's tenure at Magnolia Hill the fair market value of the property increased from $175,000.00 to more than $337,500.00.

In 1983 the marriage of the plaintiffs deteriorated. They were separated and Billy demanded that Betsy leave the farm. She did so and filed this action.

The superior court submitted to the jury the claims for a parol trust, unjust enrichment and fraud. The jury answered the issue against the plaintiffs on their claim for a parol trust. The jury answered the issue favorably to the plaintiff Betsy Britt on her claim for unjust enrichment and awarded her $363,616.00. They answered the issue on the claim for fraud favorably to the plaintiff Betsy Britt and awarded her $1.00 in compensatory and $400,000.00 in punitive damages.

The defendants appealed from a judgment on the verdict and the Court of Appeals reversed. The Court of Appeals held there was not sufficient evidence to support a claim of unjust enrichment or fraud. It ordered the superior court to enter a judgment dismissing the case. This Court allowed discretionary review.

Womble, Carlyle, Sandridge & Rice, by Carole S. Gailor, for plaintiff appellant Betsy Bracey Britt.

Faison, Brown, Fletcher & Brough, by Charles Gordon Brown and William D. Bernard and Ward & Smith, P.A., by Robert D. Rouse, Jr., and Donalt J. Eglinton, for defendant appellees.

WEBB, Justice.

The plaintiffs did not appeal from the judgment dismissing their claim for a parol trust and that question is not before us.

[1] The appeal of the plaintiff Betsy Britt brings to the Court questions involving unjust enrichment and fraud. The Restatement of Restitution § 1 lays down the general principle that "a person who has been unjustly enriched at the expense of another is required to make restitution." In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be gratuitous and it must be measurable. *See* E. Allan Farnsworth, *Contracts* § 2.20. *Wells v. Foreman*, 236 N.C. 351, 72 S.E. 2d 765 (1952), says that the defendant must have consciously accepted the benefit. A claim of this type is neither in tort nor contract but is described as a claim in quasi-contract or a contract implied in law. A quasi-contract or a contract implied in law is not a contract. The claim is not based on a promise but is imposed by law to prevent an unjust enrichment. If there is a contract between the parties the contract governs the claim and the law will not imply a contract. *Concrete Co. v. Lumber Co.*, 256 N.C. 709, 124 S.E. 2d 905 (1962).

In this case we believe the plaintiff Betsy Britt has introduced evidence which, if believed, entitles her to restitution for any damages she may prove. The defendant Billy Britt promised the plaintiffs he would convey the farm to them when they "hit diamond." That was an oral promise and unenforceable under the statute of frauds. N.C.G.S. § 22-2. There was no evidence that the plaintiffs "hit diamond" and the plaintiffs could not have compelled a conveyance for this reason. The unenforceable contract does keep the plaintiffs' action in making improvements to the farm from being officious. Neither of the plaintiffs was a volunteer in making improvements because they could reasonably expect that they would be paid for them if the farm was not conveyed to them. The defendant Billy Britt was aware of any improvements as they were made. *Wells*, 236 N.C. 351, 72 S.E. 2d 765.

In her proof of damages, the plaintiff Betsy Britt introduced expert testimony as to the reasonable value of her services. It was error to allow this testimony. In this case, the evidence showed there were two contracts between the parties. One of the contracts was to convey the farm when the plaintiffs "hit diamond." There was another contract for the operation of the farm. There is some dispute about this. The plaintiff Betsy Britt contends she was the owner of the farm operation. Billy Britt contends that Betsy worked for him and that her compensation was to be allowed to live in the house rent free and to retain any surplus income from the farm operations. If Betsy operated the farm as her own business, the value of her services were of no consequence to Billy Britt. He should not have to pay for them. If Betsy Britt worked for Billy in operating the farm, she made an express contract with him for compensation. She was to live in the house rent free and receive all surplus income from the farm. She made an express contract for her pay and the law will not imply one for her. *Concrete Co.*, 256 N.C. 709, 124 S.E. 2d 905 and *Supply Co. v. Clark*, 247 N.C. 762, 102 S.E. 2d 257 (1958). For this reason it was error to let the jury consider the reasonable value of her services.

Betsy Britt also introduced evidence of payments on the indebtedness on the farm to show Billy Britt was unjustly enriched by the payments. There was a conflict in the evidence as to these payments. The plaintiff Betsy Britt contends that in the agreement between the parties these payments were not intended to be paid from the gross income from the farm. If the jury should find it was not part of the contract between the parties that the payments should be paid from the gross income, Betsy's compensation was reduced by making payments for the defendant Billy Britt and she would be entitled to compensation for these payments which unjustly enriched Billy Britt. There was evidence that she continued making the payments after she was told to leave the farm in March 1984. Betsy would not be entitled to damages for payments after she was told to leave the farm. She would be acting officiously in making payments after she was told to leave.

The plaintiffs also introduced evidence that Betsy expended $40,460.99 in making improvements on the farm. If the jury should find that the expenditures were made not as normal

business expenses in operating the farm but were made by Betsy from her own funds or funds she should have been allowed to keep from the operation of the farm, the plaintiffs should recover for such expenditures. The measure of damages should be the amount the expenditures have enhanced the value of the farm. *Wright v. Wright*, 305 N.C. 345, 289 S.E. 2d 347 (1982) and *Jones v. Sandlin*, 160 N.C. 150, 75 S.E. 1075 (1912).

[2] The plaintiffs also obtained a judgment against the defendants based on fraud. The elements of fraud are: (1) the defendant's false representation of a past or existing fact, (2) defendant's knowledge that the representation was false when made or it was made recklessly without any knowledge of its truth and as a positive assertion, (3) defendant made the false representation with the intent it be relied on by the plaintiff, and (4) the plaintiff was injured by reasonably relying on the false representation. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). Evidence of a promise which is not fulfilled is not sufficient to support a finding of a false representation unless the evidence shows the promisor made the promise with no intention of fulfilling it. *Hoyle v. Bagby*, 253 N.C. 778, 117 S.E. 2d 760 (1961).

The plaintiff Betsy Britt contends that in a conversation by telephone with her, Billy Britt made a promise to her that he had no intention of keeping, that he made this representation to keep her working on the farm and making the mortgage payments, and that she reasonably relied on this false representation to her injury. She contends the false promise was made when she asked Billy Britt to put their contract in writing and he told her he was forming a corporation and asked how she would like to be issued stock in the corporation each time she made a payment on the loan. She contends she relied on this promise and stayed on the farm to her injury.

Although the defendant Billy Britt did not specifically promise to put stock in a corporation in Betsy Britt's name if she stayed on the farm, the jury could infer that is what he meant when he said "how would you feel about accruing stock in the corporation each time you made a mortgage payment . . .?" If the defendant did not intend to keep this promise at the time it was made, this would be the misrepresentation of a material fact. The only evidence that he did not intend to keep the promise is that

no stock was issued to Betsy Britt. In *Williams v. Williams*, 220 N.C. 806, 18 S.E. 2d 364 (1942), the plaintiff's evidence showed that she released a deed of trust based on a promise by the defendant to execute a note secured by a second deed of trust. The defendant refused to execute a note or a second deed of trust. This Court affirmed a judgment of involuntary nonsuit. The Court said, "Mere proof of nonperformance is not sufficient to establish the necessary fraudulent intent." *Vincent v. Corbett*, 244 N.C. 469, 94 S.E. 2d 329 (1956), contains the same holding. We are bound by *Williams* and *Vincent* to hold that the evidence fails to show that the promise by Billy Britt was a misrepresentation of a material fact. All Betsy has shown is nonperformance.

We also hold there was not sufficient evidence that the plaintiff Betsy Britt was injured by relying on the representation. We have held that Betsy cannot recover in unjust enrichment for the value of her services in managing the farm because she was paid for those services pursuant to an express contract. By the same token, she cannot say she was injured by relying on a promise to her which caused her to continue working on the farm when she received compensation to which she had agreed for the employment. The plaintiff Betsy Britt also contends that she was injured by making the payments on the farm indebtedness and for the repairs and maintenance when she relied on Billy Britt's representation. We do not believe Betsy Britt has shown she was injured by making these payments. The funds to make these payments were generated by farm operations. If Betsy had not stayed on the farm she would not have had these funds. She has not shown a loss to her by staying on the farm after her conversation with Billy Britt.

The appellant contends she has been injured by not receiving the stock in the corporation Billy Britt told her he was forming. This argument raises the question of whether the plaintiff in a claim for fraud may recover damages for the loss of a bargain. As far as we can determine, this is a question of first impression in this jurisdiction. There have been cases from other states dealing with this problem. *See* Prosser and Keeton, *Law of Torts*, Ch. 18 § 110 (5th ed. 1984). The plaintiff has not sued for breach of contract which she could have done for the failure of Billy Britt to have the stock issued to her. Her claim is for fraud. The gravamen of a claim for fraud is the damage to a person for a change in

position based on the reliance on a false statement. The damage is caused by this change of position and not the lost bargain. There is a split among the jurisdictions which have decided this question. A majority allows damages for the lost bargain as well as for the change in position. A minority limits damages to that caused by a change in position.

We do not have to choose in this case between the majority and minority rules. All jurisdictions which have passed on the question hold that loss of bargain damages must be proved with reasonable certainty before they are allowed. *Id.* In this case there is no evidence that Betsy Britt was damaged by not receiving stock. The evidence does not show for what purpose the corporation was to be organized or that it ever was organized. There is no evidence as to the value of the stock. Betsy Britt has not shown she was damaged by the failure to receive stock.

For the reasons stated in this opinion there must be a new trial on the issue of unjust enrichment. We affirm the Court of Appeals in regard to the claim for fraud. We remand this case to the Court of Appeals for remand to the Superior Court of Orange County for further proceedings consistent with this opinion. The decision of the Court of Appeals is

Affirmed in part, reversed and remanded in part.

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

STATE OF NORTH CAROLINA v. RONALD LEE McCOY

No. 31A86

(Filed 3 September 1987)

1. Constitutional Law § 61; Jury § 5.2— jury venire—urban dwellers excluded—no error

Urban dwellers in Rutherford County do not constitute a distinct group because Rutherford County is a predominately rural county with small cities and the values and attitudes of the residents of the urban areas of the county are not so different from the values and attitudes of the residents of the rural

areas that they will bring to the judicial process potentially unique and varied perspectives. Sixth Amendment to the United States Constitution.

2. **Constitutional Law § 60; Jury § 5.2— evidence of systematic exclusion of blacks insufficient**

Defendant's evidence was not sufficient to show that blacks had been systematically excluded by the method used to select jurors in Rutherford County where the method used tended to exclude the urban population, but there was no evidence of the precise number of blacks excluded, and an attorney who testified that very few blacks had served on juries since 1 January 1984 testified on cross-examination that, until the past few weeks, the number of blacks on jury panels had been in accordance with the percentage of blacks in the population.

3. **Homicide § 24.1— instructions—presumption of malice—no error**

The trial court did not err in a murder prosecution by instructing the jury that the law implied that the killing was done with malice if the State proved beyond a reasonable doubt that defendant had intentionally killed the victim with a deadly weapon. Defendant did not except at trial to that part of the charge, defendant offered no evidence of self-defense and very little evidence of a killing in the heat of passion based on adequate provocation, and, assuming error, it was not so fundamental as to affect a basic right of the defendant.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment of life imprisonment entered by *Beaty, Judge*, at the 28 October 1985 Special Criminal Session of RUTHERFORD County Superior Court. Heard in the Supreme Court 15 April 1987.

The defendant was tried for the first degree murder of John Kingsley Ramsey. The State's evidence showed that on 12 July 1985, the defendant and Ramsey were both incarcerated in the Rutherford County jail. The two men were working in the kitchen of the jail. The defendant started to check the oven and Ramsey told him the food needed further cooking. The defendant removed a butcher knife from a drawer and said, "I'll show you." The defendant then stabbed Ramsey. Ramsey died as a result of the stabbing.

The defendant testified in his own defense. He admitted he had stabbed Ramsey and attributed it to racial tensions pervading the jail which eventually caused him to "snap." Other inmates testified to racial animosity in the jail. They testified further that the defendant, a black man, had been abused by white men while he was in a cell which was occupied predominantly by white men.

A forensic psychiatrist testified that in his opinion, the defendant had not formed a specific intent to kill at the time of the stabbing. The defendant was found guilty and sentenced to life in prison. He appealed.

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

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

WEBB, Justice.

The defendant first assigns error to the denial of his motion, made before trial, to quash the bill of indictment. His motion to quash was based on the denial of his right to have a jury selected from a representative cross section of the community. The Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, guarantees a defendant the right to be tried by a jury selected from a representative cross section of the community, in this case Rutherford County. In order to make a prima facie case that he has been denied this right, a defendant must show that (1) a group alleged to have been excluded from selection for the jury is a distinctive group, (2) that the representation of the group within the jury venire is not fair and reasonable with respect to the number of such persons within the community, and (3) the underrepresentation of the group is due to systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 58 L.Ed. 2d 579 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 42 L.Ed. 2d 690 (1975); *State v. Price*, 301 N.C. 437, 272 S.E. 2d 103 (1980); and *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980). The rationale for this rule has been said to be, ". . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." *Taylor*, 419 U.S. 522, 530-531, 42 L.Ed. 2d 690, 698. In order to be a cognizable group, such a group must bring to the judicial process potentially unique and varied perspectives and the values and attitudes of the group must be substantially different from those of other segments of the community. *Price*, 301 N.C. 437, 446, 272 S.E. 2d

103, 110. Blacks, daily wage earners and females have been held to be cognizable groups. *See Thiel v. Southern Pacific Co.*, 328 U.S. 217, 90 L.Ed. 1181 (1946).

In this case, evidence at the hearing on the motion to quash the indictment showed that in 1984 Rutherford County began using a computer to generate a master jury list. The names of all registered voters and all residents of Rutherford County who hold driver's licenses were placed on the jury list. Duplicate names and the names of all those under eighteen years of age were removed from the lists. The computer was then instructed to number each name. It did this by looking at certain designated spaces, whether letters or blank spaces, in each potential juror's name and address and assigning a number according to the letter or blank space. After numbers had been assigned to each potential juror, the computer placed the names of potential jurors in numerical order based on the numbers which had been assigned. The jurors were then picked by starting with the lowest number and taking every other number. There were many more jurors picked with rural addresses than addresses within the three towns in Rutherford County which are Rutherfordton, Forest City and Spindale. This was explained by an expert in computer programming as having occurred because rural addresses which have route and box numbers have a blank space at a certain place in each address to which the computer assigns a low number. The blank space caused an extraordinary number of persons with rural addresses to be selected for the jury.

The defendant's evidence also showed that 51.3% of the blacks in Rutherford County do not have rural addresses. The defendant contends this eliminated a disproportionate number of blacks from the venire. There was not any evidence of precisely how many blacks were selected to serve on juries, but Robert Harris, an attorney practicing in Rutherford County, testified that he had been present at all terms of court in the county since 1 January 1984 and very few blacks had been on jury panels. He said he could not recall how many blacks were on the panel for the trial that was to be conducted that week. On cross examination he was asked whether he had not observed that if there were 30 to 35 potential jurors in the courtroom, it is normal to see from 3 to 5 blacks in the group which would be in accordance with the percentage of the black population in the county. Mr. Harris

answered, "I would say that it has been, but, for some reason, the last few weeks it does not seem to have been the case."

The defendant does not contend the method of selecting the jury does not comport with the statutory requirements. *See* Chapter Nine of the North Carolina General Statutes. Nor does he contend that the jury commission in Rutherford County intentionally discriminated against any group. He contends the method used had the effect of systematically excluding a cognizable group from consideration for jury service. If he could show this, he would be entitled to relief. *Duren*, 439 U.S. 357, 58 L.Ed. 2d 579; *Taylor*, 419 U.S. 522, 42 L.Ed. 2d 690; and *Price*, 301 N.C. 437, 272 S.E. 2d 103.

[1] The defendant contends the residents of the cities of Rutherford County comprise one cognizable group that was excluded from consideration for jury service. We hold that in Rutherford County urban dwellers do not constitute a distinctive group. The evidence in this case showed that 53,787 people live in Rutherford County. The populations of the cities in the county are as follows: Forest City 7,648, Spindale 4,226, and Rutherfordton 3,410. It is apparent that Rutherford County is a predominantly rural county. The cities in it are small. We do not believe that in Rutherford County the values and attitudes of the residents of the urban areas are so different from the values and attitudes of the rural areas, that they will bring to the judicial process potentially unique and varied perspectives. This prevents the residents of the cities in Rutherford County from being a cognizable group. *Price*, 301 N.C. 437, 446, 272 S.E. 2d 103, 110.

[2] The defendant also contends the method used by Rutherford County in selecting jurors excluded a disproportionate number of blacks from consideration. He says this is so because blacks compose a much higher percentage of the urban population than the rural population and by excluding the urban population a disproportionate number of blacks were excluded. There is no evidence of the precise number of blacks excluded. The jury lists do not show race. The defendant introduced testimony by an attorney practicing in Rutherford County that very few blacks had served on juries since 1 January 1984. On cross examination he said in effect that until the last few weeks, the number of blacks on the jury panels had been in accordance with the percentage of blacks

in the population. This is not sufficient evidence to show that blacks had been systematically excluded by the method used to select jurors in Rutherford County. The defendant's first assignment of error is overruled.

[3] The defendant next assigns error to the charge. In charging the jury on first degree murder the court said,

> If the State proves beyond a reasonable doubt that the defendant Ronald Lee McCoy, killed the deceased, John Kingsley Ramsey with a deadly weapon or intentionally inflicted a wound upon John Kingsley Ramsey with a deadly weapon that proximately caused the deceased's death, the law implies, first, that the killing was unlawful and, second, that it was done with malice.

The defendant did not except to this charge at the trial. In charging on second degree murder the court said,

> If the State proves beyond a reasonable doubt that the defendant intentionally killed John Ramsey or intentionally inflicted a wound with a deadly weapon that proximately caused his death, again, you may first infer that the killing was unlawful and, second, that it was done with malice, but you're not compelled to do so. You may consider this evidence along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. If the killing was unlawful and was done with malice, then the Defendant would be guilty of second degree murder.

The defendant contends the court erred by telling the jury that if the State proved beyond a reasonable doubt that the defendant had intentionally killed Ramsey with a deadly weapon, the law implied the killing was done with malice. The defendant says this violates the rule of *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508 (1975), which he contends holds that this instruction unconstitutionally relieves the State of proving malice, an element of first degree murder, beyond a reasonable doubt. The defendant did not except at trial to this part of the charge. Rule 10(b)(2) of the Rules of Appellate Procedure provides that an assignment of error may not be made to any portion of the charge unless an objection is made to it before the jury retires. In *State*

v. Odom, 307 N.C. 655, 300 S.E. 2d 375 (1983), this Court adopted the plain error rule under which we may consider an assignment of error to the charge, although an objection was not made at the trial. We stated it to be as follows:

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

Id. at 660, 300 S.E. 2d at 378 (quoting *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982)).

In determining whether the plain error rule should apply in this case, we have considered *State v. Rynolds*, 307 N.C. 184, 297 S.E. 2d 532 (1982), in which this Court approved an instruction virtually identical to the questioned instruction in this case. This Court said the instruction was proper because no proof of lack of malice was offered. This holding was based on the premise that if the jury finds beyond a reasonable doubt that the defendant intentionally killed the victim with a deadly weapon and the defendant offers no evidence of a heat of passion killing on sudden provocation and no evidence the killing was in self-defense, there is a presumption that the killing was with malice. The defendant in this case offered no evidence of self-defense and very little evidence of a killing in the heat of passion based on adequate provocation. The defendant introduced evidence that he had been abused by white inmates in the jail, but there was no evidence he was abused by the man he killed. The fact that the deceased told him the food needed further cooking is not adequate provocation for finding heat of passion which would negate malice. *See State v. Wynn*, 278 N.C. 513, 180 S.E. 2d 135 (1971). If we were to con-

sider this assignment of error, it is doubtful that we would find error.

We also consider *Rose v. Clark*, 478 U.S. ---, 92 L.Ed. 2d 460 (1986), in which the United States Supreme Court held that an error of the type for which the defendant contends, should be subject to a harmless error analysis. In determining whether error is harmless the Court said,

> Apart from the challenged malice instruction, the jury in this case was clearly instructed that it had to find . . . beyond a reasonable doubt as to every element of both first- and second-degree murder. . . . Placed in context, the erroneous malice instruction does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction.

Id. at ---, 92 L.Ed. 2d at 471. The Court said further,

> When a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not intend to cause injury. In that event the erroneous instruction is simply superfluous: the jury has found, in Winship's words, "every fact necessary" to establish every element of the offense beyond a reasonable doubt.

Id. at ---, 92 L.Ed. 2d at 472 (citations omitted).

In this case the jury has found beyond a reasonable doubt the predicate facts, an intentional killing or the intentional infliction of a wound with a deadly weapon which proximately caused death, upon which the inference of malice was made. It is a logical inference. The jury also found beyond a reasonable doubt that defendant murdered his victim after premeditation and deliberation. This finding renders harmless any instructional errors on the element of malice which improperly relieve the State of its burden of proof. *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982).

Finally, if this part of the charge was error, it was not so fundamental as to affect a basic right of the defendant. We cannot

say that absent the error, if indeed there was error, the jury would have reached a different result. *State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986). We cannot invoke the plain error rule.

In the trial we find

No error.

STATE OF NORTH CAROLINA v. CHARLES ALFRED HURST

No. 513PA86

(Filed 3 September 1987)

Criminal Law § 26.5— armed robbery—felonious larceny—sentencing for both not double jeopardy

Felonious larceny is not a lesser included offense of armed robbery, and defendant could properly be convicted and sentenced for both armed robbery and felonious larceny of property worth over $400 when both charges were based on the same incident.

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

Justice FRYE dissenting.

Chief Justice EXUM joins in this dissenting opinion.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 82 N.C. App. 1, 346 S.E. 2d 8 (1986), ordering that a judgment of felonious larceny be arrested, finding no error in defendant's trial and conviction for armed robbery and remanding the case for resentencing. Heard in the Supreme Court 13 May 1987.

The defendant was tried for robbery with a dangerous weapon, N.C.G.S. § 14-87, and felonious larceny, N.C.G.S. § 14-72. The State's evidence showed that on 6 October 1984, in Fayetteville, Ms. Colleen Shield approached her automobile which was parked at a shopping center. She put her pocketbook and two grocery bags containing personal property in the trunk of her automobile. The value of the articles placed in the trunk exceeded $400.00. As she was entering her automobile the defendant appeared by her side and pointed a gun at her. She was able to escape from the

defendant but he took her car keys and drove the automobile away.

The defendant was convicted of both charges and was sentenced to twenty years in prison. The Court of Appeals found no error in the conviction of armed robbery but arrested judgment of the conviction of felonious larceny. We allowed the State's petition for discretionary review.

Lacy H. Thornburg, Attorney General, by Newton G. Pritchett, Jr., Assistant Attorney General, for the State.

James R. Parish, for defendant-appellee.

WEBB, Justice.

We have allowed discretionary review to determine whether the defendant in this case may be convicted and sentenced for both armed robbery and felonious larceny when both charges are based on the same incident. The Court of Appeals held the defendant could not be so convicted and arrested the judgment of felonious larceny. We believe that *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984); *State v. Beaty*, 306 N.C. 491, 293 S.E. 2d 760 (1982); and *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980), require that we reverse the Court of Appeals. Each of these cases holds or says that felonious larceny is not a lesser included offense of armed robbery.

In its opinion the Court of Appeals, relying on *State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986), analyzed some of our cases dealing with the question of whether felonious larceny is a lesser included offense of armed robbery. The court did not reach a conclusion as to this question because it did not feel it was necessary to do so. It based its holding on the conclusion that the Legislature did not intend that the defendant be punished for both crimes. In reaching this conclusion, the Court of Appeals relied on some language from *State v. McGill*, 296 N.C. 564, 568, 251 S.E. 2d 616, 619 (1979), which says, "[m]ultiple punishment is one facet of the prohibition against double jeopardy. . . . That rule applies '[w]here two or more offenses of the same nature are by statute carved out of the same transaction and are properly the subject of a single investigation.' " *McGill* dealt with a question of whether the State should have been required to elect be-

tween two separate charges upon which to prosecute the defendant. The quoted language was not necessary to a decision in the case. It does appear that if the language in *McGill* is the law, a defendant may not be punished for more than one offense if two or more offenses created by statute arise from one transaction and are properly the subject of one investigation. In *State v. Pagon*, 64 N.C. App. 295, 307 S.E. 2d 381 (1983), the Court of Appeals decided a case based on this language. We do not believe this is a correct statement of the law. There are many instances in which a defendant may be punished for more than one crime based on one transaction including *Gardner*, *Murray* and *Revelle* which we have cited above. We shall cite others in this opinion.

Gardner, 315 N.C. 444, 340 S.E. 2d 701, deals with the question of whether a defendant, who is convicted of two separate crimes, may be sentenced for both of them if one of the crimes is a lesser included offense of the other. If a defendant is convicted of two crimes based on the same incident and neither crime is a lesser included offense of the other, he may be sentenced for both crimes. *Murray*, 310 N.C. 541, 313 S.E. 2d 523 and *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). If felonious larceny is not a lesser included offense of armed robbery, it was not error to sentence the defendant in this case for both offenses and *Gardner* has no application. As the Court of Appeals points out, there appears to be a conflict between two lines of cases in this state as to whether felonious larceny is a lesser included offense of armed robbery. *See also* Braun, *Lesser Included Offenses: A New Piece In The Puzzle*, Campbell Law Observer, June 26, 1987, at 1. The following cases hold or say that felonious larceny is a lesser included offense of armed robbery. *State v. Owens*, 277 N.C. 697, 178 S.E. 2d 442 (1971); *State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399, *appeal dismissed and cert. denied*, 402 U.S. 1006, 29 L.Ed. 2d 428 (1971); *State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970); *State v. Rogers*, 273 N.C. 208, 150 S.E. 2d 525 (1968); *State v. Parker*, 262 N.C. 679, 138 S.E. 2d 496 (1964); *State v. Wenrich*, 251 N.C. 460, 111 S.E. 2d 582 (1959); *State v. Davis*, 242 N.C. 476, 87 S.E. 906 (1955); *State v. Bell*, 228 N.C. 659, 46 S.E. 834 (1948); *State v. Horne*, 59 N.C. App. 576, 297 S.E. 2d 788 (1982); *State v. Reid*, 55 N.C. App. 72, 284 S.E. 2d 519 (1981); *State v. Chapman*, 49 N.C. App. 103, 270 S.E. 2d 524 (1980); *State v. Allen*, 47 N.C. App. 482, 267 S.E. 2d 514 (1980); *State v. Perry*, 38 N.C. App. 735,

248 S.E. 2d 755 (1978); *State v. Fletcher*, 27 N.C. App. 672, 220 S.E. 2d 101 (1975); *State v. Coxe*, 16 N.C. App. 301, 191 S.E. 2d 923 (1972). On the other hand, *Murray*, *Beaty* and *Revelle* hold or say that felonious larceny is not a lesser included offense of armed robbery.

An offense is a lesser included offense when all its essential elements are included in the greater offense and proof of all elements in the greater offense will prove all elements of the lesser offense. *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982). Armed robbery is defined by N.C.G.S. § 14-87 as

> (a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

An armed robbery can occur when the defendant attempts to take property from another with the use of a firearm or other dangerous weapon. *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971). N.C.G.S. § 14-72 deals with larceny. It does not define larceny but makes larceny a felony if the property taken has a value of more than $400.00, or if the larceny is from the person, or committed pursuant to a burglary or breaking or entering, is of an explosive or incendiary device, firearm or of a record in the custody of the North Carolina State Archives. The elements of larceny, as defined by our cases, are that the defendant: (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the property permanently. *State v. Bowers*, 273 N.C. 652, 161 S.E. 2d 11 (1968). To be guilty of larceny, the defendant must have taken and carried away the property of another. An attempt to do so, which would be sufficient proof under N.C.G.S. § 14-87 to satisfy the element of a taking, in a trial for armed robbery would not satisfy the taking element in a trial for larceny. This keeps larceny from being a lesser included offense of armed robbery. In

this case the felonious larceny was based on the goods having a value of more than $400.00. Proof of the elements of armed robbery need not include proof that the goods taken are worth more than $400.00. This prevents felonious larceny in this case from being a lesser included offense of armed robbery.

We overrule, insofar as they are inconsistent with this opinion, all the above cases which either hold or say that felonious larceny is a lesser included offense of armed robbery.

For the reasons stated in this opinion, we reverse the Court of Appeals and remand for an order affirming the judgment of the superior court.

Reversed and remanded.

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

Justice FRYE dissenting.

In this case defendant, with the threatened use of a firearm, took and carried away the victim's automobile. At the time of the taking, the trunk of the automobile contained the victim's shopping bags and pocketbook. As a result of this single taking, defendant was charged with two offenses, felonious larceny of the automobile and armed robbery of the money and items contained in the pocketbook and shopping bags. He was convicted of both offenses and sentenced accordingly.

The Court of Appeals held that judgment on one of the convictions must be arrested because

> defendant's right to be free from double jeopardy under Article I, § 19, of the North Carolina Constitution and Amendments V and XIV to the United States Constitution was violated by his punishment under two statutes which the legislature intended to be mutually exclusive under facts such as those in the case at bar.

The Court of Appeals' opinion continues as follows:

> The issue before us is whether a single series of acts may support convictions under both N.C. Gen. Stat. Secs.

14-87 (armed robbery) and 14-72 (felonious larceny) (1981) when there has been only one taking from one victim at one time. We hold that it cannot.

State v. Hurst, 82 N.C. App. 1, 10-11, 346 S.E. 2d 8, 14 (1986). The majority now reverses that decision. In so doing, the majority effectively overrules the following cases previously decided by this Court: *State v. McGill*, 296 N.C. 564, 568, 251 S.E. 2d 616, 619 (1979); *State v. Owens*, 277 N.C. 697, 178 S.E. 2d 442 (1971); *State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399, *appeal dismissed and cert. denied*, 402 U.S. 1006, 29 L.Ed. 2d 428 (1971); *State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970); *State v. Rogers*, 273 N.C. 208, 150 S.E. 2d 525 (1968); *State v. Parker*, 262 N.C. 679, 138 S.E. 2d 496 (1964); *State v. Wenrich*, 251 N.C. 460, 111 S.E. 2d 582 (1959); *State v. Davis*, 242 N.C. 476, 87 S.E. 906 (1955); *State v. Bell*, 228 N.C. 659, 46 S.E. 834 (1948).

The majority also effectively overrules at least the following cases decided by the Court of Appeals: *State v. Pagon*, 64 N.C. App. 295, 307 S.E. 2d 381 (1983); *State v. Horne*, 59 N.C. App. 576, 297 S.E. 2d 788 (1982); *State v. Reid*, 55 N.C. App. 72, 284 S.E. 2d 519 (1981); *State v. Chapman*, 49 N.C. App. 103, 270 S.E. 2d 524 (1980); *State v. Allen*, 47 N.C. App. 482, 267 S.E. 2d 514 (1980); *State v. Perry*, 38 N.C. App. 735, 248 S.E. 2d 755 (1978); *State v. Fletcher*, 27 N.C. App. 672, 220 S.E. 2d 101 (1975); *State v. Coxe*, 16 N.C. App. 301, 191 S.E. 2d 923 (1972).

The majority believes that three cases decided by this Court require that we reverse the decision of the Court of Appeals in this case. I believe that those cases may be distinguished from the present case. The first of these cases, *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980), involved convictions of felonious larceny of an automobile and armed robbery where the defendant first took money and wallets from the inhabitants of a trailer before going outside and taking their automobile. The Court held that the two offenses (and the other charges of burglary and rape) represented separate actions by defendant although all the charges were based on the same series of events. The Court found no error in the convictions. *Revelle* is distinguishable from the instant case because there were two separate takings in *Revelle* whereas there was only one taking in the instant case.

In *State v. Beaty*, 306 N.C. 491, 293 S.E. 2d 760 (1982), defendant was charged and convicted of two counts of armed robbery resulting from his assault of a loan company employee with property taken from both the employee and the business. The Court arrested judgment on one of the armed robbery charges, finding that the controlling factor was the existence of a single assault. While the Court's language would apply, *Beaty* does not control the instant case because *Beaty* involved only indictments charging armed robbery whereas the instant case involves whether a defendant may be punished for both armed robbery *and* felonious larceny based on the same taking.

In the third case, *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984), the defendant was convicted of first degree murder, felonious larceny of an automobile and armed robbery. The defendant contended that he was twice placed in jeopardy for the same offense because he was charged and tried for both the armed robbery of the victim by taking his wallet and keys and the felonious larceny of his automobile. Relying upon our decision in *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476, we held that since at least one essential element of the two crimes is not an element of the other, defendant was not subjected to double jeopardy by being convicted of both armed robbery and felonious larceny. Nevertheless, it is clear from the facts that were before the Court that even if felonious larceny were a lesser included offense of armed robbery, the armed robbery involving the wallet and keys preceded in time the later distinct act of felonious larceny of the automobile. Thus, in *Murray* we have two takings, not one as in the instant case.

While the three cases relied on by the majority support the holding that felonious larceny is not always a lesser included offense of armed robbery, they do not answer the question of whether the legislature intended that a person should be punished for both felonious larceny and armed robbery for a single taking from a single victim at one time. A careful review of the opinions in the long list of cases overruled by the majority today would suggest that the legislature did not so intend. The Court of Appeals, in a well-reasoned and unanimous decision, concluded that larceny of goods worth over $400 and armed robbery of the same goods from the same person at one time are mutually excludable offenses: that is, if defendant is punished for one, he can-

not be punished for the other based on the same taking. The Court of Appeals thus arrested judgment on the felonious larceny conviction, upheld the armed robbery conviction, and remanded for resentencing. I would affirm that decision.

Chief Justice EXUM joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. NICHOLAS ARTHUR BOLINGER

No. 570A85

(Filed 3 September 1987)

1. **Criminal Law §§ 138.32, 138.38— second degree murder—failure to find mitigating factors of duress and provocation—no error**

The trial court did not err in a second degree murder prosecution by failing to find that the murder was committed under duress, coercion, compulsion, and strong provocation where defendant's testimony established that his mental condition at the time of the murder was affected by his consumption of drugs and alcohol, economic insecurity, and his deteriorating relationship with the victim, and where the trial judge found in mitigation that defendant was suffering from a mental condition which was insufficient to constitute a defense but which significantly reduced his culpability. Moreover, there was no merit to defendant's contention that his testimony that the victim smacked him prior to the attack required the trial judge to find strong provocation.

2. **Criminal Law § 138.14— second degree murder—balancing of aggravating and mitigating factors—no error**

The trial court in a murder prosecution did not abuse its discretion in balancing aggravating and mitigating factors and sentencing defendant to life imprisonment where the court found one aggravating factor, prior convictions, based on at least eight offenses punishable by confinement in excess of sixty days, and in mitigation found that defendant was suffering from a mental condition which significantly reduced his culpability and that the relationship between defendant and the victim was an extenuating circumstance.

3. **Criminal Law § 23— plea of guilty—no appeal of right**

The defendant in a murder prosecution did not have an appeal as a matter of right to challenge the court's acceptance of his guilty plea to second degree murder; defendant may obtain appellate review only upon a grant of certiorari for which he did not petition. However, the court nevertheless elected to review the merits of his contention. N.C.G.S. § 15A-1444(e).

4. **Criminal Law § 23.3— guilty plea—knowing and voluntary**

The trial court properly determined that defendant knowingly pled guilty to second degree murder where defendant's response to the judge's question-

ing clearly indicated that defendant admitted killing the victim and intended to plead guilty to murder in the second degree. Nothing in N.C.G.S. § 15A-1022 requires the court to inquire whether defendant is, in fact, guilty.

APPEAL of right 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 entered by *Burroughs, J.*, on 9 April 1985, upon a plea of guilty to murder in the second degree. Heard in the Supreme Court 8 June 1987.

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

Elisabeth A. Wyche, for defendant-appellant.

FRYE, Justice.

In this appeal we consider defendant's contentions that the trial court erred in (1) failing to find several mitigating factors; (2) balancing the aggravating and mitigating factors and imposing a life sentence; and (3) accepting a plea of guilty. We reject each of these contentions.

Testimony at the sentencing hearing tended to show the following facts. On 26 September 1984, the deteriorated body of the victim was found in a car parked at the Ramada Inn in Hendersonville, North Carolina. An autopsy revealed substantial injuries to the victim's head, face and jaw.

On 4 September 1984, the victim called the Asheville Police Department from a pay phone and informed an officer that defendant had threatened to kill her. A police unit was dispatched to the area and picked up the victim. She told the police that defendant had stolen a television set the previous day and had stolen other televisions on other occasions and transported them to Tennessee where he sold them. She reported that the defendant had attempted to sell her into prostitution and that when she refused he had beaten her. The victim indicated that the defendant would kill her if he knew she had talked to the police. She later stated that this might be the last time the police would see her alive and reiterated her fear that the defendant was going to kill her.

In early August 1984, defendant told an acquaintance that the victim had stolen one hundred and fifty dollars from him and that he intended to smash her head in after he got his money back. Defendant admitted killing the victim. According to his testimony he and the victim, both of whom were recovering alcoholics, had lived together for some time. They moved constantly from city to city and, while driving, would consume alcohol and amphetamines. During this time, the victim began to work as a prostitute. Both began to drink more heavily and as a result their relationship deteriorated. According to defendant, he and the victim decided to drive to North Carolina from Orlando, Florida. The victim engaged in prostitution at truck stops along the way while defendant stayed awake at night to make sure nothing happened to her. Defendant testified that the trip lasted four days during which he consumed alcohol and amphetamines. They stopped at a bar in Asheville in order to wait for a friend who had promised to lend defendant some money. Defendant testified that he got out of the car to tighten the screws which attached the license plate to the car and returned to the car with the ratchet wrench in hand. When he returned to the car he told the victim that the friend would be there soon. According to defendant, the victim, who had also been drinking, stated that, "You're not going to do anything you SOB," and smacked defendant on the ear and face. Defendant testified that at the time, he had the wrench in his hand and that although he did not remember hitting victim the first time, at a later point he did realize he was hitting her with the wrench and immediately stopped. He realized then that she was dead. Defendant left the victim's body in the car which he parked at the Ramada Inn in Hendersonville.

Defendant pled guilty to murder in the second degree. The sentencing judge found that the murder was aggravated by defendant's prior convictions for criminal offenses punishable by more than sixty days. In mitigation, the judge found that the defendant was suffering from a mental condition that significantly reduced his culpability and that the relationship between the defendant and the victim was an extenuating circumstance. The trial judge found that the aggravating factor outweighed the mitigating factors and sentenced defendant to life imprisonment. Defendant appealed to this Court.

[1] Defendant first contends that he is entitled to a new sentencing hearing because the sentencing judge failed to find as mitigating circumstances that the murder was committed under duress, coercion, compulsion, and strong provocation. We disagree.

In *State v. Clark*, 314 N.C. 638, 336 S.E. 2d 83 (1985), a case involving the mitigating factor of strong provocation, this Court stated that when evidence is offered in support of a mitigating factor, the trial judge must first determine what facts are established by a preponderance of the evidence and then determine whether those facts support the conclusion that the mitigating factor exists. "Only if the evidence offered at the sentencing hearing 'so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn' is the court compelled to find that the mitigating factor exists." *Id.* at 642, 336 S.E. 2d at 85. (Citations omitted.) We are not convinced that the evidence presented so clearly established that defendant committed the murder under duress, coercion or compulsion that no reasonably inference to the contrary can be drawn. Defendant's testimony established that his mental condition at the time of the murder was affected by his consumption of drugs and alcohol, economic insecurity and his deteriorating relationship with the victim. We believe, however, that these facts were appropriately considered by the sentencing judge when he found in mitigation that "the defendant was suffering from a mental condition that was insufficient to constitute a defense [but] significantly reduced his culpability of the offense." We also find no merit in defendant's contention that his testimony that the victim smacked him prior to the attack was such as to require the trial court to find as a mitigating factor that the defendant acted under strong provocation.

[2] Defendant next contends that the sentencing judge abused his discretion in balancing the aggravating and mitigating factors and in imposing the maximum sentence of life imprisonment.

Judges have the discretionary power under the Fair Sentencing Act to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). This Court has held that:

> [t]he discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. Although the court is required to consider all statutory factors to some degree, it may very properly emphasize one factor more than another in a particular case . . . .

Id. at 597, 300 S.E. 2d at 697, quoting *State v. Davis*, 58 N.C. App. 330, 333-34, 293 S.E. 2d 658, 661 (1982). In addition, this Court has articulated the following standard of review of a sentencing judge's balancing of aggravation and mitigating factors:

> The balance struck by the sentencing judge in weighing the aggravating against the mitigating factors, being a matter within his discretion, will not be disturbed unless it is 'manifestly unsupported by reason,' . . . or 'so arbitrary that it could not have been the result of a reasoned decision . . . .' We will not ordinarily disturb the trial judge's weighing of aggravating and mitigating factors. When, however, there is no rational basis for the manner in which the aggravating and mitigating factors were weighed by the sentencing judge, his decision will amount to an abuse of discretion.

State v. Parker, 315 N.C. 249, 258, 337 S.E. 2d 497, 502-03 (1985). (Citations omitted.)

The sentencing judge in this case did not abuse his discretion in balancing the aggravating and mitigating factors and in sentencing defendant to life imprisonment. Judge Burroughs found one aggravating factor, that the defendant had prior convictions for criminal offenses punishable by more than sixty days confinement. The record reflects that the defendant had been convicted of at least eight offenses which were punishable by confinement in excess of sixty days. In mitigation, Judge Burroughs found that the defendant was suffering from a mental condition which significantly reduced his culpability and that the relationship between the defendant and the victim was an extenuating circumstance. It was entirely reasonable for the sentencing judge in this case to find that the aggravating factor found, involving multiple convic-

tions, outweighed the factors found in mitigation. Thus, his decision to impose the maximum term of life imprisonment does not constitute an abuse of discretion.

[3] Defendant lastly contends that the trial judge erred in accepting his guilty plea in violation of N.C.G.S. § 15A-1022. Defendant argues first that the court failed to determine that he knowingly pled guilty to murder in the second degree and second that the court did not inquire whether he in fact was guilty of this offense.

We note first that the defendant in this case does not have an appeal as a matter of right to challenge the court's acceptance of his guilty plea. N.C.G.S. § 15A-1444(e) (1983) provides that:

> Except as provided in subsection (a1) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari. If an indigent defendant petitions the appellate division for a writ of certiorari, the presiding superior court judge may in his discretion order the preparation of the record and transcript of the proceedings at the expense of the State.

Subsection (a1) provides for appeals as a matter of right only to challenge the sufficiency of the evidence to support the sentence in certain limited situations. N.C.G.S. § 15A-979 deals with appeals from the denial of a motion to suppress evidence and therefore does not apply here. Similarly, defendant has made no motion to withdraw the plea. Thus, according to N.C.G.S. § 15A-1444 defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea. Defendant may obtain appellate review of this issue only upon grant of a writ of certiorari. Because defendant in the instant case failed to petition this Court for a writ of certiorari, he is therefore not entitled to review of the issue.

Neither party to this appeal appears to have recognized the limited bases for appellate review of judgments entered upon

pleas of guilty. For this reason we nevertheless choose to review the merits of defendant's contention.

[4] Defendant's contention that the court did not determine that he knowingly pled guilty to murder in the second degree is based on the following colloquy at the hearing:

> Q. Do you now personally plead guilty?
>
> A. I plead guilty to killing Mary Blesavage.
>
> Q. In the second degree murder classification, you plead guilty to—
>
> A. I am pleading guilty to second degree murder. I stated that earlier. I'm saying I am pleading guilty now to killing Mary Blesavage. I am accepted [sic] a second degree because —I've already pled guilty to second degree.
>
> MR. BLANCHARD: Your Honor, if I could interject at this time. We spent a great deal of time talking about it. He admits to the killing of the deceased but does not—he enters a plea of second degree murder to avoid the possibility of the death penalty. He pleads guilty to killing the lady; however, the main reason he's entering a plea to second degree and the sentencing hearing before your Honor, I believe your Honor will better understand at that time because he will take the stand at the sentencing hearing and explain to the Court how it happened.
>
> Q. I see, but your Attorney's statement is correct that you're pleading guilty to second degree murder because of the risk of a possible death penalty?
>
> A. No—YES.
>
> Q. In the original case, I should say?
>
> A. Yes, I understand, I didn't catch it.

We cannot agree with defendant's contention that the trial court failed to determine that he knowingly pled guilty to second degree murder. Defendant's response to the judge's questioning clearly indicates that the defendant admitted killing the victim and intended to plead guilty to murder in the second degree. The only ambiguity revealed in defendant's responses related to

whether his guilty plea was motivated by the risk of the death penalty and not whether he understood himself to have entered a plea of guilty to murder in the second degree. We must also reject defendant's contention that the court's acceptance of his plea was in error because the court failed to inquire whether he was in fact guilty. Nothing in N.C.G.S. § 15A-1022 requires the court to make such an inquiry. Further, the United States Supreme Court in *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S.Ct. 160, 167, 27 L.Ed. 2d 162, 171 (1970), held that

> while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

Defendant's assignment of error is therefore meritless.

Affirmed.

STATE OF NORTH CAROLINA v. FRANK R. NICKERSON

No. 18A86

(Filed 3 September 1987)

1. Criminal Law § 34— defendant's prior acts of misconduct—erroneously admitted—harmless error

There was no prejudicial error in a murder prosecution from the admission of testimony by which the State placed before the jury prior acts of misconduct by the defendant where the evidence was overwhelming that defendant went into a house with the intent to kill the victim and that he carried out this intention. N.C.G.S. § 8C-1, Rules 608(b) and 404(a).

2. Criminal Law § 73.1— hearsay—recorded recollection—properly admitted

The trial court did not err in a murder prosecution by admitting a statement given by a witness to a deputy after the shooting where the witness testified at trial that he could not remember what happened after he heard the shots fired. Even though the statement was made five weeks after the incident, the trial court could properly conclude that the matter was fresh in the witness's memory at the time of the statement, and the witness's testimony

that he made a truthful statement to the deputy, that he saw the deputy take down the statement, and that he signed the statement was sufficient for the court to conclude that the witness adopted this statement. N.C.G.S. § 8C-1, Rule 803(5).

3. Criminal Law § 181.4— murder—newly-discovered evidence—motion for appropriate relief denied

The trial court did not err in a murder prosecution by denying defendant's motion for appropriate relief, which was based on the affidavits of two witnesses that they had consumed a substantial amount of marijuana and were disoriented and intoxicated on the night in question, where neither witness stated that his testimony at trial was false or recanted his testimony. N.C.G.S. § 15A-1415(b)(6).

APPEAL by defendant as a matter of right from a judgment by *Hight, Judge*. Judgment entered 14 October 1985 in Superior Court, PERSON County. Heard in the Supreme Court 8 June 1987.

The defendant was tried for first degree murder. The evidence for the State showed the defendant had been married to Delores Bell but they were divorced. On 30 March 1985 Delores Bell and Willie Mitchell went to Ms. Bell's home at approximately 10:00 p.m. Frank Nickerson, Jr., the defendant's son, was playing cards in the living room with two of his friends. Ms. Bell and Willie Mitchell talked with the three young men for about fifteen minutes and then went to Ms. Bell's bedroom.

Frank Nickerson, Jr. testified that approximately one hour after his mother and Willie Mitchell retired to the bedroom he answered a knock at the front door of the residence. He opened the door and saw the defendant Frank Nickerson standing outside. Nickerson, Jr. testified his father walked past him without saying a word and went towards his mother's bedroom. He said that within a matter of seconds he heard the sound of two gunshots. Nickerson, Jr. then walked in the direction of his mother's bedroom and observed a smoking gun in his father's hand. He heard his father admonish his mother in regard to having sexual intercourse "in front of my children." At the time he heard his father say this, he observed his mother crouched naked behind a nightstand and the victim curled up and shaking on the floor. The defendant told his son to call the police, which he did.

Delores Bell testified that she and Willie Mitchell were in bed when the defendant forced her locked bedroom door open, burst into the room with a gun in his hand and fired twice

towards her and Willie Mitchell. She testified further that as she rolled off the bed and crouched behind a nightstand, she saw Willie Mitchell sit up in bed and fall to the floor. He gasped for breath and then quit breathing.

Both Anthony Quinn Jackson and Gerald Moore testified that they were in the living room with Frank Nickerson, Jr. when the defendant entered the house. Each of them said when he heard shots he ran from the house. There was evidence that Willie Mitchell died of a gunshot wound.

The defendant testified that he opened the door and saw his former wife and Willie Mitchell in bed. He saw Willie Mitchell reach down towards his clothes. He thought Mr. Mitchell was reaching for a gun and shot him. A deputy sheriff found a .25 caliber handgun wrapped in a blue bath cloth a few inches from the body of Mr. Mitchell.

The defendant was found guilty of first degree murder and sentenced to life in prison. He appealed.

Lacy H. Thornburg, Attorney General, by Joan H. Byers and Jane P. Gray, Special Deputy Attorneys General, for the State.

Andrew P. Cioffi and James E. Ramsey, for the defendant appellant.

WEBB, Justice.

[1] The defendant's first assignment of error deals with questions propounded to the defendant on cross-examination in regard to prior acts of misconduct by the defendant. The following colloquy took place during the cross-examination of the defendant:

> Q. And when you saw Harold Johnson, you remembered an occasion seventeen or eighteen years ago when you threatened to pull a knife on him and told him to quit messing around with your girlfriend or you would kill him, didn't you?
>
> A. I don't know nothing about this. Me and Harold is friends, right now.
>
> . . . .

Q. And so you were so enraged about her being with another man that you went in and you intended to kill him and were going to claim self defense, weren't you?

A. No, I did not.

Q. Just like you killed Donald Harry Boone on March the 7th, 1976, and claimed self defense?

A. I didn't claim self defense; not me.

The State was thus able to place before the jury prior acts of misconduct by the defendant. The State concedes that pursuant to *State v. Morgan*, 315 N.C. 626, 340 S.E. 2d 84 (1986), this testimony was inadmissible under N.C.G.S. § 8C-1, Rules 608(b) and 404(a). The State contends the testimony was admissible under Rule 404(b) which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show 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 argues that this evidence was relevant to the defendant's motive, intent and state of mind.

Assuming it was error to allow this testimony we hold it was harmless error. In order to show prejudicial error an appellant must show "a reasonable possibility that, had the error not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a). *State v. Milby*, 302 N.C. 137, 273 S.E. 2d 716 (1981). In this case the evidence was overwhelming that the defendant went into the house with the intent to kill Willie Mitchell and that he carried out this intention. We hold that if the erroneously admitted testimony had been excluded the outcome of the trial would not have changed. The defendant's first assignment of error is overruled.

[2] In his second assignment of error the defendant contends it was error to read into evidence a statement of Anthony Quinn Jackson, one of the friends of Frank Nickerson, Jr., who was in the house at the time of the shooting. During his testimony Mr. Jackson stated that he could not remember what happened after

he heard the shots fired. The State then showed him a writing which he had signed. He testified that he remembered making a statement to a deputy sheriff five weeks after the shooting and that he saw the deputy sheriff write it down. He testified he told the truth to the deputy and that he and the deputy had signed it. The witness then read into evidence the statement which had been signed by him and the deputy. He read from the statement that after hearing two shots, "then I heard a voice saying, 'I done told you to leave her alone.' "

This assignment of error presents a question under N.C.G.S. § 8C-1, Rule 803(5) which provides in part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (5) Recorded recollection—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

This rule is a codification of the recorded past recollection rule that existed when the Rules of Evidence were adopted by the General Assembly. *See* 1 Brandis on North Carolina Evidence § 33 (2d rev. ed. 1982) and *State v. Wright*, 282 N.C. 364, 192 S.E. 2d 818 (1972). We hold the reading of the statement was admissible under the rule. The testimony of Anthony Quinn Jackson showed that he once had knowledge about the matter but at the time of the trial could not recall it sufficiently to testify about it at trial. He testified further that he told the truth to the deputy and saw him write it down. He then signed the statement. This satisfies the requirement of the Rule that the statement be adopted by the witness when the matter was fresh in his memory and reflected his knowledge accurately.

The defendant argues that the statement was not admissible because it was not shown that it was made while the matter was fresh in the memory of the witness. The statement was made approximately five weeks after the incident. The trial occurred approximately five months after the statement. We believe the superior court could properly conclude from this evidence that the matter was fresh in the witness' memory at the time of the statement.

The defendant also contends the witness did not adopt the statement. The witness testified that he remembered making a statement to the officers but he did not remember making that part of the statement which was read into evidence. We hold that the witness' testimony that he made a truthful statement to Mr. Slaughter, that he saw Mr. Slaughter take down his statement and that he signed the statement is sufficient for the court to have concluded the witness adopted the statement. The defendant's second assignment of error is overruled.

[3] More than 150 days after the judgment had been entered in this case the defendant made a motion for appropriate relief pursuant to N.C.G.S. § 15A-1415(b)(6). This motion was supported by affidavits from two of the witnesses at the trial which tended to cast some doubt on their testimony. The court denied the motion for appropriate relief and we issued a writ of certiorari to determine this question.

The affidavits submitted in support of the motion for appropriate relief were by Frank Nickerson, Jr., the defendant's son, and Gerald Moore, one of the friends of the defendant's son who was in the house when the defendant entered. Each of them said he had consumed a substantial amount of marijuana on the night in question so that he was disoriented and intoxicated. Each said that as a result of being under the influence of marijuana he "had limited memory and recall, ability to perceive the events that took place, diminished capacity to relate what he perceived, and motivation to withhold information." Each of them said he had told defendant's counsel that he had not smoked marijuana on the night in question. Both of them also said that the explicitness of their "testimony had more to do with the pressures placed upon him by those interested in his testimony than on his ability to recall and perceive the event." The defendant argues that the

testimony of these two witnesses was material to the defendant's intent at the time of the incident and was crucial to his conviction. He argues that a new trial should be granted in light of the affidavits.

The defendant discusses this issue in terms of newly discovered evidence. It may be more in the nature of recanted or retracted testimony. Some of our cases have discussed recanted testimony in terms of newly discovered evidence. *See State v. Morrow*, 264 N.C. 77, 140 S.E. 2d 767 (1965); *State v. Roddy*, 253 N.C. 574, 117 S.E. 2d 401 (1960); *Conrad Industries v. Sonderegger*, 69 N.C. App. 159, 316 S.E. 2d 327 (1984) and *State v. Blalock*, 13 N.C. App. 711, 187 S.E. 2d 404 (1972). There is a difference between recanted testimony and newly discovered evidence. Newly discovered evidence is evidence which was in existence but not known to a party at the time of trial. Recanted testimony is testimony which has been repudiated by a party who gave it. Recanted testimony is not evidence which existed at the time of trial because the recanting witness would not have testified to it at trial. A motion for a new trial on the basis of recanted testimony is for the purpose of removing testimony from a jury. A motion for a new trial based on newly discovered evidence is for the purpose of putting new evidence before a jury. In *State v. Ellers*, 234 N.C. 42, 65 S.E. 2d 503 (1951), a case in which a witness repudiated his testimony, this Court said, "the decisions ordinarily applicable to newly discovered evidence will not be held as controlling upon a factual situation like that disclosed by the present record." *Id.* at 45, 65 S.E. 2d at 505. In *Ellers* the Court did not use the rule normally stated for newly discovered evidence but ordered a new trial. We believe *Ellers* stands for the proposition that the rule for granting a new trial for newly discovered evidence is not the same as the rule for granting a new trial for recanted testimony.

We do not believe we must decide whether the affidavits filed in this case show there is recanted testimony or newly discovered evidence. We hold that the affidavits do not show either. Although both affiants say they were under the influence of marijuana and had limited capacity to perceive what took place and to relate it, neither of them say their testimony at trial was false. Neither of them recanted his testimony. The rule for newly discovered evidence is that in order for a new trial to be granted it

must appear that (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial. *See State v. Beaver*, 291 N.C. 137, 229 S.E. 2d 179 (1976) and *State v. Casey*, 201 N.C. 620, 161 S.E. 2d 81 (1931). If the witnesses were allowed to testify as stated in their affidavits this would merely discredit their testimony at the first trial. This is not grounds for a new trial for newly discovered evidence. The court properly overruled the defendant's motion for a new trial.

In the trial we find

No error.

STATE OF NORTH CAROLINA v. LEE R. TRENT, III

No. 81A86

(Filed 3 September 1987)

1. **Rape and Allied Offenses § 3— indictment for rape of child under 13—failure to charge crime**

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

2. **Criminal Law § 51.1; Rape and Allied Offenses § 4— sexual abuse—medical testimony inadmissible**

In a prosecution for first degree rape and taking indecent liberties with a minor, a pediatrician's diagnosis of sexual abuse based upon the history given to him by the victim and a pelvic examination four years after the date of the alleged offenses which revealed only that the victim's hymen was not intact was not admissible under N.C.G.S. § 8C-1, Rule 702 since the witness was not in a better position than the jury to determine whether the victim had been sexually abused.

State v. Trent

APPEAL by defendant from a sentence of life imprisonment imposed by *Phillips, J.* Defendant was convicted at the 28 October 1985 Session of Superior Court, PITT County, of first degree rape and taking indecent liberties with a minor. He received concurrent sentences of life imprisonment for the conviction of first degree rape and three years' imprisonment for the conviction of taking indecent liberties with a minor. Defendant's motion to bypass the Court of Appeals on the lesser offense was allowed by this Court on 11 February 1986. Heard in the Supreme Court 12 May 1987.

Lacy H. Thornburg, Attorney General, by Stephen F. Bryant, Assistant Attorney General, for the State.

Fitch, Butterfield & Wynn, by James A. Wynn, Jr., and Milton F. Fitch, Jr., for defendant-appellant.

FRYE, Justice.

We find two issues dispositive in this case. First, we hold that the indictment for first degree rape was fatally defective, and judgment must therefore be arrested in that case. Second, we hold that reversible error occurred during the testimony of the State's medical expert.

Defendant was indicted on 19 August 1985 for taking indecent liberties with a minor, his daughter, in 1980, and for first degree rape of that same daughter in 1981. These offenses were consolidated for trial. Defendant was tried at the 28 October 1985 Session of Superior Court, Pitt County, before Phillips, J.

According to the evidence presented at defendant's trial, defendant was twice married. By his first wife, he had a son and a daughter, the victim in the instant case. His first marriage ended in divorce, and defendant and his two children lived in Richmond, Virginia, where his mother took care of the children while he attended medical school. After his graduation, the family moved to Greenville, North Carolina, where defendant married his present wife in 1979. The victim testified at trial that in 1980, when she was ten years old, defendant began to touch her vaginal area and breasts. He had sexual intercourse with her when she was eleven. She also testified that while visiting in Richmond during the summer of 1981, she told relatives about defendant's actions, and she

was allowed to live with her grandmother in Richmond. In 1984, she returned to live with defendant. She testified that defendant resumed touching her at that time.

Defendant testified in his own behalf and denied any misconduct. He offered evidence that his children were hostile to his second wife, and his remarriage caused friction with his mother. He testified that his relatives asked him to take his daughter back to live with him in 1984 because she had become a discipline problem. He said that he was in a state of shock when he first learned of her allegations against him.

Defendant was convicted of both charges. The trial judge imposed the mandatory life sentence for first degree rape and sentenced defendant to a term of three years' imprisonment for the offense of taking indecent liberties with a minor. Defendant appealed to this Court; his motion to bypass the Court of Appeals on the lesser offense was allowed on 11 February 1986.

[1] The indictment charging defendant with first degree rape was fatally defective and should have been quashed. It charged defendant, pursuant to N.C.G.S. § 14-27.2, with the rape of "a child under the age of 13 years" during the "[a]cademic [s]chool [y]ear of 1981." N.C.G.S. § 14-27.2 was amended effective 1 October 1983 by substituting "a child under the age of 13 years" for "a child of the age of 12 years or less." 1983 N.C. Sess. Laws chs. 175 and 720. Thus, at the time of the alleged offense, the prior statute controlled. This Court has previously held in *State v. Howard*, 317 N.C. 140, 343 S.E. 2d 538 (1986) (*per curiam*) that a bill of indictment alleging the rape of "a child under the age of 13 years" does not allege a criminal offense for a rape allegedly occurring before the amendment to the statute. We hold that *Howard* controls and that the judgment entered in the first degree rape case must therefore be arrested. The State may, of course, seek an indictment of defendant based upon the statute in effect at the time of the alleged rape.

[2] We also hold that defendant is entitled to a new trial on the remaining charge of taking indecent liberties with a minor. The State introduced into evidence in its case in chief the testimony of Dr. James R. Markello, who was admitted by the court as an expert in the field of medicine with a specialty in pediatrics. Dr. Markello testified that he examined the victim on 9 August 1985

at the request of the Department of Social Services for the purpose of determining the existence of sexual abuse and for foster placement. He interviewed her specifically with regard to her allegations of sexual abuse. He testified in essence that she told him that her father had treated her for a rash on her thigh when she was about ten years old, that he had at that time begun to touch her private parts and breasts and continued to do so even after the rash disappeared, and that he had had sexual intercourse with her. Dr. Markello said that the victim also told him about moving back to Virginia to live with her grandmother in the summer of 1981 and returning to Greenville in September of 1984, when, according to the victim, the touching, but not the sexual intercourse, began again. The victim told Dr. Markello that she attempted to commit suicide in July of 1985 but was not treated for the attempt. Dr. Markello further testified that he turned the victim over to another physician to conduct a pelvic exam, which showed that the victim's hymen was not intact. The exam showed no lesions, tears, abrasions, bleeding or otherwise abnormal conditions. The following then transpired:

> PROSECUTOR: Dr. Markello, based upon the physical examination that was conducted by you and that part conducted under your supervision, and the history that was related to you by Valerie Trent, did you arrive at a diagnosis?
>
> MR. FITCH: Objection.
>
> THE COURT: Overruled.
>
> A. I did.
>
> Q. And what was that diagnosis?
>
> MR. FITCH: Objection.
>
> THE COURT: Overruled.
>
> A. The diagnosis was that of sexual abuse.

On cross-examination, Dr. Markello clarified that based on the history given to him by the victim, his diagnosis extended to the events of 1980-81.

The trial court admitted Dr. Markello's opinion pursuant to Rule 702 of the North Carolina Rules of Evidence. His recounting of the victim's statements to him and the results of her pelvic

exam were admitted to corroborate her testimony and to show the basis for his opinion. Defendant contends, and we agree, that Dr. Markello's testimony was not admissible under Rule 702.

Rule 702 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion (1983, c. 701, s. 1).

N.C.G.S. § 8C-1, Rule 702 (1986). Thus, in order for one qualified as an expert to present an opinion based upon his specialized knowledge, his opinion must assist the trier of fact. In *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E. 2d 905, 911 (1978), this Court explained:

> [I]n determining whether expert medical opinion is to be admitted into evidence the inquiry should be . . . whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.

Upon the record before us, it is clear that the State failed to lay a sufficient foundation for the admission of Dr. Markello's testimony in this case. The doctor repeatedly testified that his diagnosis was based upon the results of the pelvic exam and the history given to him by the victim. He cited no other basis for his diagnosis. The pelvic exam was made four years after the date of the offenses with which defendant was charged. It revealed only that the victim's hymen was not intact. Dr. Markello testified that the condition of the hymen alone would not support a diagnosis of sexual abuse, but only a conclusion that the victim had been sexually active. The State was required to lay a sufficient foundation to show that the opinion expressed by Dr. Markello was really based upon his special expertise, or stated differently, that he was in a better position than the jury to have an opinion on the subject. Given the limited basis recited by Dr. Markello for his diagnosis, there is nothing in the record to support a conclusion that he was in a better position than the jury to determine whether the victim was sexually abused in 1980-81. Accordingly,

this testimony was not admissible under Rule 702, and the trial judge erred in overruling defendant's objection to it.

We also hold that in the instant case, the error was prejudicial. Defendant is entitled to a new trial if 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(a) (1983). The central contest in the instant case was over credibility. The alleged sexual acts were not brought to the attention of the authorities for approximately four years. There was considerable evidence of conflict in the family arising out of resentment over defendant's second marriage. There was evidence that until the present charges were brought, defendant had an excellent reputation in the community. We cannot say that, under the facts of this case, there was no reasonable possibility of a different result had the error not occurred.

Because defendant's remaining assignments of error may not arise upon retrial of this case, we deem it unnecessary to discuss them.

For the reasons set forth in this opinion, we arrest judgment on defendant's conviction for first degree rape and order that he be given a new trial on the charge of taking indecent liberties with a minor.

No. 85CRS17159 first degree rape—judgment arrested.

No. 85CRS17160 indecent liberties—new trial.

STATE OF NORTH CAROLINA v. ALFONZO MEEKS

No. 301A86

(Filed 3 September 1987)

1. Criminal Law § 34.2— testimony concerning subsequent offense—harmless error

The trial court in a murder prosecution did not commit reversible error by allowing the prosecutor to question defendant about an unrelated shooting which occurred after the shooting in this case where defendant had previously testified that he disposed of the gun in this case by dropping it down a drain

and it was not improper for the prosecutor to inquire about his subsequent possession of a similar gun; assuming that a question about whether defendant and the second victim had pulled handguns on each other was improper, defendant's denial removed any prejudice and the prosecutor did not dwell on the matter; and defendant specifically excluded the question concerning whether he had shot and killed the second victim from his continuing objection.

2. **Criminal Law § 34.2— murder—testimony concerning defendant's previous possession of gun—no prejudice**

There was no prejudicial error in a murder prosecution from the trial court's permitting the prosecution to ask a witness whether she had ever seen defendant with a gun before, considering the brevity and incomplete nature of the exchange, the obvious hostility of the witness to defendant, the trial judge's action in instructing the witness to confine her responses to the question asked, and the prompt action of defendant's attorney. Moreover, defendant himself later testified on cross-examination that he had owned the gun used to shoot the victim for about two years.

3. **Criminal Law § 73— murder—prior altercation with deceased—hearsay**

The trial court did not err in a murder prosecution by ruling inadmissible testimony from two witnesses that defendant's supervisor had complained earlier on the day of the shooting that the deceased was harassing defendant and two other men working with him. The statement was hearsay because it was offered to prove the truth of the matter asserted, that an altercation between the deceased and defendant occurred earlier in the day, and defendant did not argue an exception to the hearsay rule before the Supreme Court.

4. **Criminal Law § 138.38— second degree murder—strong provocation—not found**

The trial court did not err by failing to find the mitigating factor of strong provocation where, although defendant's evidence would support the factor, the testimony of the deceased's fiancee was to the contrary.

APPEAL by defendant from a sentence of life imprisonment imposed by *Hight, J.*, following defendant's conviction of murder in the second degree at the 17 February 1986 Criminal Session of Superior Court, WAKE County. Heard in the Supreme Court 15 April 1987.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State.

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

FRYE, Justice.

Defendant contends on this appeal that the trial judge erred in permitting certain cross-examination by the prosecutor, in refusing to allow into evidence certain testimony by two of defendant's witnesses, and in failing to find a mitigating factor. We find no prejudicial error and hold that defendant received a fair trial.

Defendant was indicted on 28 May 1985 for the murder of Reddick Royster. The case came on for trial at the 17 February 1986 Criminal Session of Superior Court, Wake County, before Hight, J. The State introduced evidence that defendant shot and killed the victim on 6 May 1985 and that there was a history of hostility between defendant and the deceased. Defendant testified in his own defense that he believed the deceased was in the process of pulling out a gun to shoot him when defendant fired his own gun. Although no gun was in fact found on the deceased's body, he was known to carry a handgun. Defendant also introduced evidence that the deceased had threatened him. The jury found defendant guilty of second degree murder. The trial judge found one aggravating factor, that defendant had a prior conviction of an offense punishable by more than sixty days' confinement, and two mitigating factors, the statutory factor that the relationship between the defendant and the deceased was an extenuating circumstance and the non-statutory factor that defendant was employed and actively working at the time the crime was committed. The judge then found that the aggravating factor outweighed the mitigating factors and sentenced defendant to life imprisonment. Defendant appealed.

[1] Defendant's first contention is that the trial judge erred in allowing the prosecutor to question him about an unrelated shooting, for which defendant was also indicted, that occurred after the shooting in the instant case. Before allowing the questions, the trial judge held a *voir dire* to determine their propriety. The prosecutor asked defendant several questions concerning his presence at the scene of the second shooting, his possession of a gun at that time, and finally, whether he had shot and killed the victim of the second shooting. Defendant objected to all of the questions except the final one, whether he had killed the second victim. The trial judge overruled defendant's objections, and, in

the presence of the jury, the prosecutor asked defendant essentially the same questions that he had asked on *voir dire*. Defendant testified that he had a gun at the scene of the second shooting of the same caliber and general appearance as the gun used in the shooting in the instant case, but that the two were not the same. He denied pulling a handgun on the second victim and denied killing him. The trial judge allowed defendant a continuing objection to all of these questions except the last, whether defendant had shot and killed the second victim.

We find no reversible error in this instance. Because defendant had previously testified that he disposed of the gun used in the instant case by dropping it down the street drain, it was not improper for the prosecutor to inquire about his subsequent possession of a similar gun. *See* 1 Brandis on North Carolina Evidence §§ 38, 42, 46-48 (1982 and Cum. Supp. 1986). Assuming, *arguendo*, that the prosecutor's question "At some point during the evening hours on the 25th of January, 1986, did you and [the second victim] pull handguns on each other?" was improper, we note that a defendant's denial is normally held to have removed any prejudice that might arise. *See State v. Black*, 283 N.C. 344, 350, 196 S.E. 2d 225, 229 (1973); *cf. State v. Scott*, 318 N.C. 237, 347 S.E. 2d 414 (1986) (reversible error where defendant, charged with first degree sexual offense, was asked multitudinous improper and prejudicial questions about sexual misconduct). In the instant case, the prosecutor did not dwell on the matter but went on to question defendant about the gun he carried on this later occasion. Defendant specifically excluded the final question, whether defendant had shot and killed the second victim, from his request for a continuing objection and made no specific objection at the time the prosecutor asked it. He therefore waived any right to complain of this question on appeal. *See* N.C.R. App. P. 10.

[2] In a related argument, defendant next contends that the trial judge erred in allowing the prosecutor to ask a witness, who testified that she saw defendant, armed, leaving the scene of the shooting, whether she had ever seen defendant with a gun before. She testified that she had seen him with one two years before. Defendant contends that this evidence was impermissible "bad character" evidence and was irrelevant.

When defendant initially objected to this line of questioning, one of his express concerns was the hostility of the witness to him. The witness had given answers to the prosecutor that were nonresponsive to his questions and hostile to the defendant. Although the trial judge ruled that the prosecutor could question the witness about previously seeing defendant with a gun, the judge admonished her to confine her responses to the question asked. The following exchange between the prosecutor and the witness then occurred:

> Q. MS. HINTON, A FEW MOMENTS AGO YOU INDICATED THAT YOU HAD SEEN THE DEFENDANT WITH A HANDGUN PRIOR TO THE INCIDENT THAT YOU JUST DESCRIBED. WHEN WAS THE LAST TIME YOU HAD SEEN HIM WITH A HANDGUN?
>
> A. THE LAST TIME I SAW HIM WITH A HANDGUN WAS BACK ON MAY 6th OF 1985.
>
> Q. ALL RIGHT. THE LAST TIME BEFORE THAT?
>
> A. BEFORE THAT, THAT WAS ABOUT MAYBE TWO YEARS AGO WHEN HE DRAWED IT ON—

Defendant's attorney intervened at this point, and the witness apologized and did not finish her answer. The prosecutor did not attempt to question the witness any further about the prior incident. Considering the brevity and incomplete nature of the exchange, the obvious hostility of the witness to defendant, the trial judge's action in instructing the witness to confine her responses to the question asked, and the prompt action of defendant's attorney, we do not believe that this interchange was sufficiently prejudicial to entitle defendant to a new trial. *See* N.C.G.S. § 15A-1443(a) (1983).

As to any error of the trial judge in allowing this line of questioning, defendant himself later testified on cross-examination that he had owned the gun used to shoot the victim in the instant case for about two years. He therefore waived his objection to this line of examination. *See State v. Welch*, 316 N.C. 578, 342 S.E. 2d 789 (1986).

Accordingly, we find no merit in defendant's second argument.

[3] Defendant next contends that the trial judge erred in refusing to allow him to introduce into evidence testimony of two employees of the Raleigh Housing Authority to the effect that defendant's supervisor had complained to them earlier on the day of the shooting that the deceased was harassing defendant and two other men working with him. The construction company for which defendant was working at the time of the shooting was finishing a job at the housing project where the deceased's fiancee lived. Defendant sought to have the two housing authority employees testify because the supervisor was unavailable. Attempts to subpoena him had failed, and defendant believed that he had moved to another state. The trial judge ruled the testimony inadmissible, but defendant was allowed to make an offer of proof.

We find no error in the trial judge's ruling. Rule 801(c) of the North Carolina Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C, Rule 801(c) (1986). Although defendant contends before this Court that he was offering the testimony of these two witnesses for the non-hearsay purpose of showing that a complaint was made, and that therefore the rule barring the admission of hearsay does not apply, examination of his argument shows its fallacy. The only value of the complaint to the defendant was its content, the fact that the deceased had been harassing defendant and his co-workers on the day of the shooting. In his argument before the trial judge and before this Court, defendant repeatedly contended that this evidence was relevant because it showed that an altercation between the deceased and defendant took place earlier in the day. Defendant was therefore seeking to have evidence of the supervisor's complaint introduced "to prove the truth of the matter asserted." The testimony of the two housing authority employees was therefore hearsay and inadmissible unless some exception applied. *See id.*; N.C.G.S. § 8C, Rule 802 (1986). No exception was argued before this Court.

[4] Defendant's final argument is that the trial judge failed to find as a mitigating factor that defendant acted under strong provocation. Although defendant's evidence, if believed, would support this factor, the testimony of the deceased's fiancee was to the contrary. The trial judge is not required to find a mitigating

factor where the evidence supporting it was contradicted. *See State v. Clark*, 314 N.C. 638, 336 S.E. 2d 83 (1985).

For all of the reasons discussed herein, we hold that defendant received a fair trial, free of prejudicial error.

No error.

KAREN CLODFELTER BRANKS v. DR. PAUL KERN AND ANIMAL EMERGENCY CLINIC, P.A.

No. 662PA86

(Filed 3 September 1987)

Negligence § 30.1— cat bite during treatment by veterinarian—insufficient evidence of negligence

In an action to recover for injuries received by plaintiff invitee when her cat bit her while the cat was undergoing a catheterization by defendant veterinarian, plaintiff's forecast of evidence was insufficient to enable the jury to find that defendant veterinarian violated a duty of care to plaintiff by failing to restrain plaintiff's cat or by failing to warn plaintiff of the risks of remaining in close proximity to the cat during the procedure where it showed that plaintiff was in as good a position as the veterinarian to appreciate the danger that the cat would try to bite someone in his immediate vicinity, and plaintiff's own testimony established that, before the cat bit plaintiff, he had been unambiguously revealed as a hazard to anyone of ordinary intelligence when he tried to bite the veterinarian's assistant.

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

ON grant of defendants' petition for discretionary review of the decision of the Court of Appeals, 83 N.C. App. 32, 348 S.E. 2d 815 (1986), reversing summary judgment for defendants entered 9 December 1985 by *Lamm, J.* Heard in the Supreme Court 13 May 1987.

C. David Gantt, for plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Russell P. Brannon and Michelle Rippon, for defendant-appellant Kern, and Harrell and Leake, P.A., by Larry Leake, for defendant-appellant Animal Clinic.

FRYE, Justice.

Plaintiff sued her veterinarian after she was bitten by her own cat while it was being treated by the veterinarian. The Court of Appeals held that plaintiff had shown a sufficient forecast of evidence to enable a jury to find that the veterinarian violated a duty of due care to the plaintiff. We disagree and reverse the Court of Appeals' decision.

The plaintiff in the instant case owned a cat named Sam. Sam suffered from feline urethral syndrome, a condition common in neutered male cats, marked by inflammation of the bladder and the production of stones. These stones can completely block the cat's urethra and cause the cat's death if the blockage is not treated. The normal treatment is to catheterize the cat. Sam unfortunately suffered three or four such blockages. His last attack occurred on 21 April 1984. Plaintiff took him to defendant clinic for treatment. Plaintiff and Sam were shown into an examining room, where defendant Dr. Kern examined the cat. Dr. Kern determined that Sam needed to be catheterized once again.

Dr. Kern decided to attempt the catheterization without the use of an anesthetic. Plaintiff contends that the decision was the veterinarian's alone; defendants contend that plaintiff's reluctance to spend any more money on the cat entered into the decision to attempt the procedure without anesthesia. In any event, plaintiff does not contend that this decision was in any way medically improper. More importantly, plaintiff admits that Dr. Kern informed her beforehand of the decision. Thus, it is uncontroverted that plaintiff knew that no anesthetic was being used.

Dr. Kern instructed an assistant to hold the cat and began the catheterization. Sam kept squirming and trying to get away. Plaintiff testified in her deposition that she realized from his behavior that Sam was in pain, and moreover was in more pain than he had been during the two previous catheterizations. Plaintiff put her hands over Sam's paws to try to soothe him. As she described it, about five minutes into the procedure the assistant "let go" of Sam,[1] who promptly tried to bite the assistant. Dr.

1. Plaintiff's attorney argued before this Court that the veterinarian's assistant "dropped" the cat. However, plaintiff testified at her deposition that the cat was on the examining table when the assistant "let go." There is no basis for arguing that the assistant "dropped" the cat.

Kern stopped and made an unsuccessful attempt to put a muzzle on Sam. When this attempt failed, the assistant renewed his grip on the cat. Dr. Kern resumed his task, and plaintiff once more placed her hands over Sam's paws, a mere three inches away from the cat's face. About five minutes later, according to the plaintiff, the veterinarian's assistant once again "let go" of the squirming cat. This time, Sam snapped at the plaintiff and bit her hand.

Plaintiff's bite did not appear serious. The receptionist bandaged her hand. Dr. Kern meanwhile completed the catheterization. The treatment was successful, and the plaintiff took Sam home with her. During the night, her hand began to throb. She went to the emergency room for relief; there, the doctor discovered that Sam had severed a tendon in her hand. Plaintiff was hospitalized and treated for the severed tendon. While she was in the hospital, she decided to have Sam put to sleep to avoid any possible recurrence of the blockages.

Plaintiff initiated this action on 15 April 1985 by filing a complaint that alleged that her bite was the result of the defendants' negligence. Defendants each answered. They denied any negligence and asserted plaintiff's contributory negligence and assumption of the risk as further defenses. On 18 November 1985, each defendant moved for summary judgment. A hearing on these motions was held at the 9 December 1985 Session of Superior Court, BUNCOMBE County, before *Judge Lamm*, who entered summary judgment for defendants. Plaintiff appealed to the Court of Appeals, which reversed the trial judge's decision. Defendants allege that Dr. Kern warned the plaintiff not to let the cat bite her after the animal snapped at the veterinarian's assistant; plaintiff denied receiving any such warning. The Court of Appeals held, *inter alia*, that defendants' failure to restrain the cat and the factual controversy over the issuance of a warning were sufficient to take the case to the jury. We disagree.

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). As this Court remarked in *Koontz*, "An issue is

material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz*, 280 N.C. at 518, 186 S.E. 2d at 901. All inferences are to be drawn against the moving party and in favor of the opposing party. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379; *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897.

Defendants in the instant case have met their burden of showing that they are entitled to judgment as a matter of law.

Plaintiff contends, and defendants concede, that she was a business invitee. As such, defendants owed her a duty to exercise ordinary care for her safety while she was on the premises. *Little v. Oil Co.*, 249 N.C. 773, 107 S.E. 2d 729 (1959). This duty includes a duty to maintain the premises in a condition reasonably safe for the contemplated use and a duty to warn of hidden dangers known to or discoverable by the defendants. *Hedrick v. Tigniere*, 267 N.C. 62, 147 S.E. 2d 550 (1966); *see also Mazzacco v. Purcell*, 303 N.C. 493, 279 S.E. 2d 583 (1981). However, it has long been the law in North Carolina that there is no duty to warn an invitee of a hazard obvious to any ordinarily intelligent person using his eyes in an ordinary manner, or one of which the plaintiff had equal or superior knowledge. *See Wren v. Convalescent Home*, 270 N.C. 447, 154 S.E. 2d 483 (1967); *Grady v. Penny Co.*, 260 N.C. 745, 133 S.E. 2d 678 (1963); *Garner v. Greyhound Corp.*, 250 N.C. 151, 108 S.E. 2d 461 (1959); *Little v. Oil Co.*, 249 N.C. 773, 107 S.E. 2d 729. A business proprietor is not an insurer of an invitee's safety. *Wren v. Convalescent Home*, 270 N.C. 447, 154 S.E. 2d 483.

Initially, it may be said that plaintiff's knowledge that the cat might bite under these circumstances was equal or superior to the veterinarian's. Her evidence shows that it was obvious that poor Sam was in pain and that he was struggling to get away; indeed, she acknowledges that she realized this to be the case. The cat belonged to her. "Anyone with normal experience is required to have knowledge of the traits and habits of common animals . . . ." W. Prosser, *Handbook of the Law of Torts* § 33, 197-98 (5th ed. 1984). Plaintiff can therefore be expected to have known that any animal in pain may very well blindly strike out. She was in as good a position as the veterinarian to appreciate the danger that the cat would try to bite someone in his immediate vicinity.

In any event, the facts in the instant case clearly establish that the cat was an obvious hazard to anyone whose hands were only three inches away from its teeth. According to plaintiff's deposition testimony, a similar incident had occurred less than five minutes before the cat bit her; the veterinarian's assistant had "let go" of the squirming animal, who promptly snapped at the assistant. Plaintiff witnessed this incident. The assistant then renewed his grip on the cat, who continued to struggle and obviously continued to be in pain. Plaintiff's deposition testimony attests to Sam's continuing struggles; she also said that she realized when Sam tried to bite the assistant that he was in greater pain than he had been during his two previous catheterizations. Plaintiff's own testimony thus establishes that before the cat bit the plaintiff, he had been unambiguously revealed as a hazard obvious to anyone of ordinary intelligence. Plaintiff does not allege that she was under any disability in this respect. Accordingly, defendants were under no obligation to warn her to keep away from Sam. Even if plaintiff's account is taken as correct and the veterinarian failed to warn her not to let her pet bite her, defendants have violated no duty of care toward her. Because plaintiff's own evidence establishes the absence of a breach of duty on defendants' part, defendants have shown that no issue of material fact remains to be resolved in a trial. They are therefore entitled to judgment as a matter of law. The Court of Appeals thus erred in reversing the trial court's award of summary judgment for defendants.

For the reasons set forth in this opinion, the decision of the Court of Appeals is reversed.

Reversed.

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

STATE OF NORTH CAROLINA v. FLOYD RUFUS FIE AND STEVE HARVERSON

No. 389A86

(Filed 3 September 1987)

Judges § 5— recusal—standard of proof—letter asking grand jury consideration of charges against defendants

The appearance of a preconception by the trial judge concerning the validity of the charges against a defendant is sufficient to require that the trial judge be recused upon motion by defendants. Therefore, the trial judge should have been recused where the evidence showed that the judge had written a letter to the district attorney requesting that the grand jury be asked to consider eight criminal charges against one defendant and seven criminal charges against the second defendant based on testimony he had heard when presiding over the trial of a third person.

APPEAL by defendants of right pursuant to N.C.G.S. § 7A-30(2), from the decision of a divided panel of the Court of Appeals, reported at 80 N.C. App. 577, 343 S.E. 2d 248 (1986), affirming in part, reversing in part and arresting in part judgments entered by *Burroughs, Judge*, at the 29 August 1984 Criminal Session of HAYWOOD County Superior Court. Heard in the Supreme Court 16 April 1987.

The defendants appeal from a decision of the Court of Appeals in which a divided panel found no error in their convictions of conspiracy to commit breaking or entering and accessory before the fact to breaking or entering and larceny. Judge Wells dissented on the ground that the judge who tried the case should have been recused.

Prior to the trial of the case each defendant made a motion that Judge Burroughs be recused. In support of the motions, the defendants attached a copy of a letter Judge Burroughs had written to the district attorney requesting that the grand jury be asked to consider eight criminal charges against Floyd Fie and seven criminal charges against Steve Harverson. Judge Burroughs based his letter on testimony he had heard in the trial of Donna Rowe over which he had presided. That testimony indicated that the defendants in this case might be implicated in the charges for which Donna Rowe was tried. The defendants stated in their motions that by writing the letter, Judge Burroughs

showed his disbelief of their witnesses in the Rowe trial. These same witnesses were to testify at the defendants' own trials. The defendants stated that the letter indicated Judge Burroughs' partiality.

The motion to recuse was heard by Judge Downs who denied the motion. The majority in the Court of Appeals found no error in Judge Downs' order.

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

John E. Shackelford, for the defendant Floyd Rufus Fie.

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

WEBB, Justice.

This case brings to the Court the question of the standard to be applied when a defendant makes a motion that a judge be recused. Judge Martin in his concurring opinion in the Court of Appeals said that in his view "the burden is upon the party moving for disqualification to demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially." Judge Martin relied on *State v. Duvall*, 50 N.C. App. 684, 275 S.E. 2d 842, *rev'd on other grounds*, 304 N.C. 557, 284 S.E. 2d 495 (1981) and *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978). These cases support Judge Martin's position. Nevertheless, we also agree with Judge Wells that a party has a right to be tried before a judge whose impartiality cannot reasonably be questioned. Code of Judicial Conduct, Canon 3(C)1 (1973).

N.C.G.S. § 15A-1223 provides in pertinent part:

. . .

(b) A judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is:

> (1) Prejudiced against the moving party or in favor of the adverse party; or
>
> . . .
>
> (4) For any other reason unable to perform the duties required of him in an impartial manner.

It appears that under this section Judge Burroughs should not have been disqualified. This does not settle the matter. A judge may be disqualified for reasons other than those stated in the statute. We said in *Ponder v. Davis*, 233 N.C. 699, 706, 65 S.E. 2d 356, 360 (1951):

> It is not enough for a judge to be just in his judgment; he should strive to make the parties and the community feel that he is just; he owes this to himself, to the law and to the position he holds. . . . "The purity and integrity of the judicial process ought to be protected against any taint of suspicion to the end that the public and litigants may have the highest confidence in the integrity and fairness of the courts." (*Quoting, Haslam v. Morrison*, 113 Utah 14, 190 P. 2d 520.)

N.C.G.S. § 5A-15 which governs plenary proceedings for criminal contempt provides that if "the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge." The standard for a criminal trial should be as high as for a criminal contempt proceeding. *See State v. Mettrick*, 305 N.C. 383, 289 S.E. 2d 354 (1982).

When Judge Burroughs initiated the criminal process against the two defendants, a perception could be created in the mind of a reasonable person that Judge Burroughs thought the defendants were guilty of the crimes with which they were charged and that it would be difficult for the defendants to receive a fair and impartial trial before Judge Burroughs. It was thus error for Judge Downs not to recuse Judge Burroughs. This error requires a new trial.

We do not mean to imply that Judge Burroughs was actually prejudiced against the defendants or that he was in fact unable to preside fairly over the trial. The appearance of a preconception of

the validity of the charges against these defendants is sufficient to require a new trial.

New trial.

JOHN E. KEITH v. CHARLES H. DAY AND ACE TOWN & COUNTRY HARDWARE STORE, INC.

No. 474PA86

(Filed 3 September 1987)

ON discretionary review of the decision of the Court of Appeals, 81 N.C. App. 185, 343 S.E. 2d 562 (1986), affirming in part and reversing in part a judgment entered by *Lee, J.*, on 15 October 1985 in Superior Court, WAKE County, and remanding for entry of a new judgment. Heard in the Supreme Court on 13 April 1986.

McMillan, Kimzey, Smith & Roten by James M. Kimzey for plaintiff appellant.

Hunter, Wharton & Howell by John V. Hunter, III, for defendant appellees.

PER CURIAM.

After hearing oral argument and considering the new briefs, the Court concludes that 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

BLACK v. HIATT

No. 359P87.

Case below: 86 N.C. App. 111.

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

BOWEN v. LAURENS-PIERCE GLASS

No. 295P87.

Case below: 85 N.C. App. 720.

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

COUNTY OF WAKE v. K & K DEVELOPMENT

No. 337P87.

Case below: 85 N.C. App. 720.

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

DEVELOPMENT ENTERPRISES v. ORTIZ

No. 386P87.

Case below: 86 N.C. App. 191.

Petition by defendants and third-party plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 September 1987.

DRAIN v. UNITED SERVICES LIFE INSURANCE CO.

No. 230P87.

Case below: 85 N.C. App. 174.

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

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

HARDY v. INTEGON LIFE INS. CORP.

No. 269P87.

Case below: 85 N.C. App. 575.

Petitions by plaintiff and defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1987. Petition by all parties for writ of supersedeas and temporary stay denied 3 September 1987.

HARVEY v. RALEIGH POLICE DEPT.

No. 309P87.

Case below: 85 N.C. App. 540.

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

HAYMAN v. RAMADA INN, INC.

No. 432A87.

Case below: 86 N.C. App. 274.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and App. Rule 16(b) as to additional issues denied 3 September 1987.

HUYCK CORP. v. TOWN OF WAKE FOREST

No. 320PA87.

Case below: 86 N.C. App. 13.

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

IN RE APPLICATION OF MELKONIAN

No. 354P87.

Case below: 85 N.C. App. 351.

Petition by Board of Adjustment for discretionary review pursuant to G.S. 7A-31 denied 3 September 1987.

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

JONES v. LIBERTY FINANCIAL PLANNING

No. 357P87.

Case below: 86 N.C. App. 232.

Notice of appeal by plaintiffs pursuant to G.S. 7A-30 dismissed 3 September 1987. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 September 1987.

KNOTVILLE VOLUNTEER FIRE DEPT. v. WILKES COUNTY

No. 313P87.

Case below: 85 N.C. App. 598.

Petition by respondent (Broadway Fire Department, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 3 September 1987. Petition by respondent (Wilkes County) for discretionary review pursuant to G.S. 7A-31 dismissed 3 September 1987.

LAKE v. PHILLIPS INVESTMENT BUILDERS, INC.

No. 292P87.

Case below: 85 N.C. App. 538.

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

MCKINNEY v. MOSTELLER

No. 303PA87.

Case below: 85 N.C. App. 429.

Petition by defendant (Eugene Baker Willis) and several defendants for discretionary review pursuant to G.S. 7A-31 allowed 3 September 1987.

MILLER v. PARLOR FURNITURE

No. 305P87.

Case below: 85 N.C. App. 538.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1987. Notice of appeal by defendant pursuant to G.S. 7A-30 dismissed 3 September 1987.

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

PERKINS v. PERKINS

No. 332P87.

Case below: 85 N.C. App. 660.

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

PHILLIPS & JORDAN INVESTMENT CORP. v. ASHBLUE CO.

No. 385P87.

Case below: 86 N.C. App. 186.

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

ROBERTS v. BURLINGTON INDUSTRIES, INC.

No. 387PA87.

Case below: 86 N.C. App. 126.

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

ROBINSON v. N. C. FARM BUREAU INS. CO.

No. 323PA87.

Case below: 86 N.C. App. 44.

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

ROWLAND v. TERMINIX SERVICE

No. 296P87.

Case below: 85 N.C. App. 538.

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

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

SHELTON v. FAIRLEY

No. 389P87.

Case below: 86 N.C. App. 147.

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

SOUTHERN AUTO AUCTION v. DOT

No. 415P87.

Case below: 86 N.C. App. 232.

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

STATE v. BARROW

No. 331P87.

Case below: 86 N.C. App. 112.

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

STATE v. BROWN

No. 376P87.

Case below: 86 N.C. App. 232.

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

STATE v. CLAY

No. 308P87.

Case below: 85 N.C. App. 477.

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

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

STATE v. COLEY

No. 298P87.

Case below: 86 N.C. App. 112.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 3 September 1987.

STATE v. DAVENPORT

No. 390P87.

Case below: 85 N.C. App. 721.

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

STATE v. HAYES

No. 218PA87.

Case below: 85 N.C. App. 349.

Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 3 September 1987.

STATE v. HINSON

No. 307P87.

Case below: 85 N.C. App. 558.

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

STATE v. JEFFERS

No. 275P87.

Case below: 77 N.C. App. 239.

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

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

STATE v. MCLAUGHLIN

No. 284P87.

Case below: 86 N.C. App. 112.

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

STATE v. NASH

No. 285P87.

Case below: 85 N.C. App. 721.

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

STATE v. PARKER

No. 213P87.

Case below: 85 N.C. App. 172.

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

STATE v. PERRY

No. 410PA87.

Case below: 86 N.C. App. 233.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed solely as to conviction for possession of a firearm 3 September 1987.

STATE v. PRATT

No. 367P87.

Case below: 86 N.C. App. 112.

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

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

STATE v. THOMAS

No. 392P87.

Case below: 82 N.C. App. 682.

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

STATE v. VIKRE

No. 411P87.

Case below: 86 N.C. App. 196.

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

STATE v. WOODRUFF

No. 399P87.

Case below: 86 N.C. App. 233.

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

STATEN ISLAND HOSPITAL v.
ALEXANDER HOWDEN, LTD.

No. 268P87.

Case below: 85 N.C. App. 350.

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

STOKES v. WILSON AND REDDING LAW FIRM

No. 224P87.

Case below: 85 N.C. App. 173.

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

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

STONE v. MARTIN

No. 302P87.

Case below: 85 N.C. App. 410.

Petition by defendants (Martin and Sanderford) for discretionary review pursuant to G.S. 7A-31 denied 3 September 1987. Notice of appeal by defendants (Martin and Sanderford) pursuant to G.S. 7A-30 dismissed 3 September 1987.

VANDOOREN v. STROUD

No. 15P87.

Case below: 86 N.C. App. 234.

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

WARNER v. DUPEA

No. 371P87.

Case below: 86 N.C. App. 113.

Petition by defendant (Craft) for discretionary review pursuant to G.S. 7A-31 denied 3 September 1987. Notice of appeal by defendant (Craft) pursuant to G.S. 7A-30 dismissed 3 September 1987.

WELSH v. NORTHERN TELECOM, INC.

No. 271P87.

Case below: 85 N.C. App. 281.

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

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

PETITIONS TO REHEAR

DILLINGHAM v. YEARGIN CONSTRUCTION CO.

No. 638PA86.

Case below: 320 N.C. 499.

Petition by defendants denied 3 September 1987.

OLIVETTI CORP. v. AMES BUSINESS SYSTEMS, INC.

No. 418PA86.

Case below: 319 N.C. 534.

Petition by defendant denied 3 September 1987.

TOWN OF HAZELWOOD v. TOWN OF WAYNESVILLE

No. 43PA87.

Case below: 320 N.C. 89.

Petition by plaintiff denied 3 September 1987.

TOWN OF EMERALD ISLE, BY AND THROUGH ITS MAYOR, RICHARD SMITH, AND ITS DULY ELECTED BOARD OF COMMISSIONERS, AND RICHARD SMITH, A. B. CREW, BEULAH PASE, AND WALT GASKINS, INDIVIDUALLY v. THE STATE OF NORTH CAROLINA, JAMES B. HUNT, GOVERNOR, RUFUS EDMISTEN, ATTORNEY GENERAL, JAMES A. SUMMERS, SECRETARY OF THE DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT, AND JANE S. PATTERSON, SECRETARY OF THE DEPARTMENT OF ADMINISTRATION

No. 111A86

(Filed 7 October 1987)

1. **Constitutional Law § 4; Declaratory Judgment Act § 4— legislative act establishing beach access—standing to challenge**

The Town of Emerald Isle had standing to bring a declaratory judgment action challenging an act of the Legislature providing for public beach access facilities in a particular location where the act provided that the Town would be responsible for maintaining the facilities. The individual plaintiffs also had standing because the act requires the expenditure of public funds. N.C.G.S. § 1-254.

2. **Statutes § 2.1— disctinction between general and local act—test applied**

The traditional reasonable classification analysis previously applied in determining what constitutes a "local act" in *Adams v. Dept. of N.E.R.*, 295 N.C. 683, was ill suited to a case involving a legislative enactment establishing public pedestrian beach access facilities at a particular location at Bogue Inlet, and the Supreme Court instead focused its attention on the extent to which the act affected general public interests and concerns. Art. II, § 24 of the North Carolina Constitution.

3. **Statutes § 2.4— legislative act establishing particular public beach access—not a local act**

A legislative enactment establishing particular public beach access facilities in order to promote the general public welfare of the State does not constitute a local act within the meaning of Art. XIV, § 3, of the North Carolina Constitution. By directing the establishment of public pedestrian beach access facilities, the Legislature sought to promote the general public welfare by preserving the beach area for general public pedestrian use.

4. **Constitutional Law § 19— exclusive emolument or privilege**

A statute which confers an exemption that benefits a particular group of people is not an exclusive emolument or privilege if the exemption is intended to promote the general welfare rather than the benefit of the individual and there is a reasonable basis for the Legislature to conclude the granting of the exemption serves the public interest. Art. I, § 32 of the North Carolina Constitution.

5. **Constitutional Law § 19; Statutes § 2.4— limitation of vehicular traffic on specific portion of beach—not exclusive emolument or privilege**

A legislative act establishing pedestrian beach access facilities and limiting vehicular traffic over Blocks 51 thru 54 of the Town of Emerald Isle

was intended to promote the general welfare in that the intent of the act was to reserve the ocean beaches on the western portion of the Town of Emerald Isle for public pedestrian use, and there was a reasonable basis for closing only the ocean front beach dunes area of Blocks 51 thru 54 in that the act restricted vehicular traffic in the areas where such traffic was likely to cause the most interference with public pedestrian use of the beach. Art. I, § 32 of the North Carolina Constitution.

6. Constitutional Law § 23— closing of right of way—no taking of vested property rights without due process

A legislative act establishing pedestrian beach access facilities and closing a particular highway right of way at Emerald Isle did not deprive the Town of Emerald Isle of its vested property rights in the beach access ramp right of way without due process of law because the power of municipal corporations to regulate the use of public streets arises through a legislative grant of authority and is subject to the authority of the General Assembly. Art. I, § 19 of the North Carolina Constitution; N.C.G.S. § 160A-296(a)(5).

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

Justice MEYER dissenting.

APPEAL of right by defendants, pursuant to N.C.G.S. § 7A-30(2), from the decision of a divided panel of the Court of Appeals, 78 N.C. App. 736, 338 S.E. 2d 581 (1986), affirming in part and reversing in part the trial court's grant of plaintiffs' motion for summary judgment in a declaratory judgment action challenging the constitutionality of 1983 N.C. Sess. Laws ch. 539, § 1, entered 8 February 1985 in Superior Court, CARTERET County. Defendants' petition for discretionary review of additional issues was allowed 6 May 1986. Heard in the Supreme Court 11 December 1986.

Stanley, Simpson & McNeill, by Richard L. Stanley, for plaintiff-appellees.

Lacy H. Thornburg, Attorney General, by Daniel F. McLawhorn, Assistant Attorney General, for defendant-appellants.

FRYE, Justice.

The question in this case is whether Chapter 539 of the 1983 Session Laws of North Carolina entitled, "An Act to Provide for Reasonable Beach Access Within the Town of Emerald Isle,"

violates Article XIV, section 3; Article I, section 32; or Article I, section 19 of the North Carolina Constitution. We conclude that it does not.

The Town of Emerald Isle, one of the plaintiffs in this case, is a municipality located on Bogue Banks, Carteret County, North Carolina, and has approximately eight miles of frontage on the Atlantic Ocean and Bogue Sound.

The owners of property located within the Town of Emerald Isle, at the western end and in close proximity to Bogue Inlet, developed their respective properties, each consisting of a large tract of land fronting approximately 1100 feet on the Atlantic Ocean and running from the Atlantic Ocean to Bogue Sound on the north into Blocks 51, 52 and 53. The subdividers caused subdivision plats for Blocks 51, 52 and 53 to be recorded in the Carteret County Registry. These subdivision plats indicate individual subdivision lots, streets, roads and alleys within Blocks 51, 52 and 53. Inlet Drive is one of the subdivision streets shown on the recorded plats of Blocks 52 and 53, Town of Emerald Isle. The approval and recordation of the subdivision plats for Blocks 51, 52 and 53 constituted an offer for dedication of these streets, roads, and alleys, including Inlet Drive, to the Town of Emerald Isle and to the general public as public streets, roads and alleys. Inlet Drive, as shown on the recorded plats of Blocks 52 and 53, has been accepted, repaired and maintained as a town street as part of the municipal street system pursuant to N.C.G.S. § 136-66.1(2). In addition, Inlet Drive is among the town streets, roads and alleys for which the Town of Emerald Isle receives Powell Bill Funding for municipal roads and streets.

In 1982, the Town obtained a permit from the State and constructed a vehicular ramp over the sand dunes and accreted lands at the western end of Inlet Drive at a point where the paved surface of Inlet Drive had eroded away. The vehicular ramp was constructed on accreted lands within the extended bounds of the right-of-way of Inlet Drive. After completion of the ramp, vehicles could travel westerly over Inlet Drive and the vehicular ramp to the beach areas within Blocks 53 and 54. Pedestrians were also allowed access to the beaches through the right-of-way.

The Town's Beach Access Ordinance regulates the entrance and travel of vehicles on the beaches. Under its terms, vehicles

are allowed to gain access to the Emerald Isle beaches through certain designated access points, and once access is gained vehicular travel is limited to certain marked streets and areas of the beach.

On 16 June 1983, the North Carolina General Assembly enacted Chapter 539 of the 1983 Sessions Laws. Section 1 of the act provides as follows:

> The Department of Natural Resources and Community Development, in cooperation with the Town of Emerald Isle, is hereby directed to acquire real property by purchase or condemnation, make improvement for and maintain facilities for the provision of public pedestrian beach access in the vicinity of Bogue Inlet. The town shall not be required to expend local funds to acquire real property, but shall be responsible for maintaining the facility. Public beach access facilities in the vicinity of Bogue Inlet shall include parking areas, pedestrian walkways, and rest room facilities, and may include any other public beach access support facilities. Insofar as is feasible, said facility shall include all lands inletward of the dune adjacent to the terminus of Inlet Drive and the adjacent portion of Bogue Court, as well as such adjacent properties necessary to provide adequate parking and support facilities. Notwithstanding any other law or authority to the contrary, beach access facilities in the vicinity of Bogue Inlet after the installation of said public pedestrian beach access facility shall not include facilities for vehicular access to the beach, including but not limited to the use of the Inlet Drive right-of-way for vehicular access; provided that such prohibition shall not apply until the pedestrian beach access facility is opened; after the installation of said public pedestrian beach access facility, motor vehicles are hereby prohibited from being operated on the ocean beaches and dunes adjacent to and within Blocks 51, 52, 53 and 54 of Emerald Isle; provided that this vehicular access prohibition shall not apply to reasonable access by public service, police, fire, rescue or other emergency vehicles.

In essence, the act directs the Department of Natural Resources, in cooperation with the Town of Emerald Isle, to acquire real property (in the vicinity of Bogue Inlet) which sur-

rounds the vehicle access ramp. The Department is also directed to build facilities for public pedestrian beach access to the property. Once the facilities are completed, the act prohibits motor vehicular traffic in the four blocks adjacent to the facilities and limits the use of the existing vehicle access ramp to public service and emergency vehicles and pedestrians.

Plaintiff Town of Emerald Isle, along with the four individual plaintiffs, property owners and taxpayers of the Town of Emerald Isle, two of whom possess beach access permits issued by the Town authorizing vehicular access to the ocean and inlet beaches, brought this declaratory judgment action to challenge the constitutionality of 1983 N.C. Sess. Laws, ch. 539, § 1. Plaintiffs and defendants stipulated facts essentially as set out above and both moved for summary judgment.

The trial court granted plaintiffs' motion for summary judgment on the following grounds:

> (1) Chapter 539 violates the North Carolina Constitution, Article II, section 24(1)(c) prohibition against local acts which authorize "the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys."
>
> (2) Chapter 539 is a special or local act concerning subject matter directed or authorized to be accomplished by general laws, in violation of the North Carolina Constitution, Article XIV, section 3.
>
> (3) Chapter 539 grants an exclusive emolument or privilege to property owners along the beach where vehicles are to be prohibited, in violation of the North Carolina Constitution, Article I, section 32.
>
> (4) Chapter 539 takes the vested property right of plaintiff Town in the dedicated right-of-way of Inlet Drive without due process of law as required by the North Carolina Constitution, Article I, section 19.

The court held that the parts of Chapter 539 which it held unconstitutional could be severed from the rest of the Chapter. The court also ordered the defendants to comply with those parts of the Chapter which it had not held to be unconstitutional. Defendants appealed.

On appeal, the Court of Appeals affirmed the trial court's determination that Chapter 539 was a local act in violation of Article II, section 24 of the North Carolina Constitution. The Court of Appeals, however, reversed that portion of the trial court's decision allowing severance of the unconstitutional sections of the act and held that the act could not be severed. Thus, having determined that the act violated Article II, section 24 of the North Carolina Constitution, the Court of Appeals passed no judgment on the trial court's ruling that the act violates other provisions of the North Carolina Constitution.

Dissenting, Judge Phillips disagreed with the majority opinion that the act violates Article II, section 24 of the North Carolina Constitution. Noting that the act expressly permits the street to continue to be used as a way by the general public, he was of the opinion that Chapter 539 is a reasonable regulation restricting the use of, but not discontinuing a street within the meaning of the constitutional prohibition.

Concurrent with its notice of appeal of right pursuant to N.C.G.S. § 7A-30(2), defendants petitioned this Court for discretionary review of the constitutional challenges to Chapter 539 which the Court of Appeals did not address. Defendants' petition was allowed on 6 May 1986.

I.

[1] We first address the issue of plaintiffs' standing to bring this action for declaratory judgment under N.C.G.S. § 1-254 (1983). The statute provides as follows:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof. (1931, c. 102, s.2)

An action may not be maintained under the Declaratory Judgment Act to determine rights, status, or other relations

unless the action involves a present actual controversy between the parties. *Greensboro v. Wall*, 247 N.C. 516, 101 S.E. 2d 431 (1957). Plaintiff is not required to allege or prove that a traditional "cause of action" exists against defendant in order to establish an actual controversy. *Sharpe v. Park Newspaper of Lumberton*, 317 N.C. 579, 347 S.E. 2d 25 (1986). However, it is a necessary requirement of an actual controversy that the litigation appear to be unavoidable. *Id.*

> The essential distinction between an action for Declaratory Judgment and the usual action is that no actual wrong need have been committed or loss have occurred in order to sustain the declaratory judgment action, but there must be no uncertainty that the loss will occur or that the asserted right will be invaded.

22 Am. Jur. 2d, *Declaratory Judgments* § 1.

A declaratory judgment may be used to determine the construction and validity of a statute. *City of Raleigh v. Norfolk Southern Railway*, 275 N.C. 454, 168 S.E. 2d 389 (1969). Denials of property rights or fundamental human rights, in violation of constitutional guarantees, also may be challenged in a declaratory judgment action when a specific provision of a statute is challenged by a person directly and adversely affected thereby. *Jernigan v. State*, 279 N.C. 556, 184 S.E. 2d 259 (1971). In addition, a municipality may have its rights and obligations determined in a declaratory judgment action. *Board of Managers v. Wilmington*, 237 N.C. 179, 74 S.E. 2d 749 (1953).

Turning now to the issue of standing in the instant case, we note that both the State and plaintiffs agree that plaintiff Town has standing to raise the constitutional question whether the act is general or local. We agree. In *Board of Managers v. Wilmington*, 237 N.C. 179, 74 S.E. 2d 749, this Court held that a declaratory judgment proceeding was available to determine the obligation of a municipality to make payments to a hospital under acts of the legislature. Similarly, the Town of Emerald Isle has standing to challenge the act here, since the act provides that the Town shall be responsible for maintaining facilities for the provision of public pedestrian beach access.

The parties disagree, however, on the standing of the individual plaintiffs to challenge the validity of the act. The in-

dividual plaintiffs in this case are taxpayers and property owners in the Town of Emerald Isle. The act in question provides that although "[t]he town shall not be required to expend local funds to acquire real property, [it] shall be responsible for *maintaining* the facility." (Emphasis added.) The act, in directing the Town to maintain the facility, appears to require the expenditure of public funds. A taxpayer in this State has standing to challenge the validity of an act which requires the expenditure of public funds on grounds that the act violates the North Carolina Constitution. *See Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E. 2d 665 (1970). *See also Mitchell v. Financing Authority*, 273 N.C. 137, 159 S.E. 2d 745 (1968); *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E. 2d 888 (1961); *Dennis v. Raleigh*, 253 N.C. 400, 116 S.E. 2d 923 (1960). Therefore we hold that the individual plaintiffs have standing to challenge the act under the North Carolina Constitution.

II.

The scope of judicial review of challenges to the constitutionality of legislation enacted by the General Assembly is clear. As this Court stated in *Glenn v. Board of Education*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936):

> It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.

It is not the role of this Court to pass judgment on the wisdom and expediency of a statute. As this Court has recognized:

> The members of the General Assembly are representatives of the people. The wisdom and expediency of a statute are for the legislative department, when acting entirely within constitutional limits. The courts will not disturb an act of the law-making body unless it runs counter to a constitutional limitation or prohibition.

McIntyre v. Clarkson, 254 N.C. 510, 515, 119 S.E. 2d 888, 891-92.

III.

Plaintiffs first contend that the act violates Article XIV, section 3 of the North Carolina Constitution. This portion of our constitution provides, in pertinent part, that "no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws." The act in question, according to plaintiffs, is a local act. They assert, furthermore, that various provisions of the act concern the subject matter directed or authorized to be accomplished by general or uniformly applicable laws. Specifically plaintiffs urge that the act violates:

1) Article II, section 24(a)(c), which prohibits the enactment of local laws "[a]uthorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys";

2) Article V, section 2(5), which provides that "[t]he General Assembly shall not authorize any county, city, or town, special district, or other unit of local government to levy taxes on property, except for purposes authorized by general law uniformly applicable throughout the State, unless the tax is approved by a majority of the qualified voters of the unit who voted thereon";

3) Article XIV, section 5, which requires that the General Assembly by general law prescribe the conditions and procedures by which certain property shall be dedicated for the purpose of conserving natural resources including the State's beaches; and

4) Article V, section 4(1), which provides that the General Assembly shall enact general laws relating to the contracting of debts by cities and towns.

[2] First we must determine whether Chapter 539 of the 1983 Session Laws is a local act. If a local act, only then must we consider whether it is an act "concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws" in violation of Article XIV, section 3. An act which is not a local act, however, is a general law, *see Smith v. County of Mecklenburg*, 280 N.C. 497, 187 S.E. 2d 67 (1972), and thus does not violate Article XIV, section 3.

This Court, in *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 249 S.E. 2d 402 (1978), set forth the test for distinguishing general laws from local acts, stating that

> the distinguishing factors between a valid general law and a prohibited local act are the related elements of reasonable classification and uniform application. A general law defines a class which reasonably warrants special legislative attention and applies uniformly to everyone in the class. On the other hand, a local act unreasonably singles out a class for special legislative attention or, having made a reasonable classification, does not apply uniformly to all members of the designated class. In sum, the constitutional prohibition against local acts simply commands that when legislating in certain specified fields the General Assembly must make rational distinctions among units of local government which are reasonably related to the purpose of the legislation. A law is general if 'any rational basis reasonably related to the objective of the legislation can be identified which justifies the separation of units of local government into included and excluded categories.' Ferrell, 'Local Legislation in the North Carolina General Assembly,' 45 N.C.L. Rev. 340, 391 (1967).

Id. at 690-91, 249 S.E. 2d at 407.

Adams involved a challenge to the Coastal Area Management Act of 1974, which established a cooperative program of coastal area management between local and state governments, on grounds that it constituted a local act in violation of Art. II, § 24 of the North Carolina Constitution. Plaintiffs contended first that the General Assembly could not reasonably distinguish between the coast and the remainder of the State when enacting environmental legislation; and secondly that even if the coast could be dealt with separately, the twenty counties covered by the act did not embrace the entire area necessary for the purposes of the legislation. The Court in *Adams*, however, after recognizing the legislative findings that "North Carolina's coastal area has an extremely high recreational and esthetic value which should be preserved and enhanced," *id.* at 692, 249 S.E. 2d at 407, concluded that the "nature of the coastal zone and its significance to the public welfare amply justify the reasonableness of special legislative treatment." *Id.* at 693, 249 S.E. 2d at 408. Additionally, the Court held that the areas included in the act were reasonably related to the purposes of the act, noting that the "constitutional prohibition against local legislation does not require a perfect fit; rather, it requires only that the legislative definition be reason-

ably related to the purpose of the Act." *Id.* at 694, 249 S.E. 2d at 409.

Similar to contentions made by the plaintiffs in *Adams*, plaintiffs here contend that Chapter 539 is a local act arbitrarily separating the Bogue Point area from the rest of the State. The instant case presents the question of whether a legislative enactment establishing particular public pedestrian beach access facilities constitutes a local act, a question not previously decided by this Court.[1] In *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E. 2d 888, this Court recognized the futility of adhering to any universally applicable formula for determining whether an act is local. The Court notes that "[t]he factors are so variable that no exact rule or formula capable of constant application can be devised for determining in every case whether a law is local, private or special or whether general." *Id.* at 517, 119 S.E. 2d at 893.

We find that the traditional reasonable classification analysis previously applied by this Court in determining what constitutes a "local act" in *Adams* is ill-suited to the question presented in this case, since by definition a particular public pedestrian beach access facility must rest in but one location. Furthermore, assuming the legislature acts within its authority when it establishes such facilities by legislative action, we find it unnecessary to require it to do so by crafting tortured classifications.

The primary purpose of the constitutional limitation on legislative enactments of local acts is to allow the General Assembly an opportunity to devote more time and attention to legislation of state-wide interest and concern. *See* Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C.L. Rev. 340 (1967); *see also McIntyre v. Clarkson*, 254 N.C. 510, 119

1. The General Assembly by rule classifies bills as public or local. A public bill is a bill affecting fifteen or more counties. A local bill is one affecting fewer than fifteen counties. *See* N.C. House R. 35(b) (1987). The designation of a bill as public or local by rule of the General Assembly is not determinative of whether a bill is a general law or a local law under the North Carolina Constitution. *See generally* Coates, *The Problem of Private, Local and Special Legislation and City and County Home Rule in North Carolina*, Popular Government, Feb.-Mar. 1949, p. 6; Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C.L. Rev. 340 (1966-67).

S.E. 2d 888.[2] Accordingly we find that, instead of applying a reasonable classification analysis, our attention should focus on the extent to which the act in question affects the general public interests and concerns. In doing so, we are aware that "a statute will not be deemed private merely because it extends to particular localities or classes of persons." *Yarborough v. Park Commission*, 196 N.C. 284, 291, 145 S.E. 563, 568 (1928).

[3] We believe that a legislative enactment establishing particular public beach access facilities in order to promote the general public welfare of the State does not constitute a local act within the meaning of Art. XIV, § 3 of the North Carolina Constitution. Specifically, we hold that the act in question, the purpose of which is to establish pedestrian beach access facilities for general public use in the vicinity of Bogue Inlet, is not a local act. As this Court recognized in *Adams*, the coastal areas of North Carolina are among the State's most valuable resources. That Court found, in essence, that the need to preserve and enhance the enormous recreational and esthetic value of the coastal area was of such significance to the public welfare as to justify special legislative treatment.

The stipulated facts in this case disclose that the ocean front and inlet beaches within the Town of Emerald Isle are frequented on a regular basis by numerous sport fishermen operating vehicles on the beaches. These beach areas adjacent to Bogue Inlet in particular are noted for excellent fishing, and annually attract numerous fishermen. Because no parking is available within two miles of the vehicle access ramp in this area, many of the fishermen are forced to drive along the beaches in order to gain access to the fishing areas.

Chapter 539, however, created a public facility in the vicinity of Bogue Inlet. By directing the establishment of public

2. Assuming that a policy motivation behind the local law—general law distinction is, as the dissent suggests, to dissuade legislators from enacting legislation that concerns only their districts and to promote statewide interests, our decision today is within the spirit of this policy concern. We believe the tantamount concern of the state legislature is to provide for the general welfare of the State. To this end, all laws enacted by the legislature must be weighed against this primordial concern. Therefore, we find the standard applied today, a public interest and concern standard, to be wholly consistent with the policy concern espoused by the dissent.

pedestrian beach access facilities including parking areas, pedestrian walkways, and restroom facilities, the legislature by this act has sought to promote the general public welfare by preserving the beach area for general public pedestrian use. We do not believe that Art. XIV, § 3 of the North Carolina Constitution was intended to deprive the legislature of its authority to so act in the interest of promoting the general public welfare.

Furthermore, plaintiffs present before this Court nothing which suggests the absence of a rational basis for the General Assembly's selection of the Bogue Inlet area as the site for public pedestrian beach access facilities proposed by the act. Additionally, we find nothing in the record to support a conclusion that the site was chosen on an improper basis or in any arbitrary manner or that the particular site is unsuited for the intended purpose. We hold therefore that Chapter 539, which provides for the establishment and maintenance of public pedestrian beach access facilities in the vicinity of Bogue Inlet, is a general law and not a local act. We need not determine whether the act regulates one of the subject matters directed or authorized to be accomplished by general law. Since the act is general law and not a local act, it does not violate Art. XIV, § 3 of the North Carolina Constitution.

IV.

Plaintiffs next contend that the act confers a constitutionality prohibited exclusive emolument. Article I, section 32 of the North Carolina Constitution provides that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public service." According to the plaintiffs, the act grants the oceanfront property owners within Blocks 51 thru 54 a special privilege or exclusive emolument in that they do not have the use and enjoyment of their oceanfront property infringed upon or restricted by the public's right to use motor vehicles on the public trust portions of such property. Plaintiffs contend that oceanfront property owners on Blocks 1 thru 50 however are granted no such privilege, since the act does not prohibit vehicular beach access over these areas.

An examination of the prior decisions of this Court reveals that "not every classification which favors a particular group of persons is an 'exclusive or separate emolument or privilege' within the meaning of the constitutional prohibition." *Lowe v.*

Tarble, 312 N.C. 467, 470, 323 S.E. 2d 19, 21 (1984) (statute providing for the assessment of prejudgment interest only against those defendants covered by liability insurance does not grant exclusive or separate emoluments within the meaning of the constitutional prohibitions); *See Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983) (statute of repose protecting certain groups in the building industry from liability does not grant an unconstitutional exclusive or separate emolument); *State v. Knight*, 269 N.C. 100, 152 S.E. 2d 179 (1967) (statute exempting individuals engaged in certain occupations from jury duty does not violate constitutional prohibition against exclusive or separate emoluments).

As this Court has repeatedly stated, the limitation on the classification of particular groups of persons intended by the exclusive emolument provision contained in Article I, section 32 of our constitution

> does not apply to an exemption from a duty imposed upon citizens generally if the purpose of the exemption is the promotion of the general welfare, as distinguished from the benefit of the individual, and if there is a reasonable basis for the Legislature to conclude that the granting of the exemption would be in the public interest. Here, as in questions arising under the exercise of the police power pursuant to the requirement of due process of law, the principle to be applied is that declared by Moore, J., for the Court, in *State v. Warren*, 252 N.C. 690, 114 S.E. 2d 660 [1960], where it said:
>
> > "The presumption is that an act passed by the Legislature is constitutional, and it must be so held by the courts unless it appears to be in conflict with some constitutional provision. [Citations omitted.] The legislative department is the judge, within reasonable limits, of what the public welfare requires, and the wisdom of its enactments is not the concern of the courts. As to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts—it is a political question. The mere expediency of legislation is a matter for the Legislature, when it is acting entirely within constitutional limitations, but whether it is so acting is a matter for the courts. [Citations omitted.]"

Lowe v. Tarble, 312 N.C. at 470-71, 323 S.E. 2d at 21. *See also Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 438-39, 302 S.E. 2d 868, 879; *State v. Knight*, 269 N.C. 100, 108, 152 S.E. 2d 179, 184.

[4] In sum, a statute which confers an exemption that benefits a particular group of persons is not an exclusive emolument or privilege within the meaning of Article I, section 32, if: (1) the exemption is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest.

[5] First, we must determine whether the limitation on vehicular traffic over Blocks 51 thru 54 as provided in the act was intended to promote the general welfare. In ascertaining the intent, the Court should consider the language of the statute, the spirit of the act and what the act seeks to accomplish. *Stephenson v. Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972).

It appears that the intent of this act is to reserve the ocean beaches on the western portion of the Town of Emerald Isle for public pedestrian use. The act provides for the establishment of public pedestrian beach access facilities, including public parking areas at the western terminus of Inlet Drive located in Block 53. Also, the act restricts vehicular traffic over the beach access ramp and surrounding Blocks 51 thru 54, located at the western end of the Town. The restriction on motor vehicular travel within Blocks 51 thru 54 promotes the general welfare of the public since it protects users of the pedestrian beach access facilities from the unnecessary hazards which arise when the adjacent beach areas are used by pedestrians and vehicles. With this intention in mind, however, we must next consider whether there is a reasonable basis for concluding that the restriction on vehicular traffic within Blocks 51 thru 54 serves the public interest.

Plaintiffs contend that there is no reasonable basis for closing only the oceanfront beach dunes area of Blocks 51 thru 54. Plaintiffs' argument here is essentially that if the intent of the legislature was to protect the users of the beach facilities from the hazards accompanying pedestrian and motor vehicle use of the beach, then vehicular traffic should have been similarly restricted on the soundfront beaches adjoining and immediately

north and east of the proposed facility as well as the remaining ocean beaches. We cannot agree. First, we reject the plaintiffs' contention that, since the purpose of the act may also be served by limitations on areas not included in the act, there is no rational basis related to the purpose of the act for the limitations placed on vehicular access of Blocks 51 thru 54. This Court, borrowing from equal protection analysis, in response to a similar argument in *Adams v. Dept. N.E.R. and Everett v. Dept. N.E.R.*, 295 N.C. 683, 693, 249 S.E. 2d 402, 408 held that

> '[T]here is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the Legislature must be held rigidly to the choice of regulating all or none . . . . It is enough that the present statute strikes all the evil where it is felt, and reaches the class of cases where it most frequently occurs.' *Silver v. Silver*, 280 U.S. 117, 74 L.Ed. 221, 50 Ct. 57 (1929). *See generally, Mobile Home Sales v. Tomlinson*, 276 N.C. 661, 174 S.E. 2d 542 (1970).

This analysis, we find, is equally applicable in determining whether there is a reasonable basis for the legislature's restriction in the instant case on vehicular traffic within Blocks 51 thru 54. The restriction on vehicular travel imposed by Chapter 539 reasonably serves the public interest intended here since it restricts vehicular traffic in the areas where such traffic is likely to cause the most interference with public pedestrian use of the beach. The record reflects that the ocean and inlet beaches, not the sound beaches, "are frequented on a regular basis by numerous sport fishermen operating vehicles on the beaches." In addition, Blocks 51 thru 54, located at the western end of the Town immediately adjacent to the public pedestrian beach access facility provided for in the act, are thereby, for the purposes of this act, distinct from other coastal beach areas.

We hold, therefore, that the restrictions on vehicular traffic contained in the act are intended to promote the general welfare of the public and are reasonably based to further this intent. Thus, these restrictions do not violate Art. I, § 32 of the North Carolina Constitution.

V.

[6] We next consider plaintiffs' contention that the act deprives the Town of its vested property rights in the beach access ramp

right-of-way without due process of law in violation of Article I, section 19 of the North Carolina Constitution. This section provides, in pertinent part, that, "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." The phrase "the law of the land" is equivalent to "due process of law." *State v. Collins*, 169 N.C. 323, 84 S.E. 1049 (1915).

The Town claims a vested property right or interest in the access right-of-way and extension of Inlet Drive containing the beach access ramp. This right, according to the Town, arose when the right-of-way and extension of Inlet Drive were dedicated to the Town by subdivision owners. The Town contends that it holds this property right in trust for the general public and that the act, by prohibiting motor vehicle traffic over the vehicular access ramp and the Inlet Drive right-of-way, deprives the public and most importantly property owners on the inlet side of the access ramp of the use of the Inlet Drive right-of-way. The Town maintains that the failure of the State to effectuate this taking in accordance with eminent domain proceedings contained in N.C.G.S. Chapter 40-A constitutes a denial of due process in violation of Article I, section 19 of the North Carolina Constitution.

We agree, however, with the State that the Town's contentions here are based on the erroneous assumption that it has the exclusive and ultimate ability to determine the use of streets and beaches within a municipality. Municipal corporations, including the Town of Emerald Isle, are agencies created by the State and have no governmental power or authority except that which has been expressly or impliedly granted by the legislature. *See State v. Furio*, 267 N.C. 353, 148 S.E. 2d 275 (1966); *State v. McGraw*, 249 N.C. 205, 105 S.E. 2d 659 (1958); *Clayton v. Tobacco Co.*, 225 N.C. 563, 35 S.E. 2d 691 (1945). Powers conferred on the municipal corporation may be enlarged, abridged or entirely withdrawn by the legislature at its pleasure. *Clayton v. Tobacco Co.*, 225 N.C. 563, 35 S.E. 2d 691.

The power of municipal corporations to regulate the use of public streets arises through a legislative grant of authority at N.C.G.S. § 160A-296(a)(5). *Elizabeth City v. Banks*, 150 N.C. 407, 64 S.E. 189 (1909). However, that power is subject to the authority of the General Assembly to regulate the use and control of public roads and streets. *Suddreth v. Charlotte*, 223 N.C. 630, 27 S.E. 2d 650 (1943).

This Court has previously held that "the control of streets is primarily a State duty, and the legislative control, in the absence of constitutional restriction, is paramount, subject to the property rights and easements of the abutting owner." *Clayton v. Tobacco Co.*, 225 N.C. at 566, 35 S.E. 2d at 693. The reasoning behind the principle was fully established in *Elizabeth City v. Banks*, 150 N.C. 407, 64 S.E. 189. Basically, the control of streets exercised by the legislature is necessary to assure that the streets are used for the benefit of the public at large, not simply for the benefit of the public as it is determined by the local authorities. This Court, in *Elizabeth City* explained that:

> 'Public streets, squares and commons, unless there be some special restriction when the same are dedicated or acquired, are for the *public* use, and the use is none the less for the *public at large*, as distinguished from the municipality, because they are situated within the limits of the latter, and because the Legislature may have given the supervision, control and regulation of them to the local authorities. The Legislature of the State represents the public at large, and has, in the absence of special constitutional restraint, and subject to the property rights and easements of the abutting owners, full and paramount authority over all public ways and public places.'

Id. at 413, 64 S.E. at 191. (Citations omitted.) (Emphasis in original.)

The plaintiffs here do not allege any property right or easements of owners of property abutting Inlet Drive or any applicable constitutional provision which restricts the paramount legislative authority to regulate the use and control of public streets. Thus, the regulation of the use of Inlet Drive is within the paramount authority of the legislature and does not constitute a taking in violation of Article I, section 19 of the North Carolina Constitution.

We conclude that Chapter 539 of the 1983 Session Laws of North Carolina does not violate sections 19 or 32 of Article I nor section 3 of Article XIV of the Constitution of North Carolina. The decision of the Court of Appeals is therefore reversed. This case is remanded to that court for further remand to the Supe-

rior Court, Carteret County, for further proceedings consistent with this opinion.

Reversed and remanded.

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

Justice MEYER dissenting.

The majority holds that, because Chapter 539 of the 1983 Session Laws of North Carolina is a general rather than a local act, it does not violate the North Carolina Constitution. In reaching its decision, the majority employs a wholly new and unsupported standard and makes meaningless a century-old and important distinction between local and general legislation in North Carolina. In fact, Chapter 539 is a local act through and through and, as such, violates Article II, section 24 of our state Constitution. Accordingly, I dissent.

The important distinction between local and general acts has long been recognized by both the courts and the people of the State of North Carolina. More than a century ago, our Court addressed the inherent danger of legislative action being accomplished by "local" rather than by "general" acts in the case of *Simonton v. Lanier*, 71 N.C. 498 (1874). The principal policy rationale for the constitutional limitation on legislation by local act is not, as the majority claims, merely to allow the General Assembly an opportunity to devote more time and attention to matters of state-wide interest and concern. Rather, we stated in *Simonton* as follows:

> Public laws are founded on the gravest considerations of public benefit. They are deliberately enacted, are permanent in character, are for the equal benefit of all, and of universal application. Not so with private statutes. These are not of common concern, and do not receive the watchful and cautious scrutiny of the legislature, which is devoted to those of a public character. They are often procured by agents, and for a purpose, who are watchful to take advantage of any relaxation in legislative vigilance.

Id. at 504-05.

Perhaps more important, the people of North Carolina have long evidenced their own recognition of and concern about the potential dangers of local legislation. They spoke most loudly on the subject when they wrote into our state Constitution a specific prohibition against local acts relating to particular subjects, providing thereby that any such acts are void. Article II, section 24 of the North Carolina Constitution provides as follows:

Sec. 24. Limitations on local, private, and special legislation.

(1) *Prohibited subjects.* The General Assembly shall not enact any local, private, or special act or resolution:

(a) Relating to health, sanitation, and the abatement of nuisances;

(b) Changing the names of cities, towns, and townships;

(c) *Authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys;*

(d) Relating to ferries or bridges;

(e) Relating to non-navigable streams;

(f) Relating to cemeteries;

(g) Relating to the pay of jurors;

(h) Erecting new townships, or changing township lines, or establishing or changing the lines of school districts;

(i) Remitting fines, penalties, and forfeitures, or refunding moneys legally paid into the public treasury;

(j) Regulating labor, trade, mining, or manufacturing;

(k) Extending the time for the levy or collection of taxes or otherwise relieving any collector of taxes from the due performance of his official duties or his sureties from liability;

(l) Giving effect to informal wills and deeds;

(m) Granting a divorce or securing alimony in any individual case;

(n) Altering the name of any person, or legitimating any person not born in lawful wedlock, or restoring to the rights of citizenship any person convicted of a felony.

(2) *Repeals.* Nor shall the General Assembly enact any such local, private, or special act by the partial repeal of a general law; but the General Assembly may at any time repeal local, private, or special laws enacted by it.

(3) *Prohibited acts void. Any local, private, or special act or resolution enacted in violation of the provisions of this Section shall be void.*

(4) *General laws.* The General Assembly may enact general laws regulating the matters set out in this Section.

N.C. Const. art. II, § 24 (emphases added).

In deciding that Chapter 539 of the 1983 Session Laws is a general rather than a local act, the majority employs a wholly unsupported legal test and turns a deaf ear to these widely recognized dangers of local legislation. Though the majority discusses in some detail our 1978 decision in *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 249 S.E. 2d 402 (1978), it concludes that the analysis utilized in that case is "ill-suited" to the question presented by the case at bar. Accordingly, it announces a new and wholly unsupported standard by which legislation in North Carolina shall be designated as local or general in nature. The test, states the majority, is "the extent to which the act in question affects the general public interests and concerns." Applying its new standard to the facts, the majority concludes, incredibly, that the act in question, which affects four blocks of the Town of Emerald Isle, is a general and not a local act within the meaning of the North Carolina Constitution.

I believe that the majority has unnecessarily and unwisely rendered meaningless the important distinction between local and general legislation. Granted, our Court stated in *McIntyre v. Clarkson*, 254 N.C. 510, 517, 119 S.E. 2d 888, 893 (1961), that the "factors are so variable that no exact rule or formula of constant application can be devised for determining in every case whether a law is local . . . or . . . general." However, given the result of

their application of the new standard to the act in question in this case, I can only conclude that no act, no matter how geographically limited, no matter how unrelated to state-wide affairs, can ever again be designated "local." Under the majority's reasoning, the century-old concerns about the dangers of legislation by local act, so eloquently expressed by the courts and the people of the State of North Carolina, will go unacknowledged. Legislation formerly considered local in nature, no less fraught with the inherent dangers our Court discussed in *Simonton*, will apparently now be considered general for purposes of our Constitution. This is a lamentable result for the State of North Carolina.

Properly analyzed, Chapter 539 of the 1983 Session Laws is in actuality a "local" act through and through. Like many areas of the law, the law in North Carolina concerning the distinction between local and general legislation has evolved over time. Standards and principles set out in our own cases, today inexplicably ignored by the majority, show clearly that the act in question in the case at bar is local and not general legislation.

In *Day v. Commissioners*, 191 N.C. 780, 133 S.E. 164 (1926), our Court held that an act which directed the Commissioners of Surry and Yadkin Counties to construct a bridge across the Yadkin River, at a location provided for in the act, was a local and special act within the meaning of our state Constitution. We so held because the act was "direct legislation addressed to the accomplishment of a single designated purpose at a 'specific spot.' " *Id.* at 784, 133 S.E. at 167. Under *Day*, Chapter 539, which directs that public pedestrian beach access facilities be established and maintained at a specific location, would surely be considered a local act.

In the 1961 case of *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E. 2d 888, our Court further defined the concept of local law as follows:

> "The phrase 'local law' means, primarily at least, a law that in fact, if not in form, is confined within territorial limits other than that of the whole state, or applies to any political subdivision or subdivisions of the state less than the whole, or to the property and persons of a limited portion of the state, or to a comparatively small portion of the state, or is

> directed to a specific locality or spot, as distinguished from a law which operates generally throughout the state. . . ."

Id. at 517-18, 119 S.E. 2d at 893 (quoting 50 Am. Jur. *Statutes* § 8, pp. 24 (1944), now appearing as rewritten in 73 Am. Jur. 2d *Statutes* § 7, p. 273 (1974)).

Accordingly then, in *McIntyre*, our Court set up five alternate tests for whether a law is a local act: (1) a law is confined within territorial limits other than that of the whole state; (2) a law applies to any political subdivision or subdivisions of the state less than the whole; (3) a law affects property and persons of a limited portion of the state; (4) a law affects a relatively small portion of the state; and (5) a law is directed to a specific locality or spot. Chapter 539 of the 1983 Session Laws satisfies all five of these tests. The law's effect is confined within the territorial limits of the Town of Emerald Isle and applies only to the political subdivision of the Town of Emerald Isle. Moreover, Chapter 539 affects only a four-block area of the Town of Emerald Isle—hardly a large portion of the persons or property within the State of North Carolina. Under *McIntyre*, Chapter 539 of the 1983 Session Laws simply can be nothing other than a local act.

In the more recent case of *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 249 S.E. 2d 402 (1978), our Court once again addressed the distinction between local and general legislation. *Adams* involved a challenge to the Coastal Area Management Act of 1974, which established a cooperative program of coastal area management between local and state governments, on grounds that it constituted a local act in violation of article II, section 24 of our State Constitution. In holding that the act there in question was a general rather than a local act, we stated that "the mere fact that a statute applies only to certain *units* of local government does not by itself render the statute a prohibited local act." *Id.* at 690, 249 S.E. 2d at 407 (emphasis added). However, we stated further:

> [T]he distinguishing factors between a valid general law and a prohibited local act are the related elements of reasonable classification and uniform application. A general law defines a class which reasonably warrants special legislative attention and applies uniformly to everyone in the class. On the other hand, a local act unreasonably singles out a class for special

> legislative attention or, having made a reasonable classification, does not apply uniformly to all members of the designated class.

Id. at 690-91, 249 S.E. 2d at 407.

Under the approach set out in *Adams*, Chapter 539 would once again be classified as a local act. Significantly, whereas the Coastal Area Management Act was directed by the legislature toward the entire coastal region of North Carolina, the act in question here affects a mere four-block area within but one town. More exactly, in *Adams*, the classification of coastal land, versus noncoastal land, as the target of the legislation was a reasonable classification by the legislature. Here, however, the choice of four blocks within the Town of Emerald Isle, as opposed to the entire balance of the state, or even to the coastal area, as the law's target was clearly not reasonable. Chapter 539 of the 1983 Session Laws is a local law under our own case law and should have been so found by the majority.

Finally, erasing all doubt as to the proper designation of Chapter 539 of the 1983 Session Laws as a local rather than a general law is the General Assembly's own labeling of the then-pending bill as local. On both the first and second readings of then-House Bill 886, the measure was explicitly designated as a "local bill." A law that walks and talks like a local law is, it seems to me, strong indication that it is indeed a local law.

Having determined, contrary to the majority, that Chapter 539 of the 1983 Session Laws is a local act, I turn next to the question not reached by the majority—whether, as a local act, Chapter 539 violates article II, section 24 of the North Carolina Constitution. In my opinion, Chapter 539 does indeed violate our state Constitution and it is therefore void.

Chapter 539 seeks to accomplish three objectives. First, it directs the Department of Natural Resources and Community Development to acquire land and to build on that land a parking lot, rest room, and other "pedestrian access facilities," bypassing the department's normal procedures for such development. The statute also prohibits vehicular traffic on the beach fronting the ocean, the inlet, and the sound in a four-block area surrounding the proposed facility. Second, the statute requires the Town of

Emerald Isle to maintain these facilities with unspecified municipal funds. Third, the statute prohibits vehicular traffic on a small portion of Inlet Drive, presumably overriding the discretion given to the department to maintain streets within facilities under its control.

I.

The establishment of the beach facility on Bogue Inlet is, for all intents and purposes, the establishment of a state park. The act calls for the construction of the sort of facilities often associated with parks. Moreover, it prohibits driving onto or on the beach in the vicinity of the facilities—again suggesting an attempt to create a recreational area. I believe that a local act creating a state park is violative of our state Constitution and is void.

The establishment of state parks is entrusted to *general laws* by article XIV, section 5 of the North Carolina Constitution:

> It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve *park*, *recreational*, and *scenic* areas . . . and . . . to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.
>
> . . . The General Assembly shall prescribe by *general law* the conditions and procedures under which such properties or interests therein shall be dedicated for the aforementioned public purposes.

N.C. Const. art. XIV, § 5 (emphases added). A local act may not be enacted where there is a general law on the subject. N.C. Const. art. XIV, § 3. It seems clear, therefore, that a local act may not create a state park.

It is the clear intent of our legislature that state park land be acquired and maintained as part of a plan; taking into account the

use and enjoyment of all of the residents of our state.[1] In 1977, the General Assembly authorized a State Parks Study Commission to study the needs of our state for park lands. 1977 N.C. Sess. Laws ch. 1030. This Commission made a recommendation for a five-year plan of development of the park system. *See* New Directions, A Plan for the North Carolina State Parks and Recreation System, 1979-1984. This report, which includes recommendations regarding beach access, emphasizes the need for comprehensive planning. Implicit in the activities of the State Parks Study Commission is a recognition that state parks are a statewide concern and, as such, should continue to be the subject of general legislation. In short, we have a state parks *system*, coordinated by state agencies that hold the state park lands in stewardship for the state as a whole.

The task of acquiring and managing lands within the system is assigned to the Department of Natural Resources and Community Development, as advised by the Parks and Recreation Council. N.C.G.S. § 143B-311 (1983). In determining the suitability of land for inclusion in "the statewide outdoor park and recreation system," the Department of Natural Resources and Community Development looks to "[t]he statewide comprehensive outdoor recreation plan and the individual site master plan." 15 NCAC 12D .0106(a). There are seven criteria for determining the suitability of a proposed site:

(1) statewide significance of the site;

(2) scenic beauty of the site;

(3) outdoor recreation potential of the site;

(4) unsatisfied recreation demands;

(5) the extent to which the various regions of the state are presently served;

(6) the goal of a balanced system including state parks, state recreation areas, state trails, state natural and scenic rivers, and state nature preserves;

1. The North Carolina State Parks System was created in 1916 with the acquisition by the state of Mount Mitchell. Since that time, over 119,000 acres of land have been added to the system, encompassing parks in all regions of the state. *See* Report of the State Parks Study Commission (1985).

(7) the need for preservation of the site.

15 NCAC 12D .0106(b)(1)-(7).

There is ample authority for a state park to be developed on Bogue Inlet if the area were found by the department to meet the above criteria. However, there is no indication that the beach facilities planned for Bogue Inlet were ever considered in the light of these criteria. Rather, the statute merely directs the department to bypass its procedures to include this beach in the State Parks and Recreation System.[2]

I would hold that a state park may only be created by general legislation, and not by local act. Because Chapter 539 purports to create a state park by local act, I would hold that it is repugnant to our Constitution and therefore void.

II.

Chapter 539 of the 1983 Session Laws also contains language that authorizes the state and *requires* the town to "maintain" the "beach access support facilities":

> The Department of Natural Resources and Community Development, in cooperation with the Town of Emerald Isle, is hereby directed to acquire real property by purchase or condemnation, make improvement for and *maintain* facilities for the provision of public pedestrian beach access in the vicinity of Bogue Inlet. The town shall not be required to expend local funds to acquire real property, but shall be responsible for *maintaining* the facility. Public beach access facilities in the vicinity of Bogue Inlet shall include parking areas, pedestrian walkways, and rest room facilities, and may include any other public beach access support facilities.

1983 Sess. Laws ch. 539, § 1 (emphases added).

By the plain language of the act, then, the facilities are to be maintained. Although the statute is ambiguous in some respects,

2. If the area around Inlet Drive becomes part of the state parks system, the control over a number of activities now regulated by the town would fall to the Department of Natural Resources and Community Development. Among these would be not only access to the beach, but the hours of access, whether bathing or fishing would be allowed, whether pets would be allowed without leashes, and whether alcoholic beverages would be allowed. *See generally* 15 NCAC 12B.

it is clear that the town is responsible for such maintenance. The legislature thus has, by local act, placed the financial burden of maintaining a facility presumably created to serve the people of the state at large on the shoulders of the few taxpayers of the Town of Emerald Isle.

III.

The people of this state have guaranteed unto themselves through the enactment of their state Constitution that:

> The General Assembly shall not enact any local, private, or special act or resolution . . . [a]uthorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys . . . .

N.C. Const. art. II, § 24(1)(c). An objective reading of the statute requires the conclusion that it calls for just such "laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys."

There is nothing to suggest that the word "alter" has attained a technical meaning or is otherwise a term of art. Thus, the ordinary meaning of the word should suffice. *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980). The term "alter" is defined as:

> To make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially. To change in one or more respects, but without destruction of existence or identity of the thing changed; to increase or diminish.

Black's Law Dictionary (5th ed. 1979). There is nothing in this definition, or in common sense, to support the notion that a street is not altered when it is changed from a street for vehicular use to a walking path for pedestrians.

Neither can it be said that the act does not "discontinue" the street. Our statutes define "street":

> The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right

for the purposes of vehicular traffic. The terms "highway" and "street" and their cognates are synonymous.

N.C.G.S. § 20-4.01(13) (Cum. Supp. 1985) (emphasis added).

A street without vehicular access, then, is no "street" at all. Thus, once Inlet Drive becomes a passageway for pedestrians only, it is discontinued as a street within the statutory definition.[3]

The facilities covered by the act include Inlet Drive. N.C.G.S. § 136-44.12 authorizes the Department of Transportation to "maintain all roads leading into and located within the boundaries of all areas administered by the Division of State Parks of the Department of Natural Resources and Community Development." Clearly, Inlet Drive leads into and is located within the area affected by chapter 539. Thus, the act violates the constitutional proscription against local acts authorizing the "maintaining" of streets.

The control over municipal streets is entrusted by general legislation to the municipalities. N.C.G.S. §§ 136-66.1 to -66.7 (1986), 160A-299 (1982). Whether chapter 539 be interpreted as authorizing the alteration, the discontinuation, or the maintenance of Inlet Drive, it certainly does one of these. And because each is prohibited by article II, section 24 of the North Carolina Constitution, I would hold that chapter 539 of the 1983 Session Laws is void.

The purpose of the constitutional prohibition against the use of local acts to accomplish certain ends was to prevent just the sort of situation presented by this case—the use of legislative power to further very limited local interests rather than the general welfare. The majority has placed its stamp of approval on what is in reality a *local act* of the General Assembly which, in several respects, does precisely what the people of this state have, in their Constitution, forbidden.

Because chapter 539 is, in my opinion, a local act, it is violative of our state Constitution and is therefore void.

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3. While, under Chapter 539, Inlet Drive would still be accessible to public service and emergency vehicles, such vehicles, when responding to an emergency, would not need specific statutory authority to use Inlet Drive. *See* Restatement (Second) of Torts §§ 196, 197, 211 (1963) (public or private necessity as a defense to action in trespass). *See generally* W. Keeton, *Prosser & Keeton on Torts*, § 13 (5th ed. 1984).

JERRY W. DANIELS v. MONTGOMERY MUTUAL INSURANCE COMPANY

No. 498PA86

(Filed 7 October 1987)

1. **Costs § 3; Rules of Civil Procedure § 41.2— failure to comply with court order —sanctions less than dismissal—taxing of costs plus attorney fees**

The trial court has the inherent authority to impose sanctions less than dismissal, including the taxing of costs plus attorney fees, for a party's failure to comply with a court order.

2. **Costs § 3; Rules of Civil Procedure § 41.2— failure to comply with court order —taxing of costs plus attorney fees**

A finding by the trial court in an action on a fire insurance policy that plaintiff's counsel failed to comply with the court's order prohibiting any reference before the jury to the fact that no criminal charges had been filed against plaintiff in connection with the fire was sufficient to support the court's order taxing plaintiff with defendant's costs, including attorney fees, after a mistrial was declared.

3. **Judgments § 16— collateral attack on order**

Plaintiff may not collaterally attack the trial court's order prohibiting any references to certain evidence unless the order was void rather than merely erroneous or irregular.

4. **Costs § 3; Judgments § 16— order taxing costs—findings—collateral attack**

Plaintiff's contention that an order taxing him with costs was not supported by sufficient findings is meritless since the order was supported by the court's finding that plaintiff's counsel failed to comply with the court's order prohibiting any reference to certain evidence. Furthermore, plaintiff could not collaterally attack the order because insufficiency of the findings would not render the order void.

5. **Judgments § 2— time and place of signing judgment**

The record was insufficient to support plaintiff's contention that an order taxing him with costs plus attorney fees was void because signed outside the judicial district at which the matter was heard where the record does not reveal where the order was signed. Nor was the order void on the ground that it was signed and entered out of session where the decision to tax plaintiff with defendant's costs was made and announced at the hearing. N.C.G.S. § 1A-1, Rule 6(c).

6. **Rules of Civil Procedure § 41.2— costs as sanction for violation of court order —refusal to pay—dismissal of action**

The trial court did not abuse its discretion in granting defendant's motion to dismiss plaintiff's action to recover under a fire insurance policy where plaintiff's counsel violated a court order prohibiting him from informing the jury that plaintiff had not been charged in connection with the fire, and plaintiff refused to comply with the trial court's order requiring plaintiff to pay

defendant's costs within thirty days as a lesser sanction for violation of the previous order. N.C.G.S. § 1A-1, Rule 41(b).

7. **Insurance § 135.1 — fire insurance — subrogation to rights of mortgagees — judgment on pleadings improper**

In an action to recover under a fire insurance policy, the trial court erred in entering judgment on the pleadings for defendant insurer on its counterclaim for amounts defendant paid to the mortgagees of the real property which was destroyed by fire where the pleadings established that defendant paid certain amounts to the first and second mortgagees and received a full assignment and transfer of the notes and deeds of trusts held by the two mortgagees, but the pleadings did not establish the due dates under either of the notes or that the amounts paid by defendant to the mortgagees were the amounts due under the notes and deeds of trust. Furthermore, plaintiff met his burden of showing that the judgment was not supported by a stipulation recited in the judgment.

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

Justice MEYER concurring in part and dissenting in part.

Justice MITCHELL joins in this dissenting opinion.

ON discretionary review, pursuant to N.C.G.S. § 7A-31, of a decision of the North Carolina Court of Appeals, 81 N.C. App. 600, 344 S.E. 2d 847 (1986), vacating and remanding orders entered 5 November 1984 and 29 April 1985 in the Superior Court, DAVIDSON County, by *Davis, J.*, and *Smith, J.*, respectively. Heard in the Supreme Court 14 May 1987.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by Stephen W. Coles and Charles H. McGirt; and Wilson, Biesecker, Tripp & Sink by Joe E. Biesecker for plaintiff-appellee.

Yates, Fleishman, McLamb & Weyher by Joseph W. Yates, III, and Barbara B. Weyher for defendant-appellant.

FRYE, Justice.

In this case, we consider whether the Court of Appeals correctly decided: (1) that a trial court may, as an alternative to granting a motion to dismiss, tax plaintiff with defendant's costs including attorney's fees incurred pursuant to the third trial of the case; and (2) that the trial court erred in dismissing the plaintiff's complaint pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure for plaintiff's failure to comply with the order

to pay costs. In addition, we consider whether the trial court erred by entering judgment against plaintiff on defendant's counterclaim subsequent to dismissing the plaintiff's action.

On the first question, we agree with the Court of Appeals that the trial court has the authority to impose lesser sanctions against a party for failing to comply with a court order, and that the lesser sanctions imposed may include costs plus attorney's fees. On the second question, we hold that the trial court did not abuse its discretion in dismissing the plaintiff's complaint, pursuant to Rule 41(b), for plaintiff's failure to comply with the order to pay costs. On the third question, the trial court erred by entering judgment on defendant's counterclaim subsequent to dismissing the plaintiff's action.

Plaintiff initiated this action to recover under an insurance policy for fire damage to his home and personal property. In its answer, defendant alleged *inter alia* that the plaintiff intentionally caused, procured or acquiesced in the fire for the fraudulent purpose of collecting insurance benefits. Defendant, in addition, filed a counterclaim to recover mortgage indebtedness on plaintiff's home.

This action was first heard by Judge Hamilton H. Hobgood at the 7 November 1983 Civil Session of Superior Court, Davidson County. Defendant, at this trial, made a *motion in limine* for an order prohibiting the introduction of evidence or reference in any manner before the jury to the fact that no criminal charges had been filed against the plaintiff in connection with the subject fire. Both parties agree that Judge Hobgood orally granted defendant's *motion in limine*. This initial action ended in mistrial when plaintiff's counsel informed the court that he might need to testify as a witness in the proceeding.

The second trial of this case was called at the 7 May 1984 Civil Session before Judge Robert A. Collier, Jr., and ended in mistrial because of a hung jury.

The third trial of this action came on before Judge James D. Davis at the 17 September 1984 Civil Session of Superior Court, Davidson County. In the course of opening statements, plaintiff's counsel made reference to the fact that the plaintiff had not been prosecuted. Pursuant to defendant's motion, a mistrial was granted.

Defendant subsequently moved to dismiss plaintiff's action pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, alleging that the comment by plaintiff's counsel referring to the lack of prosecution violated several court orders. Alternatively, defendant requested the court to tax the plaintiff with its reasonable out-of-pocket expenses incurred in defending this action. The motion was heard by Judge Davis at the 5 November 1984 Civil Session of Superior Court, Davidson County. The court did not enter a written order at that time. According to the clerk's minutes of this hearing, Judge Davis denied the motion to dismiss and assessed plaintiff with all expenses incurred by the defendant regarding the third trial. The minutes indicate further that an order and affidavit were to be prepared by the week of 26 November 1984. The clerk's minutes also noted an exception taken by plaintiff's counsel.

On 14 December 1984, defendant's counsel submitted by mail a proposed order and affidavit to Judge Davis with copies to plaintiff's counsel setting forth expenses incurred in the third trial totaling $6,021.02. Plaintiff's counsel, by letter to Judge Davis, filed an objection to defendant's proposed order. However, on 18 December 1984, Judge Davis filed an order denying defendant's motion to dismiss and taxing plaintiff with the expenses set forth in defendant's affidavit. The order required plaintiff to pay such expenses to the Clerk of Superior Court, Davidson County, within thirty days.

Plaintiff failed to pay expenses as ordered by the court. By letter dated 29 January 1985, a copy of which was sent to Judge Davis, plaintiff's counsel informed defendant's counsel of his opinion that the order requiring plaintiff to pay expenses was invalid and unenforceable. Defendant thereafter moved to dismiss the action pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure on grounds that plaintiff failed to comply with the order to pay costs within thirty days.

Defendant's motion to dismiss was heard by Judge Donald L. Smith. Judge Smith concluded as a matter of law that neither plaintiff nor his counsel could deliberately disregard the court's order to pay expenses, but were required instead to pursue whatever remedies might be provided by law to stay or vacate the order. Judge Smith ordered that the plaintiff's claim be dismissed

and that the defendant recover on its counterclaim the sum of $48,792.76 in addition to the expenses previously ordered. From this order plaintiff appealed to the Court of Appeals.

The Court of Appeals held that trial courts have the authority, pursuant to Rule 41(b), to impose a lesser sanction of costs including attorney's fees, against a party or counsel for failure to comply with a court order. It held, however, that the trial court, in order to do so, must make findings concerning the effectiveness of alternative sanctions and the ability of plaintiff to perform the alternative sanction imposed. The Court of Appeals determined that the order taxing costs was not supported by sufficient findings and was thus erroneous. It therefore vacated this order as well as the second order dismissing the plaintiff's claim and granting defendant's counterclaim and remanded the cause for further findings. Defendant's petition for discretionary review of this decision was granted by this Court.

I.

Plaintiff contends that the trial court had no authority to tax him with defendant's costs including attorney's fees as an alternative to dismissal under Rule 41(b). Defendant, on the other hand, contends that the Court of Appeals correctly held that a trial court has the inherent authority, pursuant to Rule 41(b), to impose lesser sanctions against a party, as an alternative to dismissal, on grounds that the party failed to comply with a court order.

We note first that the question in this case is not whether a trial court may, pursuant to Rule 41(b), impose a sanction of costs, but instead, whether the trial court, in exercise of its inherent powers, may tax a party with the reasonable costs including attorney's fees of a party-opponent for failure to comply with a court order.

In a recent opinion, *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E. 2d 694, 696 (1987), this Court stated that:

> Inherent power is that which the court necessarily possesses irrespective of constitutional provisions. Such power may not be abridged by the legislature. Inherent power is essential to the existence of the court and the orderly and effective exercise of the administration of justice.

> *Through its inherent power the court has authority to do all things that are reasonably necessary for the proper administration of justice. See* 20 Am. Jur. 2d *Courts* §§ 78, 79 . . . .

(Emphasis added.)

In *In re Superior Court Order*, 315 N.C. 378, 338 S.E. 2d 307 (1986), this Court held that the superior court had the inherent power to order a banking corporation to disclose to the district attorney a customer's bank account records, noting that "situations occasionally arise where the prompt and efficient administration of justice requires that the superior court issue an order of the type sought here by the State." *Id.* at 380, 338 S.E. 2d at 309.

Similarly, we hold it to be within the inherent power of the trial court to order plaintiff to pay defendant's reasonable costs including attorney's fees for failure to comply with a court order.

[1, 2] The power of the trial court to sanction parties for failure to comply with court orders is essential to the prompt and efficient administration of justice. Rule 41(b) of the North Carolina Rules of Civil Procedure, which is identical to the federal rule, grants the trial court authority to dismiss actions with prejudice on grounds that plaintiff failed to comply with a court order. Dismissal with prejudice, however, is a harsh sanction. In *Rogers v. Kroger Co.*, 669 F. 2d 317, 321-22 (5th Cir. 1982), the court said that:

> Assessments of fines, costs, or damages against the plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings are preliminary means or less severe sanctions that may be used to safeguard a court's undoubted right to control its docket.

We agree. Therefore we conclude that a trial court has the inherent power to tax a plaintiff with the reasonable costs, including attorney's fees incurred by a defendant in a proceeding in which a plaintiff has failed to comply with a court order. Further, we believe that the finding of fact by the trial court in the instant case that plaintiff's counsel failed to comply with the court's order prohibiting the introduction of evidence or reference to the fact

that no criminal charges had been filed against the plaintiff is sufficient to support an award taxing plaintiff with the reasonable costs incurred by defendant in this third trial. Accordingly, we hold that Judge Davis' order taxing plaintiff with costs was not erroneous.

II.

Plaintiff next contends that the trial court erred in dismissing the plaintiff's complaint pursuant to Rule 41(b) because of plaintiff's failure to comply with the order to pay costs.

Rule 41(b) authorizes a trial court to dismiss an action for failure of a plaintiff to comply with a previous court order. It provides as follows:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him.

N.C.R. Civ. P. 41(b) (1983).

In the instant case, defendant initially moved to dismiss this action for the failure of plaintiff to comply with an order prohibiting the introduction of evidence or reference to the jury that no criminal charges had been filed against the plaintiff. As an alternative lesser sanction to dismissal, defendant requested the taxation of reasonable out-of-pocket expenses against the plaintiff. On 18 December 1984 Judge Davis filed an order requiring plaintiff to pay defendant's costs totaling $6,021.62 within thirty days. Plaintiff does not dispute that he failed either to comply with or to directly attack this order. Instead plaintiff contends that the order itself was flawed in the following respects: (1) the order was supported by insufficient findings of fact; (2) the order was signed outside of the judicial district in which the matter was heard; and (3) the order was signed and entered after the expiration of the term at which the matter was heard. Plaintiff contends that because of these alleged flaws in the order taxing him with costs, the trial court erred in granting defendant's motion to dismiss for failure to comply with the order.

To respond to plaintiff's contentions we must first determine whether plaintiff, having failed to appeal or otherwise directly contest the order taxing costs, may later raise a collateral attack

on it. The plaintiff may raise a collateral attack on the order taxing costs as a defense to defendant's motion to dismiss only if the order taxing costs was void *ab initio*. *State v. Sams*, 317 N.C. 230, 345 S.E. 2d 179 (1986); *Stroupe v. Stroupe*, 301 N.C. 656, 273 S.E. 2d 434 (1981); *Lumber Co. v. West*, 247 N.C. 699, 102 S.E. 2d 248 (1958); *Massengill v. Lee*, 228 N.C. 35, 44 S.E. 2d 356 (1947); *Edwards v. Brown's Cabinets*, 63 N.C. App. 524, 305 S.E. 2d 765 (1983); *Manufacturing Co. v. Union*, 20 N.C. App. 544, 202 S.E. 2d 309, *cert. denied*, 285 N.C. 234, 204 S.E. 2d 24 (1974); *but see Thornburg v. Lancaster*, 303 N.C. 89, 277 S.E. 2d 423 (1981); *contra In re Will of Parker*, 76 N.C. App. 594, 334 S.E. 2d 97, *disc. rev. denied*, 315 N.C. 184, 337 S.E. 2d 859 (1985). In *State v. Sams*, 317 N.C. 230, 235-36, 345 S.E. 2d 179, 182-83, this Court stated that

> [a]n order is void *ab initio* only when it is issued by a court that does not have jurisdiction. Such an order is a nullity and may be attacked either directly or collaterally, or may simply be ignored. (Citations omitted.)
>
> In contrast, a voidable order stands until it is corrected. It may only be corrected by a direct attack; it may not be attacked collaterally. An irregular order, one issued contrary to the method of practice and procedure established by law, is voidable. (Citations omitted.)

An erroneous order is one "rendered according to the course and practice of the court, but contrary to law, or upon a mistaken view of the law, or upon an erroneous application of legal principles." *Wynne v. Conrad*, 220 N.C. 355, 360, 17 S.E. 2d 514, 518 (1941). An erroneous order may be remedied by appeal; it may not be attacked collaterally. *Id.*

Our attention is directed to this Court's decision in *Massengill v. Lee*, 228 N.C. 35, 44 S.E. 2d 356. In *Massengill* the plaintiff, having won judgment in a summary ejectment case, applied for execution against defendant's land notwithstanding a restraining order issued by the superior court in another case involving plaintiff which prohibited him from attempting to take possession of the land. The sheriff, having knowledge of the restraining order, did not serve the execution. Plaintiff subsequently made a motion against the sheriff for amercement for failing to serve the execution. Plaintiff based his motion on the theory that the restraining

order issued by Judge Harris was void as attempting to restrain the action of a different court in a different action. This Court observed however, that the restraining order was issued in the superior court by a judge against parties in the action and in respect to subject matter of that action. The Court concluded therefore that:

> Whether the restraining order was properly issued or not, it could not be ignored by plaintiff Massengill. Judge Harris, on proper showing and in accordance with the statutes, had the judicial power to issue the restraining order . . . , but if the order was erroneously issued, the remedy was by motion to dissolve, or appeal, or by action on the injunction bond, and not by open defiance.

Id. at 37, 44 S.E. 2d at 358 (citations omitted).

[3] The Court's reasoning in *Massengill* reflects the fundamental proposition that our judicial system requires the orderly functioning of process. Parties must therefore not be encouraged to obey or disobey rulings of the court according to their own whim. As this Court stated in *Lumber Co. v. West*, 247 N.C. 699, 701, 102 S.E. 2d 248, 249:

> The correct method of attacking a judgment is dependent on the character of the asserted defect. Errors in law can only be rectified by an appellate court on proceedings properly taken in the action in which the judgment was rendered. Irregularity due to an inadvertence of the court in rendering an improper judgment can be corrected by motion made in the action in which the judgment was rendered. An erroneous or irregular judgment binds the parties thereto until corrected in a proper manner. Diligence is necessary to obtain relief. A void judgment, however, binds no one. Its invalidity may be asserted at any time and in any action where some benefit or right is asserted thereunder. A judgment is void if the court rendering it does not have jurisdiction either of the asserted cause of action or of the parties. *Moore v. Humphrey*, 247 N.C. 423, 101 S.E. 2d 460; *Mills v. Richardson*, 240 N.C. 187, 81 S.E. 2d 409; *Powell v. Turpin*, 224 N.C. 67, 29 S.E. 2d 26; *Dunn v. Wilson*, 210 N.C. 493, 187 S.E. 802; *Clark v. Homes*, 189 N.C. 703, 128 S.E. 20; *Carter v. Rountree*, 109 N.C. 29, 13 S.E. 716.

Applying the principles outlined above, plaintiff in the case *sub judice* may challenge the dismissal of this action on grounds that the order not complied with was invalid only in those instances where the alleged error would render the order void. Stated otherwise, unless the order was void, as distinguished from merely erroneous or irregular, plaintiff cannot attack the order collaterally.

[4] We turn again to plaintiff's contentions that: (1) the order was supported by insufficient findings of fact; (2) the order was signed outside of the judicial district in which the matter was heard; and (3) the order was signed and entered after the expiration of the term at which the matter was heard. Plaintiff's contention that the order taxing him with costs was not supported by sufficient findings of fact is meritless, since, as indicated above, the trial court's finding that plaintiff's counsel failed to comply with the court's order prohibiting the introduction of or reference to certain evidence was sufficient to support the order taxing costs. Even if the findings were not sufficient, that fact alone would not render the order void since it does not challenge the jurisdiction of the court to issue the order. Therefore plaintiff could not collaterally attack this order on the basis of insufficient findings of fact.

[5] Plaintiff's second and third contentions arguably challenge the jurisdiction of the trial judge to issue the order. These contentions are therefore considered substantively.

We note first that the record does not reveal where the order was signed. Instead, the record merely reflects that the proposed order and affidavit along with a cover letter addressed to Judge Davis were mailed to a Concord address. Thus, the record is insufficient to support plaintiff's contention that the order was signed outside of the judicial district at which the matter was heard.

We also find no merit in plaintiff's argument that the order was void because it was signed and entered out of session. Rule 6(c) of the North Carolina Rules of Civil Procedure provides that:

> The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a session of court. The

> continued existence or expiration of a session of court in no way affects the power of the court to do any act or take any proceeding, but no issue of fact shall be submitted to a jury out of session.

In *Feibus & Co. v. Construction Co.*, 301 N.C. 294, 271 S.E. 2d 385 (1980), this Court interpreted the application of Rule 6(c) to facts similar to the case *sub judice*. That case was heard by the trial judge on a motion for summary judgment. The judge denied defendant's motion at the close of the hearing but did not sign the written order at that time. After the term of court expired, he signed the written order at his home, which was outside of the district. Defendant in that case argued that the trial judge's order granting summary judgment was invalid because it was signed out of term and district without their consent. This Court held that their contention was without merit. The Court explained that:

> Rule 6(c) of the Rules of Civil Procedure provides that the expiration of a session of court has no effect on the court's power 'to do any act or take any proceeding.' G.S. sec. 1A-1, Rule 56(c) (1969). This rule clearly allows a written order to be signed out of term, especially when such an act merely documents a decision made and announced before the expiration of the term.

Id. at 305, 271 S.E. 2d at 392.

The trial judge in the instant case adequately made and announced his decision to tax plaintiff with defendant's expenses in the district and during the session in which the motion was made. At the hearing, Judge Davis determined and announced the nature of the penalty to be assessed against the plaintiff. The fact that the order was subsequently signed and supplemented with the actual amounts does not alter the fact that the decision to tax plaintiff with defendant's costs was made and announced at the hearing. Therefore it is clear that the delayed signing and filing of the order taxing plaintiff with costs had no effect on the authority of the trial judge to enter this order. Thus, the order taxing costs was valid and not void.

Because the order issued by Judge Davis assessing plaintiff with defendant's costs was not void, the plaintiff could not col-

laterally attack it. Stated differently, plaintiff cannot challenge Judge Smith's order dismissing this cause for failure of plaintiff to comply with Judge Davis' order on the grounds that Judge Davis erred in issuing the earlier order.

Plaintiff in this case nevertheless relies on this Court's decision in *Thornburg v. Lancaster*, 303 N.C. 89, 277 S.E. 2d 423 (1981), for the proposition that dismissal with prejudice cannot be premised on a party's failure to comply with an erroneous order. We note that the Court in *Thornburg* referred to the order as being "erroneous *ab initio*," a term not heretofore used by this Court as far as our research has revealed. We note further that the Court in *Thornburg* was troubled by the fact that defendants in that case raised the question of the appealability of the reimbursement order for the first time in their brief to this Court and therefore the Court apparently treated the appeal as a direct attack on the reimbursement order. Nevertheless, to the extent that *Thornburg* may be read as establishing a rule that dismissal with prejudice may not be premised on a party's refusal to comply with an erroneous order from which there has been no direct appeal, the decision in *Thornburg* is overruled.

Plaintiff, however, makes a final argument challenging Judge Smith's order dismissing this action. Plaintiff argues that dismissal was not a proper remedy for enforcement of the order. We do not agree.

[6] We hold that the trial court did not abuse its discretion in granting defendant's motion to dismiss. Neither party contests the fact that plaintiff's counsel violated the order prohibiting him from informing the jury that plaintiff had not been charged in connection with the fire. Nor do the parties dispute the fact of plaintiff's failure to comply with Judge Davis' order requiring plaintiff to pay defendant's costs within thirty days. Judge Smith, in the order dismissing plaintiff's action on 29 April 1985, found the following facts:

> 15. That plaintiff's counsel . . . in a letter dated Jan. 29, 1985 informed counsel for the defendant that the expenses taxed to the plaintiff had not been paid and further stated in essence that the order of Judge James Davis as heretofore referred to would be treated as a nullity.

16. That the expenses of the defendant at the third trial of this action as heretofore referred to have not been paid as of this date [29 April 1985], nor has execution issued thereon.

17. That the plaintiff personally was aware certain expenses had been taxed to him no later than his receipt of a copy of his counsel's letter to the defendant's counsel, the same being dated Jan. 29, 1985.

18. That neither the plaintiff nor his counsel has sought to obtain from the Hon. James Davis any stay of that order of Dec. 17, 1984, nor have they sought a stay from any other Superior Court Judge; that neither the plaintiff nor his counsel has sought to stay the effect of that order of Dec. 17, 1984 by posting a bond pursuant to G.S. 1-289.

19. That neither the plaintiff nor plaintiff's counsel have sought a stay or writ of supersedeas from the Appellate Division of the North Carolina General Court of Justice.

20. That neither the plaintiff nor the plaintiff's counsel have petitioned the Appellate Division of the North Carolina General Court of Justice for certiorari regarding the order of Judge Davis signed on December 17, 1984.

21. That neither plaintiff nor plaintiff's counsel have sought to appeal from the order of the Hon. James Davis dated Dec. 17, 1984 as being either a final judgment or an interlocutory order affecting a substantial right as is by law provided.

We believe that the foregoing facts as found by the trial judge indicate an intentional disregard for Judge Davis' order requiring the plaintiff to pay defendant's costs. In addition, it is clear that a lesser sanction in this case would not serve the best interests of justice. Dismissal in this case arises from plaintiff's previous refusal to comply with a lesser sanction, taxing him with costs. This lesser sanction had also been imposed by a trial court in response to plaintiff's counsel's violation of a court order. Given the intentional noncompliance by the plaintiff and the ineffectiveness of the previously imposed sanctions, Judge Smith did not abuse his discretion in ordering the dismissal of plaintiff's action pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure.

III.

[7] Plaintiff lastly contends that the trial court erred by entering judgment on defendant's counterclaim without a hearing on the merits. We agree.

In paragraph 3 of the 21 February 1985 motion to dismiss, defendant moved the trial court to enter judgment, "in favor of the Defendant upon the counterclaim asserted by the Defendant in this action." Defendant, however, failed to state the rule number under which this motion was made as required by N.C.G.S. § 7A-34, Rule 6 of the General Rules of Practice for the Superior and District Courts.[1] Since plaintiff does not raise this error on appeal, we decline to dispose of this issue on that basis and therefore proceed to consider the merits of plaintiff's assigned error.

Defendant's motion for judgment on the counterclaim is in essence a motion for judgment on the pleadings pursuant to N.C.G.S. § 1A-1, Rule 12(c) of the North Carolina Rules of Civil Procedure. Rule 12(c) provides, in pertinent part, as follows:

> *Motion for judgment on the pleadings.*—After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

N.C.R. Civ. P. 12(c) (1983).

"A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E. 2d 494, 499 (1974). The party moving for judgment on the pleadings must show that no material issue of fact exists and that he is entitled to judgment as a matter of law. *Id.* Upon review of a motion for judgment on the pleadings:

> The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all con-

1. Rule 6 provides that "[a]ll motions, written or oral, shall state the rule number or numbers under which the movant is proceeding."

> travening assertions in the movant's pleadings are taken as false . . . . All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Id. (Citations omitted.)

We now consider defendant's motion for judgment on the pleaded counterclaim. Defendant's counterclaim alleges, in pertinent part, as follows:

> 1. The policy of insurance issued by defendant to plaintiff contained a standard mortgage clause which provided that a loss, if any, under the policy, shall be payable to the mortgagees (or trustees), named in the policy, in order of precedence of the mortgages and that the insurance as to the interests of the mortgages shall not be invalidated by any act or neglect of the insureds.
>
> 2. Named as mortgagees in the policy, pursuant to the foregoing provision, were Industrial Federal Savings & Loan Association and Household Realty Corporation.
>
> 3. The policy . . . provided that whenever the insurance company [defendant] shall pay the mortgagees (or trustees) any sum for loss under the policy and claim that, as to the insured, no liability existed, the insurance company may at its option pay to the mortgagees (or trustees) the whole principal due or to grow due on the mortgages, with interest accrued and shall thereupon receive a *full assignment and transfer of the mortgage and of all such other securities.* (Emphasis added.)

Defendant in its counterclaim denies liability for plaintiff's claim. It further alleges that pursuant to the policy provisions referred to in paragraph 3, defendant exercised its option to pay Industrial Federal Savings & Loan Association, as first mortgagee, the full mortgage indebtedness in the amount of $21,524.58 and received in exchange a full assignment and transfer of the note and deed of trust on the property in question. Likewise defendant alleges that it exercised its option and paid Household Realty Corporation, as second mortgagee, the sum of $27,268.18 and received in exchange

a full assignment and transfer of the note and deed of trust on the property in question. Finally, the counterclaim alleges that the plaintiff is obligated to the defendant in the amount of $48,792.76 plus interest for the two notes and prays the court to enter judgment against plaintiff in this amount.

Plaintiff in his reply to the counterclaim admits the allegations contained in paragraphs 1, 2 and 3 above. Further, plaintiff admits that defendant has paid Industrial Savings and Loan Association the sum of $21,524.58 and Household Realty Corporation the sum of $27,268.18, but denied any obligation to defendant for that amount.

Based on the pleadings, the material facts as to which there is no genuine issue established that the defendant has paid $21,524.58 to the first mortgagee and $27,268.18 to the second mortgagee and that pursuant to a provision in plaintiff's insurance policy, defendant has received in exchange for these payments a full assignment and transfer of the respective notes and deeds of trust held by the two mortgagees. However, nothing in the pleadings reveals the nature of the rights and obligations contained in the notes and deeds of trust. The pleadings do not establish due dates under either of the notes. Nor is there an admission by the plaintiff that the amounts paid by the insurance company to the mortgagees were the amounts then due under the notes and deeds of trust. Therefore, we find no basis for concluding, as a matter of law, that defendant is entitled to a judgment of $48,792.76 against the plaintiff.[2] The trial court thus erred in granting a judgment on the pleadings as to defendant's counterclaim.

The decision of the Court of Appeals vacating the order taxing costs including attorney's fees, entered 5 November 1984, and

2. The judgment against plaintiff recited that it was "pursuant to the stipulation of the parties." However, the judgment does not recite the terms and conditions of the stipulation or the nature thereof. Neither do the trial court's findings of fact nor the conclusions of law in support of the judgment refer to a stipulation. We have been unable to find a stipulation in the record. Plaintiff, in his brief, asserts that there was no stipulation and defendant's brief is silent on the question. Neither party mentioned the stipulation at oral argument. On this state of the record, and the briefs and argument, plaintiff has met whatever burden he may have of showing that the judgment is not supported by a stipulation.

vacating that portion of the order entered 29 April 1985 dismissing plaintiff's action, is reversed. The decision of the Court of Appeals vacating that portion of the order entered 29 April 1985 awarding judgment in favor of the defendant on the counterclaim is affirmed for the reason stated in this opinion. The cause is remanded to the Court of Appeals for further remand to the Superior Court, Davidson County, for further proceedings consistent with this opinion.

Reversed in part; affirmed in part and remanded.

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

Justice MEYER concurring in part and dissenting in part.

I concur in the majority opinion, except that part which relates to the court's discussion and ruling reversing the trial judge's granting judgment on the pleadings as to defendant's counterclaim for the amounts the carrier paid to the mortgagees on the real property which was destroyed by fire.

First, a very capable and experienced trial judge included in the ordering portion of his judgment the following:

> 2. That pursuant to the stipulation of the parties that the defendant have and recover of the plaintiff on its counterclaim the sum of $48,792.76 with interest ~~from and after the ____ day of _____ 19____~~ as provided by law [DLS].

It is obvious from the trial judge's delineation and initialing thereof that he was particularly aware of and concerned about the accuracy of that paragraph.

There is a presumption in favor of the regularity and validity of judgments in the lower court and the burden is upon appellant to show prejudicial error. *London v. London*, 271 N.C. 568, 157 S.E. 2d 90 (1967). The judgment entered by Smith, J., indicates the existence of a stipulation. That must be presumed to be correct by this Court. Clearly, the burden was on the plaintiff to show that no stipulation exists. He could have done this by a stipulation of counsel, an affidavit of the trial judge, or some other means. He did not do so, nor even attempt to do so. He sim-

ply denied its existence in his appellee's brief to this Court—a brief to which no reply is required.

The majority addresses this problem only in a footnote in which it finds that, except for the statement in the judgment, the record is silent as to the existence of a stipulation. Based upon this silence in the record, the majority reverses the trial judge's grant of judgment on the pleadings on the counterclaim. This is entirely contrary to the dictates of our existing case law. "Where the record is silent upon a particular point, the action of the trial judge is presumed correct." *London*, 271 N.C. at 570, 157 S.E. 2d at 92.

As will become obvious from a reading of the material hereafter presented, a stipulation at the bench or in chambers would not have been unusual or unexpected in this case. The plaintiff had the burden of dispelling that possibility, and he made no attempt to do so. This Court should not set aside the judgment entered on the counterclaim upon a mere assumption made because the record is silent.

The majority apparently believes that the validity of the judgment on the counterclaim is dependent on the existence of such a stipulation. Assuming that the existence of a stipulation is necessary to uphold the judgment entered on defendant's counterclaim (and I do not believe that it is), and if such a stipulation exists, then clearly the majority has erred in allowing the judgment to be vacated. If one does not exist, that would be easy enough to determine. A far better procedure would be to remand the case for findings as to the existence or nonexistence of a stipulation as recited by the trial judge. The judge who tried this case deserves better treatment and consideration than the majority affords him.

Secondly, the plaintiff's own allegations in his complaint would, without any additional stipulation, support the granting of judgment on the pleadings on the counterclaim and belie the subsequent denial in his reply (and the majority's assumption) that the amounts paid by the carrier to the mortgagees were not the "amounts due."

Paragraph 6 of the complaint alleges as follows:

> 6. That the true and actual cash value of the dwelling destroyed by fire was $84,877.60. The actual cash value of the

personal property destroyed by the fire was $62,825.45. The plaintiff also incurred additional living expenses covered by the said policy in the amount of $3,087.50.

Thus, the total damages alleged by the plaintiff are:

	$ 84,877.60
	62,825.45
	3,087.50
Total	$150,790.55

Although the majority has completely overlooked it, the fact is that the plaintiff himself, in his own complaint, alleged as follows:

> 8. That at the time of said loss by fire, there was a first deed of trust to Industrial Federal Savings and Loan Association of Lexington, North Carolina, and a second deed of trust to Household Finance of High Point, North Carolina. That the defendant has paid to Industrial Federal Savings and Loan Association the sum of $21,382.23, and to Household Finance the sum of $27,268.18.

These mortgages total, according to plaintiff, $48,650.41.

The mathematical calculations evident in plaintiff's own complaint would then be as follows:

	$ 84,877.60
	62,825.45
	3,087.50
Total Demanded	$150,790.55
Admitted to be due Mortgagees	- 48,650.41
Net demand	$102,140.14

As one would expect, the plaintiff demands in paragraph 9 of his complaint and in the *ad damnum* a recovery of $102,140.14 as follows:

> 9. There is a balance due the plaintiff by the defendant in the amount of $102,140.14. The defendant has failed and refused, after due demand by the plaintiff, to pay said amount owed to the plaintiff or any of it.

WHEREFORE, the plaintiff prays the Court that he have and recover from the defendant the sum of $102,140.14 . . . .

Not surprisingly, then, it is precisely the amount due and paid to the mortgagees, to the penny,[1] when subtracted from the amounts plaintiff claims as covered losses, that equals the amount demanded in the complaint. The logic of these allegations in plaintiff's own complaint should not escape even a Supreme Court Justice. At the very least, it makes the existence of a stipulation more probable.

I vote to vacate the decision of the Court of Appeals except as to the part which affirms the trial judge's entry of judgment for defendant carrier for the amounts paid to the mortgagees.

Justice MITCHELL joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. JOHNNY LEE SPRUILL

No. 280A85

(Filed 7 October 1987)

1. **Criminal Law § 34.7 — first degree murder — prior assaults on victim — admissible to show malice**

Evidence that defendant on previous occasions had assaulted the victim was competent to prove his malice toward her and was admissible in a first degree murder prosecution. N.C.G.S. § 8C-1, Rule 404(b).

2. **Criminal Law § 33.4 — first degree murder — testimony of victim's mother — admissible**

There was no error in a prosecution for first degree murder where the deceased's mother identified a picture of the deceased taken three weeks before her death, testified that officers at the scene of the crime would not let her see her daughter's body, and testified that the deceased had one little boy. The determinative issue did not depend on the credibility of a State's witness as opposed to the credibility of defendant, the fact that the mother of the deceased was not allowed to see the deceased's body should not have been

1. The defendant's counterclaim clarified that the amount the carrier paid to Industrial Federal Savings and Loan Association was $21,524.58, rather than $21,382.23, as alleged in the complaint. This corrected amount was admitted by the plaintiff in his reply. The majority merely cites the similar allegations in defendant's answer and in plaintiff's reply thereto.

prejudicial to defendant, the court instructed the jury not to consider testimony that the deceased had a child, and the picture of the deceased was not shown to the jury.

3. Criminal Law § 135.8— first degree murder—aggravating factor—especially heinous, atrocious or cruel

The evidence in a first degree murder prosecution supported the aggravating factor that the killing was especially heinous, atrocious or cruel where defendant had assaulted his victim on two previous occasions; defendant followed the victim, his former girlfriend, constantly on the night of the killing and would not allow her to leave the nightclub without him; defendant followed the victim when she left the nightclub and pounced on her twice, wounding her the first time and cutting her throat the second, causing her to drown in her own blood; and there was evidence that the victim knew the defendant was following her and that she was in fear of him. N.C.G.S. § 15A-2000(e)(9).

4. Criminal Law § 135.9— first degree murder—mitigating factor—no peremptory instruction

The trial court did not err in a prosecution for first degree murder by submitting the mitigating circumstance of mental or emotional disturbance without the requested peremptory instruction where the equivocal testimony of a psychiatrist called by defendant as to defendant's mental and emotional condition was sufficient to make it a jury question as to whether defendant was under the influence of a mental or emotional disturbance at the time of the killing. N.C.G.S. § 15A-2000(f)(2).

5. Criminal Law § 135.4— first degree murder—sentencing—jury unanimity

The jury's recommendation at the end of the penalty stage of a first degree murder prosecution was unanimous even though one juror became emotionally upset and hesitated before indicating her concurrence with the death recommendation by nodding her head in the affirmative. N.C.G.S. § 15A-2000(b) requires that the jury be unanimous, but does not specifically require that the juror's assent be manifested by spoken word.

6. Criminal Law § 135.6— first degree murder—sentencing—admissibility of evidence

There was no prejudicial error in the penalty phase of a prosecution for first degree murder from a deputy's hearsay testimony that most people defendant had worked for had had trouble with him stealing because no right arising under the U. S. Constitution was affected by the testimony and because the evidence of defendant's cruelty towards the victim was so overwhelming that evidence that some people said that defendant had stolen property would not have affected the outcome. Testimony that people said defendant had assaulted his females several times went to character or reputation, which is based on what people say or do not say about a person, and was admissible.

7. Criminal Law § 135.10— first degree murder—sentencing—proportionality review

There was nothing in the record of a first degree murder prosecution to suggest that the sentence of death was imposed under the influence of passion,

prejudice, or other arbitrary factors, and the death penalty was not excessive or disproportionate. N.C.G.S. § 15A-2000(d)(2).

APPEAL by defendant from a death sentence imposed at the 29 January 1985 Session of NORTHAMPTON County Superior Court, *Smith (Donald L.), Judge*, presiding. Heard in the Supreme Court 14 April 1987.

The defendant was tried for the first degree murder of his former girlfriend Beatrice Williams. The State's evidence showed that on the night of 31 March 1984, Beatrice Williams and her friend Laura Scott went to Jasper's, a nightclub located on Highway 301 near Pleasant Hill, North Carolina. The defendant was there. The defendant and Beatrice Williams had been "dating for quite a while" but Beatrice Williams had recently broken off their relationship. During the evening the defendant "hounded" Beatrice Williams, following her every step and movement and not letting her out of his sight.

Laura Scott approached Harold Williams, an employee of Jasper's, and requested Williams' aid in stopping defendant from his actions. After observing the defendant and Beatrice Williams conversing, Harold Williams said that "the two were only talking, . . . and there's nothing I can do about that."

Later Harold Williams observed the defendant and Beatrice Williams enter the lobby of the nightclub with Laura Scott as if they were leaving together. Williams testified that Beatrice Williams "was rubbing her hands and she looked like she had tears in her eyes . . ., her knees were shaking as if she didn't know what to do." During this period of a few minutes, defendant remained close to Beatrice Williams moving every time she moved "shoulder to shoulder with her." During this entire period defendant had his hand in his coat pocket and did not remove it at any time. As Beatrice Williams started to exit the club, Harold Williams volunteered to escort her to her car, hoping to discourage the defendant's actions, "so he wouldn't do anything." As Harold and Beatrice Williams and a trailing defendant exited the nightclub Laura Scott drove the automobile to the front of the building to pick up Ms. Williams. As Ms. Williams opened the door to the car, defendant moved towards the vehicle and the victim. Harold Williams then told the defendant to "leave her alone," to which the

defendant replied "[m]an, I ain't going to do nothing to her." A few minutes later the defendant began chasing Ms. Williams around the car and Harold Williams heard the victim say "Johnny don't." At that point Harold Williams ran back into the club to call the police. When he returned to the outside, the defendant was in the front seat of the car on top of Beatrice Williams. Harold Williams, with the aid of Joseph Jackson, pulled the defendant from Beatrice Williams. Harold Williams and Jackson testified that the victim had blood on her hands and chest, they further observed cut marks in both areas. Harold Williams ran back into the club to call the rescue squad; and while Jackson held the defendant, the victim managed to pull the car up a few feet and stop. Witness Jackson was concerned for the victim's welfare so he let go of the defendant and attempted to open the door on the driver's side of the vehicle. Jackson found the door was locked and upon looking back to find the defendant he noticed that the defendant had walked around the vehicle, entered from the passenger's side and was "up on the seat with a knife." Jackson then ran back around the car to get to the defendant but by the time he arrived defendant had cut Beatrice Williams' throat. Jackson pulled the defendant off the victim and heard the defendant say, "I meant to do it; I meant to do it." Jackson observed Ms. Williams' throat to be "open," with the only audible sounds coming from the victim to be a "bubbling noise" as she attempted to speak. A rescue squad vehicle arrived on the scene some twenty-five minutes later.

The defendant then "folded his knife up and put it inside his pocket, . . . and walked off as if nothing had happened." Defendant was picked up and arrested approximately one mile from the scene by a highway patrolman.

According to the testimony of Dr. Louis Levy, a pathologist, the victim died as a result of "drowning in her own blood," when blood rushed into the airway or trachea region of the throat, forming a "foaming" physical block to the passage of air. Dr. Levy described the wound to the neck as extending over six inches long from about the angle of the jaw forward and into the windpipe which was laid open. Dr. Levy testified that the cartilage section which the defendant cut through was probably the toughest cartilage in the body, and that even with a very sharp knife it

would have taken considerable force and effort to sever such an area.

At the guilt phase of defendant's trial the State, over objection of the defendant, offered the testimony of two witnesses, Lemile Lockart and Helen Britton. They testified about two separate incidents prior to the murder when the defendant had assaulted the victim. The defendant did not offer evidence during the guilt phase of the trial. The jury returned a verdict of guilty.

At the penalty phase of trial the defendant offered evidence of a psychologist and a psychiatrist as well as five character witnesses. Defendant was diagnosed as having a low IQ (64), as well as a personality disorder. The evidence showed the defendant to be epileptic, and to have a long history of seizure disorders. The jury recommended the death penalty. From a sentence of death the defendant appealed.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.

A. Jackson Warmack, Jr. and Thomas L. Jones, Jr., for defendant appellant.

WEBB, Justice.

GUILT PHASE

[1] The defendant first assigns error to the testimony of the witnesses Lockart and Britton which showed there had been prior altercations between the defendant and Beatrice Williams. He argues that this testimony was only relevant to prove his character in order to show he acted in conformity therewith in killing Beatrice Williams. N.C.G.S. § 8C-1, Rule 404(b) prohibits evidence of other crimes, wrongs or acts to prove the character of a person in order to show he acted in conformity therewith. If evidence of the other acts tends to prove any other relevant fact such evidence is not excluded.

In *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969), the defendant was convicted of the murder of his wife. This Court held that evidence was admissible which showed the defendant had assaulted his wife on several occasions prior to the day he killed her. This Court said the evidence of ill treatment of the

deceased by her husband over a period of time was relevant to prove his malice toward her, malice being an essential element of first degree murder. We hold that the evidence that defendant on previous occasions had assaulted Beatrice Williams was competent to prove his malice toward her and was admissible. Other cases which hold that evidence of other assaults is admissible in homicide cases are *State v. King*, 301 N.C. 186, 270 S.E. 2d 98 (1980); *State v. Ray*, 212 N.C. 725, 194 S.E. 2d 482 (1938); *State v. Spinks*, 77 N.C. App. 657, 335 S.E. 2d 786, *affirmed*, 316 N.C. 547, 342 S.E. 2d 522 (1986); and *State v. Beam*, 70 N.C. App. 181, 319 S.E. 2d 616 (1984).

[2] In his second assignment of error the defendant contends that certain testimony of the deceased's mother was prejudicial. The mother testified that she drove to Jasper's after she heard her daughter had been cut but the officers would not let her see her daughter's body. The deceased's mother was asked on direct examination whether the deceased had any children. An objection to this question was sustained but the mother nevertheless answered that the deceased had "one little boy." The court then instructed the jury to disregard this testimony. The mother also identified a picture of the deceased taken three weeks before her death but the picture was not shown to the jury.

The defendant contends that the above testimony was irrelevant to any issue in the case and its only effect was to create prejudice against him. He contends that pursuant to *State v. Page*, 215 N.C. 333, 1 S.E. 887 (1939), he is entitled to a new trial. In *Page*, this Court ordered a new trial after the defendant had been convicted of rape. The prosecuting witness was allowed to testify that she was a widow supporting a young child and she had been forced to take a job with a show because there was no other work for her. This Court said this testimony was irrelevant and could "arouse in the minds of the jury sympathy for the prosecutrix and to excite therein prejudice against the accused." This Court said that because the determinative question for the jury was whether the prosecuting witness or the defendant was to be believed, the admission of this testimony was prejudicial.

Page is easily distinguishable from this case. In this case, the determinative issue does not depend on the credibility of a state's witness as opposed to the credibility of the defendant. The

defendant in this case did not testify. There were several witnesses for the State who testified to the essential elements of the crime. In addition, we do not believe the testimony which the defendant finds objectionable would create sympathy for the victim or prejudice to the defendant. The fact that the mother of the deceased was not allowed by the officers to see the deceased's body shortly after she died should not have been prejudicial to the defendant. The court instructed the jury not to consider testimony that the deceased had a child and we presume the jury followed the court's instruction. *Apel v. Coach Co.*, 267 N.C. 25, 147 S.E. 2d 566 (1966). The deceased's mother was allowed to identify a picture of the deceased but the picture was not shown to the jury. We hold this was not prejudicial to the defendant. This assignment of error is overruled.

SENTENCING PHASE

[3] The defendant has made four assignments of error to the sentencing phase of the trial. He contends first that there was not sufficient evidence to support a finding of the aggravating circumstance that the murder was especially heinous, atrocious or cruel. N.C.G.S. § 15A-2000(e)(9). This Court has held that to support this aggravating circumstance the evidence must show that the level of brutality exceeds that normally found in first degree murders or that the murder is conscienceless, pitiless or unnecessarily torturous to the victim. *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). We have also said that it is appropriate to find this aggravating circumstance when the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in murder cases. *State v. Stanley*, 310 N.C. 332, 312 S.E. 2d 393 (1984). We have said that two types of murder that fall in this category are those which are physically agonizing for the victim or which are in some other way dehumanizing and the type of killing which is less violent but involves the infliction of psychological torture by leaving the victim in his last moments aware of, but helpless to prevent, impending death. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983).

We hold that the evidence in this case supports the aggravating circumstance that the killing was especially heinous, atrocious or cruel. The defendant had assaulted his victim on two previous occasions. On the night of the killing the defendant "coattailed"

the victim, constantly following her and her companion and would not allow them to leave the nightclub without him. When she left the nightclub he followed her and when he had the opportunity he pounced on her not once but twice. He wounded her the first time and cut her throat the second time, causing her to drown in her own blood. We believe this evidence supports a finding that the level of brutality exceeds that normally found in first degree murder cases and that it was pitiless and unnecessarily torturous to the victim. In *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 166 (1986), one of the contributing causes to the victim's death was the cutting of the victim's throat and we held that this supported a finding that the victim had an agonizing death. The same reasoning applies in this case. This case is not, as contended by the defendant, governed by *State v. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984), in which the defendant followed his victim but the evidence did not show the victim feared for his life prior to the time he was shot. There was no evidence in *Moose* that the deceased lingered after he was shot. This Court held this was not sufficient evidence that the deceased knew he was being stalked to cause him to suffer psychological torture. In this case the evidence is that the victim knew the defendant was following her and that she was in fear of him. The jury could conclude from this evidence that she suffered psychological torture.

[4] The defendant next assigns error to the refusal of the court to give a peremptory instruction on the mitigating circumstance listed at N.C.G.S. § 15A-2000(f)(2), "The capital felony was committed while the defendant was under the influence of mental or emotional disturbance." The court submitted this mitigating circumstance but did not give the requested peremptory instruction. The defendant called as witnesses at the sentencing hearing Michael Hewitt, a clinical psychologist, and James Gray Groce, a psychiatrist. Dr. Groce testified that he had examined the defendant and, in his opinion, the defendant was mildly mentally retarded and this could be classified as a mental impairment. On cross-examination he testified he could not say the defendant had an emotional disorder. Dr. Groce did not testify that the defendant had a mental disturbance. Dr. Hewitt testified that he diagnosed the defendant as having "an atypical personality disorder" which is "a mental or emotional disorder."

The defendant contends that the testimony of Dr. Groce and Dr. Hewitt presented uncontradicted testimony that he was under the influence of a mental or emotional disturbance at the time Beatrice Williams was killed and pursuant to *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979), he was entitled to a peremptory instruction on this mitigating circumstance. We hold the defendant was not entitled to such an instruction. Dr. Groce testified that after examining the defendant he could not say the defendant had an emotional disorder. This is evidence that he was not under the influence of an emotional disturbance. Other testimony of Dr. Groce was to the effect that the defendant had a mental impairment. We believe this evidence is more probative of the mitigating circumstance listed at N.C.G.S. § 15A-2000(f)(6), "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." This mitigating circumstance was submitted to the jury but not found by them. The use of the word "disturbance" shows the General Assembly intended something more in the mitigating circumstance at N.C.G.S. § 15A-2000(f)(2) than mental impairment which is found in another mitigating circumstance. The equivocal testimony of Dr. Groce as to the mental and emotional condition of the defendant is sufficient to make it a jury question as to whether he was under the influence of a mental or emotional disturbance at the time of the killing.

[5] By his sixth assignment of error defendant contends the trial court erred in accepting the recommendation of the trial jury at the penalty stage, in that the recommendation of the jury was not unanimous as required by N.C.G.S. § 15A-2000(b).

During the course of polling the jury at the end of the penalty phase of trial, one of the jurors, Mrs. Bernice Scott, became emotionally upset and hesitated before indicating her concurrence with the death recommendation by nodding her head in the affirmative.

During the polling of the jury the following took place:

THE COURT: Bernice G. Scott, would you please stand. Mrs. Scott, your presiding officer has returned as the jury's unanimous verdict that the defendant, Johnnie Lee Spruill, be sentenced to death; is that your verdict, ma'am?

Would you like to sit and think for a minute, Mrs. Scott?

Sheriff, would you please give her a cup of water, please.

(REPORTER'S NOTE: The juror, Bernice G. Scott, was crying and appeared at the time unable to speak.)

THE COURT: All right, Mrs. Scott, would you please stand, ma'am. Mrs. Scott, your presiding officer has returned as the jury's unanimous verdict that the defendant Johnnie Lee Spruill, be sentenced to death; is that your verdict, ma'am?

BERNICE SCOTT: Yes—(Juror nods head affirmatively.)

THE COURT: And do you still assent thereto?

BERNICE SCOTT: (Juror nods head affirmatively.)

THE COURT: Thank you, ma'am. Be seated.

N.C.G.S. § 15A-2000(b) requires that the jury, during the sentencing phase of a capital case, be unanimous in its recommendation before the death sentence can be imposed on a defendant. Although citing no authority, defendant contends that based on the above quoted transcript, the verdict of the jury was not unanimous when polled in open court. Defendant argues that juror Scott's actions were unclear and that she did not give the requisite affirmative assent necessary to fulfill the required unanimous decision set forth in N.C.G.S. § 15A-2000(b).

N.C.G.S. § 15A-2000(b) reads in part:

> The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror *concurs and agrees* to the sentence recommendation returned. (Emphasis added.)

Thus each juror must *concur and agree* with the ultimate judgment rendered. N.C.G.S. § 15A-2000(b) does not specify how or by what method this concurrence and agreement should be expressed. It does not specifically require, as defendant contends, that the juror's assent be manifested by spoken word. Rather the crucial aspect for consideration is whether there was a concurrence with the jury verdict, not the manner in which agreement

is manifested. Here, the juror in question made an affirmative physical act (nodding of head in affirmation) as to the verdict. There was no evidence of coercion or pressure placed on the juror by any of the parties present, rather the juror's actions were voluntary in nature. Therefore, we hold that the juror's actions were sufficient to meet the requirement of N.C.G.S. § 15A-2000 (b). Accordingly, this assignment of error is overruled.

[6] In his seventh assignment of error the defendant contends it was error at the sentencing hearing for the State to elicit from Deputy Sheriff Theodore Bynum certain testimony in rebuttal. After asking several questions to which objections were sustained the following colloquy occurred.

> Q. Well, can you tell the members of the jury the way he acts, the way he is around other people?
>
> . . . .
>
> A. Well, he's a pretty good worker and mechanic, but most people that he works for, they have a little trouble with his stealing.
>
> . . . .
>
> Q. Do you know his character and reputation—do you know what his character and reputation is in the community in which he lives, that is, what other people—
>
> MR. WARMACK: Object.
>
> BY MR. BEARD:
>
> Q. . . . say about him?
>
> THE COURT: Overruled.
>
> BY MR. BEARD:
>
> Q. Do you know what it is?
>
> A. Yes, sir.
>
> Q. What is it?
>
> . . . .
>
> A. From what people say, he assaulted his females several different times.

The court submitted as a mitigating factor a question as to whether defendant was a person of good character and reputation. This testimony was relevant to rebut the defendant's evidence on this mitigating circumstance. The first question was not in regard to character or reputation. The answer seems to be based on what people said about the defendant. This makes it hearsay and it should have been excluded. The second question is in form a question as to the character or reputation of the defendant. The witness testified, "From what people say, he assaulted his females several different times." Reputation is based on what people say or do not say about a person. 1 Brandis on North Carolina Evidence § 102 (1982). The answer of the witness to the second question could have been in better form but we hold it was not error to admit it.

We hold it was not prejudicial error to admit the answer to the first question. No right arising under the United States Constitution is related to this testimony. The burden is on the defendant to prove that had the error not been committed a different result would have been reached, N.C.G.S. § 15A-1443(a). *State v. Billups*, 301 N.C. 607, 272 S.E. 2d 842 (1981). We hold there was not a reasonable possibility that had this hearsay evidence not been introduced the result would have been different. The evidence of the defendant's treatment of Beatrice Williams was so overwhelming as to his cruelty to her that evidence that some people had said he had stolen property would not have affected the outcome. We hold this was harmless error.

PROPORTIONALITY REVIEW

[7] Having determined there is no error in the guilt or penalty phase of the trial sufficient to require a new trial or sentencing hearing, we are required by N.C.G.S. § 15A-2000(d)(2) to determine (1) whether the record supports the jury's finding of the aggravating circumstance upon which the sentence of death was imposed, (2) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and (3) whether the sentence is excessive or disproportionate to the penalty imposed in the pool of similar cases, considering both the crime and the defendant.

As to the influence of passion, prejudice or other arbitrary factors on the sentence imposed, we can find nothing in the rec-

ord to suggest that the sentence of death was imposed under the influence of any of these factors. We have held that the record supports the jury's finding of the single aggravating circumstance "that the murder was especially heinous, atrocious and cruel." N.C.G.S. § 15A-2000(e)(9). In our discussion of this circumstance, we pointed out how the evidence supported this factor.

In dealing with a review as to whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" in *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983), this Court said it would use a "pool" of cases which included:

> *[A]ll 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.

This pool includes only those cases which this Court has found to be error free in both phases of trial. *State v. Jackson*, 309 N.C. 26, 45, 305 S.E. 2d 703, 717 (1983).

In *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), we said that in comparing a case with those in the pool, we would limit our consideration to those cases "roughly similar with regard to the crime and the defendant." We also said:

> 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.

Lawson, 310 N.C. at 648, 314 S.E. 2d at 503.

Distinguishing features of this case are: (1) it is a case of first degree murder, preceded by prior physical and mental abuse of the victim; (2) it is a case in which a single aggravating factor was found, "that the killing was especially heinous, atrocious or cruel," N.C.G.S. § 15A-2000(e)(9); (3) it is a case in which no mitigating factors were found, although five were submitted to the jury; and (4) it is a case in which defendant showed no remorse for his actions, and appeared in full control of his mental and physical condition.

The defendant cites sixteen cases from the pool of cases which he says involve killings in which the victim was the father, mother, wife, ex-wife, husband, in-law, girlfriend, son or daughter. In all these cases the defendant was convicted of first degree murder. In twelve of the cases the jury recommended life in prison and in four of them the jury recommended the death penalty. These cases are *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. 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. Noland*, 312 N.C. 1, 320 S.E. 2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L.Ed. 2d 369, *reh'g denied*, 471 U.S. 1050, 85 L.Ed. 2d 342 (1985); *State v. King*, 311 N.C. 603, 320 S.E. 2d 1 (1984); *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. Henson*, 310 N.C. 245, 311 S.E. 2d 256, *cert. denied*, 469 U.S. 839, 83 L.Ed. 2d 78 (1984); *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1984); *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982); *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. denied*, 454 U.S. 933, 70 L.Ed. 2d 240, *reh'g denied*, 454 U.S. 1117, 70 L.Ed. 2d 655 (1981); *State v. Anderson*, 303 N.C. 185, 278 S.E. 2d 238 (1981); *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981); *State v. Clark*, 300 N.C. 116, 265 S.E. 2d 204 (1980); *State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177 (1980); *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980); and *State v. Colvin*, 297 N.C. 691, 256 S.E. 2d 689 (1979).

Most of the cases have facts which distinguish them from this case. In *Harold*, *King*, *Henson*, *Adcock*, *Woods*, *Anderson*, *Myers*, and *Colvin* the killings were by gunshot and there was no evidence of suffering as there is in this case. In *Clark* there was much more evidence that the defendant was mentally deranged than in this case. A psychiatrist testified the "defendant might

have had a psychotic break and therefore would not have known right from wrong at the time of the stabbing." In *Spangler* and *Adcock*, there was also evidence the defendants did not know right from wrong at the time of the killings. In *Franks*, a psychiatrist testified that in his opinion defendant "suffered then, as he does now, from chronic undifferentiated schizophrenia." The psychiatrist testified that, in his opinion, the defendant did know right from wrong at the time of the killing.

We believe the cases of *Martin*, *Boyd*, *Noland* and *Huffstetler* are similar to this case.

In *Martin*, the defendant was tried and convicted of first degree murder for the shooting death of his wife. As in the present case, the evidence showed that the murder was preceded by prior threats against the victim, that defendant followed the victim to the crime scene, that the crime involved a great deal of pain and suffering, that the murder was not done in a quick and efficient manner (the defendant shot and pistol whipped the victim over a twenty-five minute span), that the victim was murdered in a public place in full view of witnesses, and that defendant suffered some mental and emotional disorders. In *Martin*, this Court upheld the death sentence citing the manner in which death was inflicted and the prior threats of death which preceded the actual crime by some six months.

In *Boyd*, this Court sustained a death sentence wherein the murder evolved from the separation of defendant from a woman he purportedly loved. Defendant threatened the victim several times prior to following her to a shopping mall where he stabbed her over thirty times in front of her family and friends. As in the present case, defendant showed no remorse after the killing. As in *Martin*, and the present case, the Court in *Boyd* found N.C.G.S. § 15A-2000(e)(9) as an aggravating circumstance to the crime. In upholding the sentence of death, this Court cited the overwhelming evidence of guilt, the prior threats by defendant, and the heinous nature of the crime including the suffering of the victim.

In *Noland*, the evidence showed defendant was upset because his wife had left him and taken their children. After trying unsuccessfully to convince her to return, defendant threatened to kill her and members of her family. Defendant made these threats several times over the course of approximately a three month

period. When his wife did not return, defendant killed his wife's sister and father and seriously wounded her mother. As in the present case, there was some evidence defendant suffered from mental and emotional problems, however the Court citing the heinous, atrocious and cruel circumstances, the prior threats and beatings of the victim, and the carefully planned and executed nature of the murders themselves, sustained the sentence of death.

Finally, in *Huffstetler*, defendant was convicted of the first degree murder of his mother-in-law, based on evidence tending to show that he had beaten her to death with a skillet. As in the present case there was evidence of the severe and brutal nature of the crime (the force necessary to cave the victim's skull in and break the jaw), a lack of remorse shown by defendant, and the defendant's cool actions after the murder. Based on these factors, this Court concluded the sentence of death entered was not disproportionate.

Martin, *Boyd*, and *Huffstetler*, have characteristics present in this case: (1) prior assaults and threats directed to the victim by defendant; (2) fear on the part of the victim; (3) a calculated plan of attack by defendant; (4) a senseless, brutal, and forceful public killing found to be especially heinous, atrocious or cruel by a jury, N.C.G.S. § 15A-2000(d)(2); (5) a period of time in which the victim suffered a high degree of physical and mental pain prior to death; and (6) a distinct lack of remorse exhibited by defendant after the murder. *Noland* also has these characteristics except the jury did not find as an aggravating circumstance that the murder was especially heinous, atrocious or cruel.

The defendant relies on *Adcock* and *Harold* as being similar to this case. In *Adcock*, the defendant was convicted of murdering his estranged wife. The evidence showed that after threatening his wife on several previous occasions, he shot her while following her in his automobile. The vehicle which his wife was driving came to a stop and he shot her again. The jury recommended life in prison. We have said that *Adcock* is distinguishable from this case in that the victim did not suffer in *Adcock* as in this case and there was evidence in *Adcock* that the defendant did not know right from wrong at the time of the killing.

In *Harold*, the defendant after pursuing his former girlfriend, shot her at point blank range as she begged for mercy. There was no evidence that she suffered after she was shot. The circumstances of that killing do not seem to be as brutal as the circumstances of this case. Another case which is somewhat similar to this case is *Parton*. In *Parton*, a witness testified he saw the victim "lying on the ground with a rope around her neck, gasping for air. Defendant then pulled the rope tighter and choked her until she died." There was some evidence that the defendant in *Parton* was under the influence of drugs at the time of the killing and there was no evidence that the defendant stalked his victim. These circumstances distinguish it from this case.

The defendant also relies on six cases in which this Court has held that a death sentence was not appropriate. These cases are *State v. Stokes*, 319 N.C. 1, 352 S.E. 2d 653 (1987), which involved a robbery and murder by a group of men; *State v. Rogers*, 316 N.C. 203, 341 S.E. 2d 713 (1986), which involved the murder of a bystander by mistake while attempting to murder another man; *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985), which dealt with a robbery and murder by a group; *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163 (1984), which involved the murder of a law enforcement officer pursuing the defendant; *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983), which dealt with a death from a gunshot wound in which the defendant sought medical assistance for the victim; and *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983), which involved a robbery and murder. All these cases are factually distinguishable from this case and are not similar for purposes of proportionality review.

We hold that the four cases which are most similar to this case are *Martin*, *Boyd*, *Noland* and *Huffstetler*. In all of them the death penalty was affirmed. We hold the death penalty imposed in this case is not excessive or disproportionate.

The defendant has made twelve assignments of error as to questions which he concedes have previously been decided against the positions he advances in this case. He raises them to give this Court an opportunity to reconsider them. This we decline to do.

In the trial and sentence we find

No error.

STATE OF NORTH CAROLINA v. JEROME PARKER BRITT

No. 498A84

(Filed 7 October 1987)

1. **Criminal Law § 83— wife compelled to testify against husband—harmless error**

Even if defendant's wife was improperly compelled to testify against defendant in violation of N.C.G.S. § 8-57(b), such error was not prejudicial to defendant where defendant's wife essentially corroborated testimony by other witnesses that defendant believed she was having an affair with the victim and that defendant had threatened the victim, and where, in view of the strength of the State's case, there is not a reasonable possibility that a different result would have been reached had defendant's wife not testified. N.C.G.S. § 15A-1443(a).

2. **Criminal Law § 135.4— first degree murder—life sentence—sentencing hearing not required**

The trial judge did not err in sentencing defendant to life imprisonment for first degree murder without holding a separate sentencing procedure in accordance with N.C.G.S. § 15A-2000 where the prosecutor announced at the beginning of the trial that there was no evidence of any aggravating circumstance. The trial court's statement that the State did not "elect" to try defendant for his life did not improperly permit the district attorney to exercise discretion as to defendant's sentence but was merely a recognition that the State had conceded the absence of aggravating factors. Furthermore, the State could properly make such announcement at the beginning of trial, or at any other time, rather than at the sentencing hearing.

3. **Criminal Law § 131.2— recanted testimony—when new trial allowed**

A defendant may be allowed a new trial on the basis of recanted testimony if (1) the court is reasonably well satisfied that the testimony given by a material witness is false, and (2) there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial.

4. **Criminal Law § 131.2— recanted testimony—new trial denied**

Defendant is not entitled to a new murder trial under the standard for newly discovered evidence because an eyewitness recanted his trial testimony and filed an affidavit corroborating defendant's trial testimony where the trial court found that the new testimony is not "probably true." Nor is defendant entitled to a new trial under the rules for recanted testimony where the court's findings can only support the conclusion that the court was not "reasonably well satisfied" that the trial testimony of the eyewitness was false.

APPEAL from sentence of life imprisonment entered by *Barefoot, J.*, on 9 May 1984 following defendant's conviction by a

jury of murder in the first degree. Heard in the Supreme Court 11 March 1987.

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

A. Jackson Warmack, Jr., for defendant-appellant.

FRYE, Justice.

Defendant contends on this appeal that the trial court erred in allowing his wife to testify against him at his trial and in imposing a life sentence without permitting the jury to determine his sentence. We find no reversible error in defendant's trial and sentencing. We also find no error in the denial of defendant's motion for appropriate relief.

Defendant was indicted on 9 January 1984 for the murder of James Thomas Cotton. The case came on for trial before Barefoot, J., on 7 May 1984, and the jury found defendant guilty of first degree murder. The trial judge sentenced defendant to life imprisonment after the State prayed judgment on the grounds that it knew of no evidence of any of the aggravating factors set forth in N.C.G.S. § 15A-2000. Defendant appealed to this Court.

The State's evidence at trial tended to show that defendant believed that his estranged wife was having an *affaire* with the victim, James Cotton, and that defendant had threatened Cotton. On 19 December 1983, at about dusk, Cotton was in Lowe's Fish Market in Seaboard, North Carolina. One of the State's witnesses testified that he saw defendant drive up, get out of his car, and, shotgun in hand, apparently reconnoiter the interior of the fish market before going in. Three witnesses, who were in the fish market at the time, testified that defendant burst into the store, holding his shotgun. He yelled, "I told you, [expletive], I'm going to kill you," or words to that effect, and shot Cotton four or five times. Cotton, who died within a few minutes, was subsequently found to have been armed.

Defendant offered evidence that Cotton had previously harassed and threatened him. He testified that he went into the fish market on 19 December 1983 to resolve matters with Cotton. Although he took his shotgun with him from his truck, he left it outside the door of the fish market. As soon as defendant entered

the store, Cotton started to fumble in his pockets. Believing that Cotton was going for a gun, defendant reached back outside the door for his own gun and shot Cotton.

I.

[1] The State called defendant's wife as one of its rebuttal witnesses. Defendant objected pursuant to N.C.G.S. § 8-57. Subsection (b) of that statute provides, "The spouse of the defendant shall be competent but not compellable to testify for the State against the defendant in any criminal action or grand jury proceedings . . . ." N.C.G.S. § 8-57(b) (1986). *See also State v. Waters*, 308 N.C. 348, 302 S.E. 2d 188 (1983). The trial judge accordingly held a voir dire where defendant's attorney questioned Mrs. Britt to determine whether she was being compelled to testify, and the following transpired:

DIRECT EXAMINATION ON VOIR DIRE BY MR. WARMACK:

Q. You are the wife of Jerome Britt?

A. Right.

Q. When were you married?

A. November 10th, 1981.

THE COURT: Let me ask her now—I'm not interested in that. I'm interested in—

Q. Did you come up here voluntarily today or are you under subpoena?

A. I was called and told I had subpoena.

Q. You were called and told you had a subpoena?

A. Right.

Q. Who called you?

A. Sheldon Skinner.

Q. When did Mr. Skinner call you and told [sic] you were subpoenaed to be up here?

A. Monday.

Q. Did you come up here Monday.

A. No. Then I talked with Mr. Beard and he told me not to come until he called me. So last night he called me.

Q. So you feel like you're up here under subpoena?

A. Well, he told me last night if I didn't come he would send a subpoena.

Q. Would you have come if you weren't told to come?

A. No.

Q. Do you want to testify in this case?

A. Well, I have nothing to testify. I wasn't there. I don't know what happened.

Q. Do you not want to testify in this case?

A. If I have to answer questions—

Q. Do you want to?

A. Got phone call—yes, I'll testify.

Q. You will testify. Do you want to?

MR. BEARD: I'm going to object. I don't know whether anybody wants to testify. It's not particularly pleasurable for anybody to have to come up here.

THE COURT: I understand that. Are you being compelled to testify in this case? Do you feel that way or do you feel you can testify freely?

THE WITNESS: Well, I feel I'm being, you know, asked to testify, because Mr. Beard called me.

Q. Do you feel under any pressure to be here?

A. Well, kind of.

THE COURT: I'll let her testify.

Defendant argues that his wife was improperly compelled to testify against him.[1]

Assuming, *arguendo*, that defendant is correct, we believe that the error was nevertheless not prejudicial.[2] Defendant's wife essentially corroborated other witnesses' testimony that defendant believed she was having an *affaire* with Cotton and that defendant had threatened Cotton. She also testified that defendant threatened her. In view of the strength of the State's case, however, we do not believe that there is a reasonable possibility that a different result would have been reached had defendant's wife not testified. *See* N.C.G.S. § 15A-1443(a) (1983).

II.

[2] Defendant also argues that the trial judge erred in sentencing him to life imprisonment without holding a separate sentencing procedure in accordance with N.C.G.S. § 15A-2000. He contends that the trial judge improperly allowed the district attorney to "elect" to try his case as a non-capital first-degree murder. Defendant is hardly entitled to assign error to the court's failure to allow him to be tried for his life. We shall discuss this assignment of error because it does raise significant questions.

The record shows that the trial judge met with defendant's attorney and the district attorney before a jury was selected. Although their conversation was not recorded by the court reporter, defendant's attorney has informed this Court that the district attorney indicated at that time that he would not seek the death penalty. The record clearly reflects that the case was in

1. We note that the privilege belongs to the wife, not to the defendant, and it does not appear that anyone advised her that she had a right to refuse to testify. Once challenged, the better practice is for the trial judge to advise the spouse that he or she cannot be compelled to testify in cases where this statute applies, and then to determine whether the spouse is in fact still willing to testify.

2. Defendant, citing *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976), contends that his wife's testimony was incompetent and that therefore the error was reversible *per se*. However, we have said that a spouse's testimony is only incompetent if the substance of the testimony concerns a confidential communication. *State v. Waters*, 308 N.C. 348, 302 S.E. 2d 188 (1983); *State v. Freeman*, 302 N.C. 591, 276 S.E. 2d 450 (1981). There is no suggestion that defendant's wife was allowed to testify to confidential communications. Therefore, her testimony was not incompetent.

fact tried as a non-capital case. After the jury returned its verdict and was polled, the following transpired:

> MR. BEARD: State prays judgment, Your Honor.
>
> THE COURT: All right.
>
> Let the record reflect, the State does not elect to try the defendant for his life or to have the second phase which would be a sentencing hearing to determine whether or not the defendant would receive life or death upon his conviction of first degree murder because there were no aggravating circumstances that the State could find. Am I not correct? EXCEPTION 47
>
> MR. BEARD: That's correct, Your Honor.

Defendant quite correctly notes that the question of trying a first degree murder case as capital or non-capital is not within the district attorney's discretion. *See* N.C.G.S. § 15A-2000 (1983); *State v. Jones*, 299 N.C. 298, 261 S.E. 2d 860 (1980); *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979). He relies upon the trial judge's use of the word "elect" in arguing that the trial judge improperly permitted the district attorney to exercise discretion as to his sentence.

However, we have previously held that where there is no evidence of any aggravating circumstance, the trial judge need not conduct the sentencing proceeding set forth in N.C.G.S. § 15A-2000 but may proceed to pronounce sentence of life imprisonment. *See State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597. When the State has no evidence of any aggravating circumstance, the district attorney may so inform the court. In doing so, the district attorney is not exercising any discretion as to defendant's sentence, because a jury may not impose a death sentence in the absence of at least one aggravating factor. *See id.* Rather, by bringing the absence of such factors to the attention of the trial judge, the district attorney is pursuing the laudable goal of avoiding needless judicial proceedings and concomitant waste of judicial resources. When Judge Barefoot's words are considered in their entirety, it is clear that he was merely announcing that the State had conceded the absence of aggravating factors and would not seek to put the court, the jury, the State, and the defendant through needless proceedings.

In *State v. Johnson*, we said, "In a case in which the state has no evidence of an aggravating circumstance we see nothing in the statute which would prohibit the state from so announcing to the court and jury *at the sentencing hearing*." 298 N.C. at 79-80, 257 S.E. 2d at 620 (emphasis added). Relying on this sentence, defendant contends that the district attorney may only make this announcement at the close of the guilt phase of a trial. Defendant has stretched the wording in *Johnson* beyond its intended meaning. All *Johnson* said was that the State *could* make its announcement at the close of the guilt phase; it did not say that this was the only permissible moment. *Id.* Although we reiterate our conclusion that any such announcement must be based upon a genuine lack of evidence to support the submission of any aggravating factors, *see id.*, there is nothing to prevent the State from making the announcement at the beginning of the trial, *see State v. Meisenheimer*, 304 N.C. 108, 111 n.1, 282 S.E. 2d 791, 794 n.1 (1981), or at any other time.

The record before this Court shows no evidence of any of the aggravating factors listed in N.C.G.S. § 15A-2000(e). Accordingly, the trial court committed no error with respect to N.C.G.S. § 15A-2000 in its conduct of defendant's trial and sentencing. *See State v. Meisenheimer*, 304 N.C. 108, 111 n.1, 282 S.E. 2d 791, 794 n.1.

III.

After defendant's conviction and entry of notice of appeal to this Court, one of the four witnesses who was in the fish market at the time of the shooting, Joe Louis Moody, recanted his testimony and filed an affidavit which in substance corroborates defendant's trial testimony. Defendant, pursuant to the provisions of N.C.G.S. § 15A-1411 to -1422, filed a motion for appropriate relief in this Court. By order entered 20 March 1985, we remanded the case to the Superior Court, Northampton County, for an evidentiary hearing on defendant's motion. The hearing was held at the 15 April 1985 Criminal Session of Superior Court, Northampton County, with Stephens, J., presiding. After hearing testimony from the witness Moody and from the deputy sheriff who investigated the murder, Judge Stephens made findings of fact and conclusions of law and denied the motion. We find no error.

Defendant seeks a new trial pursuant to N.C.G.S. § 15A-1415 (b)(6) (1983) which permits a motion for appropriate relief to be made more than ten days after entry of judgment on the grounds that:

> Evidence is available which was unknown or unavailable to the defendant at the time of the trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant.

In *State v. Ellers*, 234 N.C. 42, 65 S.E. 2d 503 (1951), a case in which the key witness repudiated his testimony after the jury verdict but before judgment was entered thereon, the Court held that the defendant was entitled to a new trial because the recantation removed the basis for the verdict. In so holding, the Court said, "the decisions ordinarily applicable to newly discovered evidence will not be held as controlling upon a factual situation like that disclosed by the present record." *Id.* at 45, 65 S.E. 2d at 505. Nevertheless, several subsequent cases have used the newly discovered evidence standard for determining whether a defendant is entitled to a new trial based on repudiated or recanted testimony. *See State v. Morrow*, 264 N.C. 77, 140 S.E. 2d 767 (1965); *State v. Roddy*, 253 N.C. 574, 117 S.E. 2d 401 (1960); and *State v. Blalock*, 13 N.C. App. 711, 187 S.E. 2d 458 (1972). In a recent case, however, we found it unnecessary to decide whether the affidavits submitted in support of a motion for appropriate relief should be treated as recanted testimony or newly discovered evidence, concluding "that the affidavits do not show either." *State v. Nickerson*, 320 N.C. 603, 609, 359 S.E. 2d 760, 763 (1987). More importantly, we recognized that *State v. Ellers*, 234 N.C. 42, 65 S.E. 2d 503 "stands for the proposition that the rule for granting a new trial for newly discovered evidence is not the same as the rule for granting a new trial for recanted testimony." *State v. Nickerson*, 320 N.C. at 609, 359 S.E. 2d at 763.

Our usual standard for evaluating motions for a new trial on the grounds of newly discovered evidence requires a defendant to establish seven prerequisites:

> 1. That the witness or witnesses will give newly discovered evidence.

2. That such newly discovered evidence is probably true.

3. That it is competent, material and relevant.

4. That due diligence was used and proper means were employed to procure the testimony at the trial.

5. That the newly discovered evidence is not merely cumulative.

6. That it does not tend only to contradict a former witness or to impeach or discredit him.

7. That it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.

State v. Cronin, 299 N.C. 229, 243, 262 S.E. 2d 277, 286 (1980). *See also State v. Beaver*, 291 N.C. 137, 229 S.E. 2d 179 (1976). This standard is a modification of the "*Berry*" rule, initially set forth in *Berry v. State*, 10 Ga. 511 (1851) (setting forth essentially the same prerequisites but lacking the requirement that the newly discovered evidence be "probably true"). The *Berry* rule is commonly used in evaluating newly discovered evidence. *See generally* Note, *Gary Dotson as Victim: The Legal Response to Recanting Testimony*, 35 Emory L. J. 969, 973-75 (1986) (hereinafter cited as *Dotson*).

[3] However, several jurisdictions have been troubled by the idea that recanted testimony is a special type of newly discovered evidence. *See, e.g., State v. Lawrence*, 112 Idaho 149, 730 P. 2d 1069 (Ct. App. 1986); *State v. Taylor*, 287 N.W. 2d 576 (Iowa 1980); *Thacker v. Commonwealth*, 453 S.W. 2d 566 (Ky. 1970); *State v. Caldwell*, 322 N.W. 2d 574 (Minn. 1982); *State v. Sena*, 103 N.M. 312, 706 P. 2d 854 (1985); *see generally* 3 C. Wright, *Federal Practice and Procedure*, § 557.1 (2d ed. 1982) (hereinafter cited as *Wright*). It "affects the integrity of the judicial process in a way that overlooked evidence does not." *State v. Lawrence*, 112 Idaho at 151, 730 P. 2d at 1071 (citing 3 C. Wright, *Federal Practice and Procedure* § 557.1 (2d ed. 1982)). In recantation cases, what is sought is a new trial *without* untruthful testimony rather than one that merely adds different material. *State v. Caldwell*, 322 N.W. 2d 574, 585 (Minn.). Accordingly, although most states and at least two federal circuits continue to use the same standard for

evaluating motions for a new trial on the basis of recanted testimony, several jurisdictions use a special standard. *See generally Dotson*, 973-975. A few use tests peculiar to their own jurisdiction, *e.g.*, *People v. Bracey*, 51 Ill. 2d 514, 283 N.E. 2d 685 (1972) (due process test—defendant has burden of showing that perjured testimony was used, then state must show that the testimony was harmless beyond a reasonable doubt); *State v. Robillard*, 146 Vt. 623, 508 A. 2d 709 (1986) (combination of first and third parts of *Larrison* rule with "probability" standard). However, most of the federal circuits and at least four states have adopted the "*Larrison*" rule, first enunciated in *Larrison v. United States*, 24 F. 2d 82 (7th Cir. 1928). *Blankenship v. State*, 447 A. 2d 428 (Del. 1982); *State v. Lawrence*, 112 Idaho 149, 730 P. 2d 1069 (Ct. App.); *State v. Caldwell*, 322 N.W. 2d 574 (Minn.); *Pickering v. State*, 260 N.W. 2d 234 (S.D. 1977); *Wright* § 557.1 (1982). Under the *Larrison* rule, a defendant may be allowed a new trial on the basis of recanted testimony if:

1) the court is reasonably well satisfied that the testimony given by a material witness is false;

2) that without it the jury *might* have reached a different conclusion; and

3) the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

Larrison, 24 F. 2d 82, 87-88 (7th Cir.) (emphasis in the original). We note that the *Larrison* rule has been adopted by the Fourth Circuit. *See United States v. Wallace*, 528 F. 2d 863 (4th Cir. 1976). Although the *Larrison* rule has not been universally approved, *see, e.g., United States v. Krasny*, 607 F. 2d 840 (9th Cir. 1979), *cert. denied*, 445 U.S. 942, 63 L.Ed. 2d 775 (1980); *United States v. Stofsky*, 527 F. 2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819, 50 L.Ed. 2d 80 (1976); *Stevenson v. State*, 299 Md. 297, 473 A. 2d 450 (1984); *State v. Robillard*, 146 Vt. 623, 508 A. 2d 709, we nevertheless believe it to be a better standard for evaluating motions for a new trial based on recanted testimony than the usual standard employed in considering motions made on the basis of newly discovered evidence. We therefore adopt a North Carolina version of the *Larrison* rule, modified and restated as

follows: A defendant may be allowed a new trial on the basis of recanted testimony if:

1) the court is reasonably well satisfied that the testimony given by a material witness is false, and

2) there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial.

We are not convinced that part three of the *Larrison* rule, requiring that the party be taken by surprise or not know of the falsity until after the trial, is a prerequisite to the award of a new trial if the conviction was based upon perjured testimony. We therefore do not adopt part three of the *Larrison* rule.

[4] The defendant, the State and the court below considered defendant's motion for a new trial under the usual rules relating to newly discovered evidence. Nevertheless, Judge Stephens' findings and conclusions are sufficient to allow review under both the more usual standard actually employed and under the new rule we adopt today. Specifically, the judge concluded that the witness Moody's recantation was not probably true. In support of this conclusion he found, *inter alia*:

> (9) That the trial testimony of each eye witness was consistent in all major respects in that all three testified that the defendant came into the market with a gun and fired five times after saying to James Cotton "[Expletive], I told you I was going to kill you, didn't I?" That the defendant entered only one time before firing and that James Cotton was struck by the bullets immediately. That James Cotton had no gun in his hand and offered no violence to the defendant before the shooting.
>
> . . . .
>
> (13) That within thirty to forty-five minutes after the shooting, Chief Deputy Otis Wheeler arrived at the fish market and observed the body of James Cotton. The first witness he questioned was Joe Louis Moody who made a statement to Wheeler consistent with his testimony later at trial. Prior to the trial he was interviewed by Wheeler and Assistant District Attorney Rollins and gave them the same

factual account he had previously given Wheeler the night of the shooting and which he later gave at trial. Prior to trial and during the trial Joe Louis Moody never indicated that he had been threatened by anyone or that his statements were false.

(14) That Joe Louis Moody is a long-time acquaintance of the defendant; that Moody spoke with defendant several times by telephone while defendant was in the Northampton County jail and he corresponded by letter with the defendant after the trial was over; Moody has since that time destroyed the letters which he received from the defendant.

(15) That Joe Louis Moody several months after the trial notified Attorney Warmack to advise him that he had testified falsely at trial as the result of threats from the mother of the deceased and being afraid for his own safety.

(16) That Joe Louis Moody has now testified before this Court that Jerome Britt came into the fish market unarmed and that Britt thereafter went outside and got his gun when James Cotton began reaching inside his clothing for a weapon. Moody testified that he told Detective Wheeler the night of the shooting that it was self defense, but Wheeler ignored him and wrote up something different which Moody signed without reading; and that Moody says he testified falsely at trial out of fear from threats.

(17) That this Court has carefully scrutinized the prior trial testimony of Joe Louis Moody and the present testimony of Moody; the Court has carefully watched and evaluated the demeanor of this witness and considered his answers to all questions, paying careful attention to his explanation of his alleged failure to testify truthfully at trial; the Court finds Joe Louis Moody's present testimony unworthy of belief. His statement to Detective Wheeler shortly after the shooting was consistent with his trial testimony and was consistent with the account of the other three witnesses who were all questioned separately. He later verified the accuracy of this statement to Detective Wheeler and Assistant District Attorney Rollins prior to trial. He failed to report any threats or fear and appeared during such interviews not to be nervous, anxious or evasive. He testified under oath at

trial consistent with his previous accounts and in a positive manner, without ambiguity. The Court is satisifed beyond a reasonable doubt that Moody's present testimony regarding alleged threats is false. He could not even recall, under cross-examination exactly when they first occurred, stating at first 'a week before trial,' then 'two weeks before the trial' and finally 'about a month before trial.' Moody's statement that he told Detective Wheeler it was self-defense but that Wheeler ignored him and wrote up another statement which he signed without reading is contrary to the testimony of Detective Wheeler before this court. Moody's statement is unworthy of belief.

(18) The Court finds that Joe Louis Moody has testified falsely before this court at this evidentiary hearing; the defendant has failed to satisfy this court that Joe Louis Moody testified falsely at the defendant's trial. To the contrary, the Court is satisfied by the clear, convincing and believable evidence that Moody's original trial testimony was in fact true.

The quoted findings, to which no exception is taken, fully support Judge Stephens' conclusion that Moody's testimony is not "probably true." Therefore, defendant was not entitled to a new trial on the basis of Moody's recantation under the usual standard for newly discovered evidence. Similarly, under the rule we adopt today, the judge must be "reasonably well satisfied that the testimony given by a material witness is false." Judge Stephens specifically found that "the defendant has failed to satisfy this court that Joe Louis Moody testified falsely at the defendant's trial." The judge's findings can only support the conclusion that he was *not* "reasonably well satisfied" that Moody's trial testimony was false. Defendant has accordingly failed to meet the first requirement of the *Larrison* rule and is also not entitled to a new trial when that standard is employed. Accordingly, defendant's motion for appropriate relief was properly denied.

For all of the reasons previously discussed, we hold that defendant received a fair trial, free from prejudicial error, and that there was no error in the denial of defendant's motion for appropriate relief.

No error.

STATE OF NORTH CAROLINA v. KENNETH DESMOND HOWARD

No. 12A87

(Filed 7 October 1987)

1. **Criminal Law § 87.2— question not leading**

After a rape victim testified that "everybody ran," the prosecutor's question as to whether she meant that "all three of the people that assaulted you before ran" was not an impermissible leading question but was asked to determine whether the victim's use of "everybody" meant the three men, including defendant, who she had testified moments before had assaulted her.

2. **Criminal Law § 99.3— judge's comment not expression of opinion**

The trial judge did not express an opinion on the significance of SBI laboratory reports introduced by defendant when he stated that he did not want each individual juror to take the time to read the reports where the judge permitted defense counsel to read the reports to the jury in their entirety and allowed counsel to pass copies of these exhibits to the jurors for them to review.

3. **Criminal Law § 89.3— prior consistent statements—admission after defense rested**

Although a witness's testimony was more detailed than that of the prosecutrix, it tended to strengthen and add credibility to the testimony of the prosecutrix and was thus admissible for corroborative purposes. Furthermore, the trial court did not err in admitting the corroborative testimony after the defense had rested.

4. **Criminal Law § 87— questioning of witness by juror**

The decision of *State v. Kendall*, 143 N.C. 659, 57 S.E. 2d 340 (1907), that the propriety of juror questioning of witnesses is within the sound discretion of the court, is still the law in this state. However, the better practice is for the juror to submit written questions to the trial judge who should have a bench conference with the attorneys, hear any objections they might have, rule on the objections out of the jury's presence, and then ask the questions of the witness. Furthermore, such questions should ordinarily be permitted only for clarification.

5. **Criminal Law § 87— questioning of witness by juror—objection not required**

When juror questions are asked of witnesses, it is not necessary for counsel to object in order to preserve the issue for appeal.

6. **Criminal Law § 87— questioning of witness by juror—clarification of medical procedures**

The trial court did not err in permitting a juror's direct questioning of a defense witness during the trial where the apparent purpose of the questioning was for clarification of medical procedures used in this case, and the trial judge stopped the questioning after the witness fully clarified her earlier answers regarding the procedures used.

7. Criminal Law § 102.6— jury argument—failure to call alibi witnesses—burden of proof not shifted

The prosecutor's jury argument that defendant did not call as a witness any one of the fifteen persons who were present at the time of the alleged offense because they probably would not back up his story about what happened did not impermissibly shift the burden of proof to defendant.

APPEAL by defendant from judgment imposing sentence of life imprisonment entered by *Battle, J.*, at the 8 September 1986 Criminal Session of Superior Court, DURHAM County, upon a jury verdict of guilty of first-degree rape. Defendant appealed as of right, N.C.G.S. § 7A-27(a), to the Supreme Court. Heard in the Supreme Court 10 September 1987.

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

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

FRYE, Justice.

Defendant brings forward several assignments of error. Three assignments involve evidentiary rulings made by the trial court that defendant contends are prejudicial to him. Next, defendant contends the trial court committed prejudicial error when it permitted direct questioning of a witness by a juror. Finally, he contends the trial court erred in permitting the prosecutor to note in closing argument that defendant failed to call any alibi witnesses, which defendant contends impermissibly shifts the burden of proof to him.

We hold that defendant received a fair trial free of prejudicial error.

Defendant was charged with first degree rape in violation of N.C.G.S. § 14-27.2. The victim testified that on 22 September 1985 she went to Hood's Food Mart in Durham, North Carolina, for the purpose of asking Mr. Hood for a job. After being told there was no job available the victim returned to her residence where she lived with her boyfriend. She testified that a fight ensued between her and her boyfriend during which the boyfriend struck her. Thereafter she left her residence, went to her mother's home and stayed awhile. The victim testified that on her way back to

her residence she stopped at Hood's Food Mart, which is located between the victim's residence and her mother's house, with the intent of making further inquiry regarding a job. Upon her arrival at Hood's sometime between 9:30 p.m. and 10:30 p.m., the victim testified that she purchased a beer, opened it, and walked outside the store to drink it, whereupon she began to talk with two men whom she knew. She then testified that after about five or ten minutes a car drove up with the defendant, whom the victim knew as "Little Bay," in the back seat.

The victim further testified that sometime later she and other individuals withdrew to a grassy area immediately behind and between Hood's Food Mart and a service station. In that area several men were shooting dice. According to the victim's testimony, she subsequently had to use the bathroom and because there were no facilities available at the service station or at Hood's Food Mart, she used an area behind some bushes. The victim testified that approximately thirty minutes after drinking more beer with the men she needed to use the bathroom again and returned to the bushes.

The victim testified it was during this second trip to the bushes that she was raped. She testified that as she was pulling her panties up she could see the defendant and another man walking up behind her, that someone else grabbed her from behind and defendant pulled her panties off and hit her in the face and as she fought back defendant engaged in forcible intercourse with her. According to the victim's testimony, after defendant got up he held her legs while another man had intercourse with her, after which a third man got on top of her but someone came up and asked the men what they were doing and all three men ran from the scene. The victim also testified that two other men not involved in the rape took her home.

According to the victim's testimony, while at her mother's house the following morning, she telephoned Butner Hospital to see if she could have herself committed there. She testified that she was referred to the Mental Health Center which she telephoned and talked with Jody Foster. During her telephone conversation she told Ms. Foster that she had been raped. Her mother, having heard part of the conversation, called the police who came to the house and escorted the victim to the hospital.

She testified that she later saw defendant on the street and called the police.

Defendant testified in his own behalf. Defendant's testimony was that he was a regular at "Hood's," a name used to describe the grassy area off the pavement behind Hood's Food Mart. He testified that on 22 September 1985 he saw the victim as she sat around drinking with the other men, and that when she went to use the bathroom behind the bushes all the men went and gathered around her, laughing at her and the way she was squatting on the ground. He further testified that someone pushed him into the victim and both fell to the ground. He testified that he did not actually see anyone have sex with the victim and that he did not have sex with her. He testified that he asked the victim to let him take her home because she was drunk, but that the victim said no and slapped him, whereupon he slapped her in return.

The jury returned a verdict of guilty of first-degree rape and defendant was sentenced to life imprisonment.

[1] Defendant contends that prejudicial error was committed when the State was permitted to ask a certain question of the victim, which defendant insists is leading. By this assignment of error defendant argues that because a leading question was allowed it ascribed to defendant an attack on the victim, a material issue in the case.

A leading question has been defined as a question which suggests the answer desired and is a question which may often be answered by a simple "yes" or "no." *State v. Riddick*, 315 N.C. 749, 755, 340 S.E. 2d 55, 59 (1986) (quoting *State v. Britt*, 291 N.C. 528, 539, 231 S.E. 2d 644, 652 (1977)). The traditional North Carolina view is that, as a general proposition, leading questions are undesirable because of the "danger that they will suggest the desired reply to an eager and friendly witness. In effect, lawyers could testify, their testimony punctuated only by an occasional 'yes' or 'no' answer." *State v. Hosey*, 318 N.C. 330, 334, 348 S.E. 2d 805, 808 (1986). However, the fact that a question may be answered yes or no does not make it leading. *State v. Thompson*, 306 N.C. 526, 529, 294 S.E. 2d 314, 316-17 (1982) (quoting *State v. Britt*, 291 N.C. 528, 539, 231 S.E. 2d 644, 652). Whether a question is leading "depends not only on the form of the question but also

on the context in which it is put." *State v. Thompson*, 306 N.C. at 529, 294 S.E. 2d at 317.

Rule 611 of the North Carolina Rules of Evidence provides in pertinent part:

> (c) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony.

N.C.G.S. § 8C-1, Rule 611(c) (1986). Also, it is well settled in this state that a ruling on the admissibility of a leading question is in the sound discretion of the trial court, *State v. Hosey*, 318 N.C. 330, 348 S.E. 2d 805, and these rulings are reversible only for an abuse of discretion. *State v. Riddick*, 315 N.C. 749, 340 S.E. 2d 55.

During the direct examination of the victim the following exchange took place:

Q. Now, when this third person got on you, where was Mr. Howard?

A. I don't know. I don't know.

Q. Now, you said that the third person—after the third person got on top of you, somebody came up and asked what are you guys—what are you all doing out here, what happened at that point?

A. Everybody ran.

Q. You mean all three of the people that had assaulted you before ran?

[DEFENSE COUNSEL]: Objection.

A. Yes.

THE COURT: Overruled.

Considering both the form of the question and the context in which it was put, we do not find it objectionable as a leading question. It is reasonable to assume the question was asked in order to further clarify the statement that "everybody ran." In essence, the prosecutor asked the question to determine whether the witness' use of "everybody" meant the three men, including defendant, whom she had testified moments before had assaulted

her. Thus, the question did not assume any facts not in evidence. Accordingly, we find no error and certainly no abuse of discretion in the trial court's ruling.

[2] Defendant next assigns as error the trial court's remark, in the presence of the jury, that the court did not want each individual juror to take the time to read exhibits which had already been admitted as evidence on behalf of defendant. Defendant contends this was a conveyance of an opinion by the trial court that these exhibits were insignificant.

The relevant statute, N.C.G.S. § 15A-1222, provides that "the judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." However, "[a] remark by the court is not grounds for a new trial if, when considered in light of the circumstances under which it was made, it could not have prejudiced defendant's case." *State v. King*, 311 N.C. 603, 618, 320 S.E. 2d 1, 11 (1984).

During the presentation of defendant's case, defense sought admission of two State Bureau of Investigation (S.B.I.) laboratory reports which defendant contends are consistent with his not being guilty of the crime charged. The trial judge admitted the two exhibits into evidence and stated:

> And then you can pass them after you've read them, if you would like, but I just don't want each individual juror to have to take the time to read all of it.

The trial judge permitted defense counsel to read the reports in their entirety and also allowed counsel to pass copies of these exhibits to the jurors for them to review. Under these circumstances we find no prejudice in the trial judge's statement. *State v. King*, 311 N.C. 603, 328 S.E. 2d 1.

[3] In his third assignment of error regarding evidentiary rulings by the trial judge, defendant contends the trial court erred in allowing the prosecutor to present testimony of a witness (Foster) after the defense had rested. Defendant contends this testimony was not corroborative evidence as held by the trial judge. Instead, defendant argues that the testimony was at great variance from the prior testimony of the prosecutrix. Defendant contends the testimony of witness Foster was therefore prejudicial to him in that it allowed the State to both open and close the

presentation of evidence which unfairly minimized defendant's evidence.

The trial judge has the discretionary power to permit the introduction of additional evidence after a party has rested its case, *State v. Carson*, 296 N.C. 31, 45, 249 S.E. 2d 417, 425 (1978), and can reopen a case for additional testimony after arguments to the jury have begun. *State v. Jackson*, 265 N.C. 558, 559, 144 S.E. 2d 584, 585 (1965) (per curiam). Also, the manner and presentation of evidence is largely within the discretion of the trial judge and his control of the case will not be disturbed absent a manifest abuse of discretion. *State v. Goldman*, 311 N.C. 338, 350, 317 S.E. 2d 361, 368 (1984).

Corroboration is defined as the "process of persuading the trier of facts that a witness is credible." 1 Brandis on North Carolina Evidence § 49 (2d rev. ed. 1982). Prior consistent statements of a witness are admissible as corroborative evidence even when the witness has not been impeached. *State v. Martin*, 309 N.C. 465, 308 S.E. 2d 277 (1983). To be admissible as corroborative evidence, prior consistent statements must corroborate the witness' testimony, *State v. Martin*, 309 N.C. 465, 308 S.E. 2d 277, but the corroborative testimony may contain "new or additional information when it tends to strengthen and add credibility to the testimony which it corroborates." *State v. Kennedy*, 320 N.C. 20, 35, 357 S.E. 2d 359, 368 (1987). *See, e.g., State v. Kim*, 318 N.C. 614, 350 S.E. 2d 347 (1987); *State v. Ramey*, 318 N.C. 457, 349 S.E. 2d 566 (1986); *State v. Riddle*, 316 N.C. 152, 340 S.E. 2d 75 (1986); *State v. Higgenbottom*, 312 N.C. 760, 324 S.E. 2d 834 (1985).

Witness Foster testified that the prosecutrix had told her that she had been raped, several men were involved and that it happened near the victim's house and the store near the victim's mother's house. Defendant contends that this testimony varied substantially from that of the prosecutrix, thus it is not proper corroboration testimony. We have reviewed the testimony of the prosecutrix and the testimony of the witness Foster, and we find no substantial variance between the testimony of the two witnesses. Although Ms. Foster's testimony is more detailed than that of the prosecutrix, it tends to strengthen and add credibility to the testimony of the prosecutrix. *State v. Kennedy*, 320 N.C.

20, 35, 357 S.E. 2d 359, 369. The testimony was thus admissible for corroborative purposes.

In his next assignment of error, defendant contends the trial court erred in permitting a juror to directly question his witness during the trial in the presence of other jurors. Defendant argues that the juror's questions relating to a particular blood testing method used shows that the juror abandoned his appearance of impartiality and became involved as an advocate rather than as an impartial finder of fact.

The issue of jurors asking questions of a witness at trial does not occur with great frequency. It appears there is only one North Carolina case addressing the propriety of jurors' direct questioning of witnesses. *State v. Kendall*, 143 N.C. 659, 57 S.E. 340 (1907). In *Kendall*, defendant challenged the validity of a trial in which one juror was permitted to ask questions of a testifying witness. In finding no error, this Court stated:

> There is no reason that occurs to us why this [juror questioning of a witness] should not be allowed in the sound discretion of the Court, and where the question asked is not in violation of the general rules established for eliciting testimony in such cases. This course has always been followed without objection, so far as the writer has observed, in the conduct of trials in our Superior Courts, and there is not only nothing improper in it when done in a seemly manner and with the evident purpose of discovering the truth, but a juror may, and often does, ask a very pertinent and helpful question in furtherance of the investigation.

Id. at 663, 57 S.E. at 341. Several courts agree with the rationale of *Kendall*, in that the propriety of juror questioning of witnesses is within the sound discretion of the trial court. *See, e.g., United States v. Witt*, 215 F. 2d 580 (2d Cir.), *cert. denied*, 348 U.S. 887 (1954); *Carter v. State*, 250 Ind. 13, 234 N.E. 2d 650 (1968); *Sparks v. Daniels*, 343 S.W. 2d 661 (Mo. App. 1961); *Krause v. State*, 75 Okla. Crim. App. 381, 132 P. 2d 179 (1942).

Alternatively, there are several arguments expounded by various courts as to why jurors should not be permitted to question witnesses directly. One is that jurors are not familiar with the rules of evidence and therefore may ask improper and preju-

dicial questions before they can be stopped. *State v. Williamson*, 247 Ga. 685, 686, 279 S.E. 2d 203, 204 (1981). Correlated to this argument is the fact that counsel, whose client is being harmed by possibly prejudicial testimony, is placed in the untenable position of having to choose between not objecting and letting the possibly prejudicial testimony in or objecting to the question and risking offending the juror. *Stinson v. State*, 151 Ga. App. 533, 536, 260 S.E. 2d 407, 410 (1979). However, the South Carolina Court apparently has resolved the latter dilemma by holding that when a court, in its discretion, allows direct questioning by a juror of a witness, "[t]he trial judge should meticulously endeavor to make it unnecessary for offended counsel to interpose an objection to a juror's question in its presence." *State v. Barrett*, 278 S.C. 414, 419, 297 S.E. 2d 794, 796 (per curiam), *cert. denied*, 460 U.S. 1045 (1982).

[4, 5] We are aware of the possible prejudice that may arise by a juror questioning a witness directly. Counsel should not have to be put into the untenable position of having to choose between not objecting to an incompetent or prejudicial question, thus letting the testimony in, or objecting to the question with the potential result of offending a juror. Therefore, we hold that, while *Kendall* is still good law in this state, the better practice is for the juror to submit written questions to the trial judge who should have a bench conference with the attorneys, hearing any objections they might have. The judge, after ruling on any objections out of the presence of the jury, should then ask the questions of the witness. Questions should ordinarily be for clarification and the trial judge should exercise due care to see that juror questions are so limited. In any event, when juror questions are asked of witnesses, it is not necessary for counsel to object in order to preserve the issue for appeal.

[6] In the case *sub judice*, defendant's first witness, a registered nurse, was testifying that she had seen the prosecutrix in the emergency room on the morning after the alleged rape and had filled out a rape trauma sheet recording the results of the emergency room examination. The witness then read several pages of the rape trauma sheet and the emergency room department sheets she had filled out while examining the prosecutrix. During the course of her reading, she stated that at the time of the examination the prosecutrix had an ETOH level of 85. At this

point the court interjected the following question: "What is ETOH?" to which the witness replied: "Alcohol level in the blood stream at that time."

Immediately following the court's question regarding the definition of ETOH, one of the jurors asked six questions regarding the technique used in drawing the blood sample for the alcohol level determination. The following questions by the juror were permitted by the trial court:

Q. This is the question I was asking this morning. The question is, when they took the blood from this lady, did they use—did they take it specifically for ethnol, the amount of ethnol in her blood?

A. Yes.

Q. Which is referred to as alcohol?

A. Excuse me?

Q. Which is referred to as alcohol.

A. Yes, sir.

Q. And it was taken specifically for this reason?

A. Yes, sir.

Q. And was it done by lobotomy [sic]?

A. No, I drew the blood myself.

Q. And what kind of swab did you use to take it?

A. It's sort of hard to remember. I do believe you have a question as to whether the isopropyl alcohol can change the content of the blood count. A study was done that says that it doesn't. So if I drew a blood level and I used the alcohol, which is isopropyl, at that time, I can't be for sure, but I believe I used the isopropyl at that time, pad to wipe off the spot for the blood.

Q. Is there another procedure or another wipe that you can use other than alcohol?

A. To my knowledge, during the three years that I was in the emergency room, we used the same thing. There is

another thing you can use but we generally used the isopropyl alcohol pads.

THE COURT: All right. I believe we better continue with the attorney.

Defendant contends the above questioning by the juror tended to impugn the validity of the particular test used and amounted to a cross-examination by the juror. Moreover, defendant argues, this "cross-examination" of a defense witness enabled the juror to become an advocate, rather than an impartial finder of fact. In examining defendant's contention we must review the juror's questioning in context. Prior to the above exchange, the witness was reading, in medical terms, notes she had taken while she was examining the prosecutrix. This medical terminology was difficult for the judge to understand, as evidenced by the record, and the questions by the juror were proper since the apparent purpose of the questioning was for clarification of the medical procedures used in this case. We note that Judge Battle stopped the questioning after the witness fully clarified the earlier answer regarding the procedures used. We find the trial judge exercised due care to see that the juror's questioning was limited to clarification of the witness' testimony and we find no error in his ruling.

[7] In his final assignment of error, defendant contends that his constitutional right of due process was violated when the trial judge permitted the prosecutor, in closing argument, to note the failure of defendant to call alibi witnesses. Defendant contends that this left the jury with the likely impression that the burden of proving his innocence was on defendant.

In closing arguments a prosecutor may not comment on the failure of a defendant to testify at trial. *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976). However, it is permissible for the prosecutor to bring to the jury's attention "a defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State." *State v. Mason*, 317 N.C. 283, 287, 345 S.E. 2d 195, 197 (1986). This Court has held that a prosecutor's comment noting the failure of a defendant to produce any alibi witnesses does not constitute an impermissible comment on the defendant's failure to testify. *See, State v. Young*, 317 N.C. 396,

346 S.E. 2d 626 (1986); *State v. Jordan*, 305 N.C. 274, 287 S.E. 2d 827 (1982).

In the case *sub judice*, the prosecutor, in his closing argument, argued to the jury that, in its deliberations, it could consider not only evidence offered by the defendant but also evidence that was not offered by the defendant and should consider the fact that there were fifteen others present at the time of the alleged offense and defendant did not call any one of them as witnesses. The prosecutor further argued that defendant did not call them as witnesses because they probably would not back up his story about what had happened. After reviewing the prosecutor's closing argument we fail to see any comment that intimates that the defendant had the burden of proving his innocence.

Admittedly, it is well-settled law that the burden of proof remains with the State regardless of whether a defendant presents any evidence, and it is well-settled law that a defendant need not testify, a fact which may not be commented on by the prosecutor. However, in the instant case defendant did testify at trial and the statements defendant takes exception to "amount merely to the prosecutor's comment on the defendant's failure to produce witnesses to corroborate the truth" of defendant's testimony. *State v. Young*, 317 N.C. 396, 415, 346 S.E. 2d 626, 637. In this there is no error.

Defendant received a fair trial, free from prejudicial error.

No error.

JOHN GLEN TAYLOR AND WIFE, NADA TAYLOR v. DOROTHY WALKER, AND C&R AMUSEMENTS, D/B/A BJ'S LOUNGE

No. 161A87

(Filed 7 October 1987)

Negligence § 35.2— barroom altercation—plaintiff not contributorily negligent as matter of law

In a negligence action against the owners of a bar arising from a fight inside the bar and a shooting outside, the trial court erred by allowing defend-

ants' motion for judgment n.o.v. on the grounds that plaintiff was contributorily negligent as a matter of law where the evidence was in conflict as to whether plaintiff exercised ordinary care for his own safety under the circumstances then existing and whether any alleged failure to do so on his part was the proximate cause of his injuries. The evidence was contradictory as to whether plaintiff himself was intoxicated, whether there was any compelling reason for him to leave the bar any sooner than he in fact did, and whether it was reasonable under the circumstances to suddenly strike another patron, and there was no direct evidence whatsoever that the shot which struck plaintiff was fired either by that patron or any of his friends.

Justice WEBB dissenting.

APPEAL by plaintiff John Glen Taylor pursuant to N.C.G.S. § 7A-30(2) and Rule 14 of the North Carolina Rules of Appellate Procedure from the decision of a divided panel of the Court of Appeals. That decision affirmed the trial judge's order allowing defendants' motion for judgment notwithstanding the verdict at the 3 February session of Superior Court, GUILFORD County, *Albright, J.*, presiding. *Taylor v. Walker*, 84 N.C. App. 507, 353 S.E. 2d 239 (1987). Heard in the Supreme Court 9 September 1987.

Gabriel, Berry, Weston & Weeks, by M. Douglas Berry, for plaintiff-appellant John Glen Taylor.

Craige, Brawley, Liipfert & Ross, by William W. Walker, for defendant-appellees.

MEYER, Justice.

The issue presented in this case is whether the trial court erred when it granted defendants' motion for judgment notwithstanding the verdict on the ground that plaintiff John Glen Taylor was contributorily negligent as a matter of law. The Court of Appeals, concluding that plaintiffs' claim against defendants was indeed barred as a matter of law by Taylor's own contributory negligence, held that the trial court did not err and affirmed its order accordingly. Because we find that the Court of Appeals misapplied the standard under our law for deciding the merits of a motion for judgment notwithstanding the verdict, we reverse and remand for entry of a judgment for plaintiff John Glen Taylor on the jury's original verdict.

The evidence presented at trial tended to show the following. Plaintiff John Taylor, his wife, Nada, and Nada's brother, Victor

Huffman, went to BJ's Lounge in Greensboro, North Carolina, between 8:30 p.m. and 9:00 p.m. on Friday, 18 December 1981. BJ's Lounge was then owned by defendant C&R Amusements, Inc. The other defendant, Dorothy Walker, was the bartender and manager on that night.

Evidence revealed that BJ's Lounge was truly not a place for the faint of heart. The bar had a history of general roughhousing, fights, and knifings. In fact, during the eighteen months immediately preceding the incident which spawned this lawsuit, thirty-three calls were made to the Greensboro Police Department concerning incidents at BJ's Lounge. These included eleven assault calls, twelve investigative calls, five disturbance calls, three liquor violation calls, and one call each for traffic and sexual offense violations.

On the night in question, Taylor and his party went into BJ's Lounge and sat with friends in the front section of the bar. Taylor noticed that there was a group of fifteen to twenty "Indians" in the lounge's back poolroom. He knew that these men, who were regular patrons of the lounge, often carried guns or knives and that they often started fights when assembled in large groups. Taylor also knew that BJ's Lounge did not employ a bouncer and that defendant Dorothy Walker was the only employee on the premises that night.

At approximately 9:30 p.m., Taylor saw an Indian named Bear Suits chase another patron out of the lounge's poolroom and into the front section of the bar. Apparently with the help of Dorothy Walker, Bear Suits lifted the smaller patron onto the bar and beat him about the head and shoulders. Walker expelled the beaten patron from BJ's Lounge, but allowed Suits to remain.

Taylor was familiar with Bear Suits and was aware of his reputation for carrying a gun. He also knew that Bear Suits had been drinking that night while at BJ's Lounge. After witnessing this incident, Taylor remarked to his wife, Nada, that Suits was going to cause somebody some trouble that night.

Following the incident, the "Indians" in the lounge's poolroom became louder and more rowdy. Taylor's friends began leaving, telling Taylor as they departed that they did not like the atmosphere or the people remaining in the bar. At about 12:30

a.m., after all of their friends had departed, Taylor, Nada, and Victor prepared to leave BJ's Lounge for the evening. Taylor and Nada went to the lounge's bathroom while Victor waited in the front section of the bar.

As Taylor was returning from the bathroom, he saw Bear Suits push Victor. Taylor approached Bear Suits, telling him that Victor was mentally retarded and that Suits should therefore just ignore him. Suits, who was quite drunk at this point in the evening, responded that he did not want an apology and told Taylor, "Why don't you just take it up." Taylor challenged Suits to go outside and fight, but Suits laughed at him and refused. The verbal exchange between Taylor and Suits continued for several minutes.

At a certain point in the exchange, Suits slipped his hands off the bar and appeared to be reaching for his back pocket. Suspecting that Suits was reaching for a gun or a knife, Taylor struck Suits in the face, knocking him onto the floor unconscious. Taylor testified that he then reached down and picked up a gun off the floor near Suits' fallen body.

Hearing the commotion, many of the "Indians" who had been in the lounge's poolroom began to move toward Taylor, Nada, and Victor. Gun poised, Taylor backed out the front door of BJ's Lounge, allowing Nada and Victor to retreat ahead of him. As Taylor was preparing to get into his car in the parking lot, an unknown person fired two gunshots from the bar's doorway. Taylor was struck in the head and seriously injured.

In their complaint, plaintiffs alleged that BJ's Lounge was operated by C&R Amusements and that defendant Walker was the bartender and manager of the establishment at the time of the shooting. Plaintiffs also alleged that defendants were negligent in that they violated several administrative regulations promulgated by the then State Board of Alcohol Control (now the North Carolina Alcoholic Beverage Control Commission) for the control of alcoholic beverage sales and the protection of the public. Plaintiffs further alleged that defendants were negligent in that they violated their common law duty to protect patrons from the criminal acts of third persons. They alleged finally that defendants' negligence was the proximate cause of Taylor's injuries.

Defendants answered, denying any negligence and alleging as an affirmative defense that Taylor, by his own conduct on the night in question, was contributorily negligent in bringing about his own injuries. At the close of all the evidence, defendants moved for a directed verdict and that motion was denied. The jury answered the issues submitted to it to the effect that plaintiff Taylor was injured by the negligence of defendant and that he was not contributorily negligent. Accordingly, the jury awarded him compensatory damages of $382,400. The trial court then allowed defendants' motion for judgment notwithstanding the verdict on the ground that Taylor was contributorily negligent as a matter of law.

No question was raised on the appeal to the Court of Appeals as to the sufficiency of the evidence to support the jury finding that negligence on the part of defendants was a proximate cause of Taylor's injuries incurred as a result of being shot. The only question there, and here, is whether Taylor's recovery is, as a matter of law, barred by his contributory negligence. The Court of Appeals concluded that it was. We disagree.

A motion for judgment notwithstanding the verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure is essentially a renewal of an earlier motion for a directed verdict. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 329 S.E. 2d 333 (1985). By making such a motion, the moving party asks that judgment be entered in accordance with his previous motion for directed verdict, notwithstanding the contrary verdict actually rendered by the jury. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). The test for determining the sufficiency of the evidence when ruling on a motion for judgment notwithstanding the verdict is identical to that applied when ruling on a motion for directed verdict. *Smith v. Price*, 315 N.C. 523, 340 S.E. 2d 408 (1986); *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549.

The party moving for judgment notwithstanding the verdict, like the party seeking a directed verdict, bears a heavy burden under North Carolina law. Both motions ask whether the evidence presented at trial is legally sufficient to take the case to the jury. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977); *Investment Properties of Asheville v. Allen*, 281 N.C. 174, 188 S.E. 2d 441 (1971). In ruling on the motion, the trial court

must consider the evidence in the light most favorable to the nonmoving party, giving him the benefit of all reasonable inferences to be drawn therefrom and resolving all conflicts in the evidence in his favor. *Smith v. Price*, 315 N.C. 523, 340 S.E. 2d 408; *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 329 S.E. 2d 333; *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678. Ordinarily, such a judgment is not proper unless it appears as a matter of law that a recovery simply cannot be had by plaintiff upon any view of the facts which the evidence reasonably tends to establish. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678.

The heavy burden carried by the movant is particularly significant in cases, such as the one before us, in which the principal issues are negligence and contributory negligence. Only in exceptional cases is it proper to enter a directed verdict or a judgment notwithstanding the verdict against a plaintiff in a negligence case. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Millikan v. Guilford Mills, Inc.*, 70 N.C. App. 705, 320 S.E. 2d 909 (1984), *cert. denied*, 312 N.C. 798, 325 S.E. 2d 631 (1985). Issues arising in negligence cases are ordinarily not susceptible of summary adjudication because application of the prudent man test, or any other applicable standard of care, is generally for the jury. *King v. Allred*, 309 N.C. 113, 305 S.E. 2d 554 (1983), *appeal after remand*, 76 N.C. App. 427, 333 S.E. 2d 758 (1985), *disc. rev. denied*, 315 N.C. 184, 337 S.E. 2d 857 (1986); *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979). Greater judicial caution is therefore called for in actions alleging negligence as a basis for plaintiff's recovery or, in the alternative, asserting contributory negligence as a bar to that recovery. *See Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255; *Gladstein v. South Square Assoc.*, 39 N.C. App. 171, 249 S.E. 2d 827 (1978), *cert. denied*, 296 N.C. 636, 254 S.E. 2d 178 (1979).

Applying these principles to the present case, we conclude that the trial court erred in allowing defendants' motion for judgment notwithstanding the verdict on the ground that Taylor was contributorily negligent as a matter of law. We are unable to say that plaintiff cannot possibly have a recovery upon any reasonable reading of the facts as established by the evidence in this case. The issue, after all, is not whether Taylor chose the best or wisest alternative in remaining in the bar that night and in even-

tually becoming involved in the altercation with the drunken and belligerent Bear Suits. He most certainly did not. The true issue is whether there is evidence that, if believed, would support an inference that he acted reasonably under admittedly difficult circumstances. We think there is and we so hold.

This is not to say that when one deliberately exposes himself to a danger of which he is, or in the exercise of reasonable care should be, aware, the trial court cannot declare his doing so to be contributory negligence as a matter of law. *Burgess v. Mattox*, 260 N.C. 305, 132 S.E. 2d 577 (1963). For instance, we approved of summary adjudication on grounds of contributory negligence as a matter of law in the case of *Dendy v. Watkins*, 288 N.C. 447, 219 S.E. 2d 214 (1975). There, plaintiff pedestrian sought in his action to recover for injuries sustained when he was struck by defendant motorist's car. Plaintiff attempted to cross the three southbound lanes of a major thoroughfare in Fayetteville, North Carolina, at 5:00 p.m. in the afternoon. He did so in the middle of the block at a place that was neither a marked nor an unmarked crosswalk. Moreover, he crossed at a forty-five degree angle, slipping between cars which were momentarily stopped in the first two lanes. He was struck by defendant's vehicle when he unsuccessfully tried to navigate the third lane of moving traffic. Plaintiff had an unobstructed view of one-half mile in the relevant direction, and defendant was traveling at only thirty miles per hour. We held that, because plaintiff was contributorily negligent as a matter of law on those facts, the trial court was correct to remove the case from the jury's consideration. *Id.* at 457, 219 S.E. 2d at 220.

The wisdom of our cautious approach to the removal of negligence issues from the jury's consideration is particularly apparent in the context of the case before us. Here, the evidence is in conflict with respect to the central question of the case—whether Taylor exercised ordinary care for his own safety under the circumstances then existing and whether any alleged failure to do so on his part was the proximate cause of his injuries. As to plaintiff's alleged acts of contributory negligence, the evidence is contradictory as to whether Taylor himself was intoxicated, whether there was any compelling reason for him to leave the bar any sooner than he in fact did, and whether it was reasonable under the circumstances to suddenly strike Bear Suits. As to proximate

cause, there was no direct evidence whatsoever that the shot which struck plaintiff was fired by either Bear Suits or any of his friends. Any such conclusion is mere speculation. These issues, and their resolution, were better left to the jury, and the trial court therefore erred in allowing defendants' motion for judgment notwithstanding the verdict.

For the reasons stated, we hold that the trial court erred in allowing defendants' motion for judgment notwithstanding the verdict on the ground that plaintiff Taylor was contributorily negligent as a matter of law. Accordingly, we reverse and remand to the Court of Appeals with instructions to that court to remand to the Superior Court, Guilford County, for entry of a judgment for the plaintiff on the jury's original verdict.

Reversed and remanded.

Justice WEBB dissenting.

I dissent. If the only inference that can be drawn from the evidence is that contributory negligence is a proximate cause of the injury, the plaintiff cannot recover. *Ragland v. Moore*, 299 N.C. 360, 261 S.E. 2d 666 (1980). If the plaintiff did something that a reasonable and prudent man would not have done, or failed to do something that a reasonable and prudent man would have done, under all the circumstances, and the plaintiff should have reasonably foreseen that this would cause the injury that occurred, or some similar injurious result, he is barred from recovery by his contributory negligence. *Kanoy v. Hinshaw*, 273 N.C. 418, 160 S.E. 2d 296 (1968) and *Holderfield v. Trucking Co.*, 232 N.C. 623, 61 S.E. 2d 904 (1950).

In this case, the question is whether the only inference which may be drawn from the evidence is that a reasonable man of ordinary prudence would have foreseen that some injury might occur if he stayed in BJ's Lounge and left before the plaintiff departed. I believe the jury could only infer that a reasonable man of ordinary prudence would have foreseen an injurious result, such as occurred, might have happened and would have left the lounge before he did, thus avoiding the injury.

The plaintiff knew the reputation of BJ's Lounge; he knew the Indians often carried knives and guns and that they often

started fights when assembled in large numbers; he knew that his friends had left the lounge and that he had with him only his wife and a friend who could not defend himself; and he told his wife Bear Suits would cause someone some trouble that night. From this evidence, I believe it can only be inferred that a reasonable man of ordinary prudence would have foreseen that some trouble and injury might occur and would have left the lounge. I believe it can only be inferred that a reasonable man of ordinary prudence would not have stayed in the bar when the danger of violence was so apparent. A reasonable man would have done as plaintiff's friends did and left the lounge before there was trouble. I believe the plaintiff deliberately exposed himself to danger of which he should have been aware. This is contributory negligence as a matter of law. *Burgess v. Mattox*, 260 N.C. 305, 132 S.E. 2d 577 (1963).

I also agree with the following language in Judge Martin's opinion in the Court of Appeals:

> Plaintiff had knowledge at least equal to that of defendants of the violent nature of Suits and his companions and of the volatile atmosphere present in the bar when he confronted Suits over the shoving of Huffman. With that knowledge, plaintiff confronted Suits and invited him outside to fight. When Suits refused, plaintiff continued to stand beside him, repeating the invitation, even though he could have left. The potential for danger and physical harm inherent in the confrontation with Suits was as well known to plaintiff as to defendants, yet, with such knowledge, plaintiff exposed himself to the danger by approaching Suits, engaging in a heated verbal exchange and delivering the first, and only, blow. It was certainly foreseeable to plaintiff that his physical attack on Suits would provoke a violent response from Suits' companions. Plaintiff had a duty not to needlessly expose himself to danger, which he clearly violated in this case. *See Witherspoon v. Owen*, 251 N.C. 169, 110 S.E. 2d 830 (1959). Moreover, plaintiff voluntarily participated in the affray, thereby helping to create the situation from which his injuries arose. It is elementary that one may not recover damages for injuries resulting from a hazard he helped to create. *Blevins v. France*, 244 N.C. 334, 93 S.E. 2d 549 (1956); *Blake v. Great Atlantic & Pacific Tea Co.*, 237 N.C. 730, 75 S.E. 2d 921 (1953).

Taylor v. Walker, 84 N.C. App. 507, 511-512, 353 S.E. 2d 239, 241-242 (1987).

I vote to affirm the Court of Appeals.

IN THE MATTER OF THE WILL OF HUGH B. HESTER, DECEASED

No. 184A87

(Filed 7 October 1987)

Wills §§ 9.2, 26— three purported wills—bifurcated proceeding—no abuse of discretion

The trial court did not abuse its discretion in a caveat proceeding by bifurcating the trial where the testator left three paper writings purporting to be his last will and testament; the last chronological writing was submitted for probate by the devisees of that writing; the devisees of the second to last chronological writing filed a caveat; all three purported wills were received into evidence; the trial court denied the propounders' motion for simultaneous submission of issues as to all three writings and submitted only issues regarding the last chronological will; the jury determined that the testator had lacked sufficient mental capacity to execute a valid last will and testament when he signed that writing; the judge declined the propounders' request for peremptory judgment, ordered the same jury to reconvene some time later, directed that the other purported wills be offered for common form probate in the interim, and required that any caveat be filed within ten days; caveators filed their writing and propounders filed a caveat; and the jury determined that the second to last writing was the testator's valid last will and testament. Bifurcation was an effective method of avoiding the potential confusion of instructions on mental capacity and undue influence with more than one script involved; it resulted in an orderly presentation of the evidence whereby competing claims were fully heard one at a time, serving the interests of judicial economy and convenience; and it did not result in an impermissible collateral attack upon the validity of the 1983 script. N.C.G.S. § 1A-1, Rule 42(b).

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

APPEAL by caveators pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 84 N.C. App. 585, 353 S.E. 2d 643 (1987), which vacated the judgment of *Lewis (Robert D.), J.*, filed 21 November 1985 in Superior Court, BUNCOMBE County, and remanded the cause for a new trial. Heard in the Supreme Court 8 September 1987.

Roberts Stevens & Cogburn, P.A., by Landon Roberts and Glenn S. Gentry, for propounders, and Bruce Elmore, Jr., Guardian ad Litem, appellees.

Womble, Carlyle, Sandridge & Rice, by G. Eugene Boyce, for caveator Meredith College, Patla, Straus, Robinson & Moore, P.A., by Richard S. Daniels, for caveators Mars Hill College and Eleanor Pittenger, and Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Susan K. Burkhart, for caveator Meredith College, appellants.

Lacy H. Thornburg, Attorney General, by Charles J. Murray, Special Deputy Attorney General, for caveator The University of North Carolina at Greensboro, appellant.

MARTIN, Justice.

The sole issue for review in this case is whether the trial court abused its discretion in bifurcating the caveat proceeding below. We hold that bifurcation was within the bounds of the trial court's discretion and therefore reverse the decision of the Court of Appeals.

The testator, retired Brigadier General Hugh B. Hester, died in the Buncombe County Veterans Administration Hospital on 25 November 1983 at the age of eighty-eight. Prostate cancer was listed as the primary cause of death, with senile dementia a significant contributing cause. Hester died a widower without issue and left three paper writings, each purporting to be his last will and testament:

1. A script dated 18 November 1983 devised the estate to Hester's niece, Katherine Watson, and to Mrs. Watson's children and grandchildren. Mrs. Watson's husband, Colonel Ted P. Watson, was named executor. Colonel Watson had obtained power of attorney on 1 November 1983.

2. A script dated 18 June 1982 devised the estate to Hester's sister-in-law, Eleanor Pittenger, and to Mars Hill College, Meredith College, The University of North Carolina at Greensboro, and the First Baptist Church of Asheville. Hester's accountant, Arthur Price, was named executor. Price had obtained power of attorney on 1 October 1981.

3. A script dated 8 June 1981 devised the estate to nieces Katherine Watson, Frances Elliot, and Kate Nichol, and to sisters-in-law Eleanor Pittenger, Alice Wheeler, Mary Chase, and Dorothy Boswell. Arthur Price was named executor.

The Watsons (propounders) submitted the 1983 script for probate in common form before the Clerk of Superior Court, Buncombe County. Mars Hill College, Meredith College, The University of North Carolina at Greensboro, and Eleanor Pittenger (caveators) then filed a caveat challenging the 1983 script on the grounds of improper attestation and execution, lack of mental capacity, and undue influence by Katherine and/or Ted Watson.

The clerk duly transferred the matter to the civil issue docket of superior court and a jury trial began 24 September 1985 before the Honorable Robert D. Lewis. Most of the testimony concerned execution of the 1983 script, but all three purported wills were received into evidence. At the close of all the evidence, Judge Lewis denied propounders' motion for simultaneous submission of issues as to all three documents and submitted issues regarding the validity of the 1983 script only. The jury determined that General Hester had lacked sufficient mental capacity to execute a valid last will and testament when he signed the 1983 writing.

Judge Lewis declined propounders' request for entry of judgment and ordered the same jury to reconvene some weeks later:

> Members of the jury, in this case the law seems to require that in these types of proceedings where there may be more than one will applicable that all the wills should be considered and probated in the same case.
>
> The procedure, then, as suggested in some of the cases, would mean that upon the rejection of one of the wills the jury has to consider the other will or wills to the end that the estate can be properly processed without undue delay.
>
> I concluded that to do that in this particular case would have led to some confusion, because the Propounders of this will, the latest will, would become the Caveators in the will of 1982, and the Caveators of the will in '83 become the Propounders of the will of '82.

> So now that we have your verdict in which you have rejected the 1983 will we are going to need your help in considering the other will or wills, applying some of the same facts and most of the same law. In other words, I have, in effect, bifurcated or divided the trial into two stages.
>
> These litigants will perhaps need some additional work to do before we consider the other two wills, and I am, therefore, going to adjourn this proceeding as not completed to final judgment and hope to convene again on the 18th of November of 1985 to complete the work necessary to properly administer the estate of Hugh B. Hester. So what I am saying is that I'm asking you to bear with us and to return on November the 18th for a conclusion of this trial.

The court further directed that the other purported wills be offered for common form probate in the interim and that any caveat be filed within ten days. Caveators complied by filing the 1982 script with the Clerk of Superior Court. Propounders filed a caveat, alleging inter alia that General Hester did not possess the mental capacity to execute a will on 18 June 1982 and that he had been subjected to the undue influence of Arthur Price and the beneficiaries of the 1982 script.

The jury reconvened 18 November 1985. The court received testimony regarding the execution of the 1981 and 1982 scripts and submitted issues as to both. The jury then determined that the 1982 writing was General Hester's valid last will and testament. Judge Lewis entered final judgment accordingly.

The Court of Appeals vacated the judgment and remanded for a new trial, holding that Judge Lewis had abused his discretion in failing to submit issues as to all three purported wills simultaneously. We disagree.

The paramount duty of the trial judge is to supervise and control the course of the trial so as to prevent injustice. *Greer v. Whittington*, 251 N.C. 630, 111 S.E. 2d 912 (1960); *Miller v. Greenwood*, 218 N.C. 146, 10 S.E. 2d 708 (1940). In discharging this duty, the court possesses broad discretionary powers sufficient to meet the circumstances of each case. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). This supervisory power encompasses the authority to structure the trial logically and to set the order of

proof. *In re Westover Canal*, 230 N.C. 91, 52 S.E. 2d 225 (1949). *See Hayes v. Ricard*, 251 N.C. 485, 112 S.E. 2d 123 (1960); *Dixon v. Brockwell*; *Martin v. Brockwell*; *Wakefield v. Brockwell*, 227 N.C. 567, 42 S.E. 2d 680 (1947). Absent an abuse of discretion, the trial judge's decisions in these matters will not be disturbed on appeal. *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980).

The North Carolina Rules of Civil Procedure expressly preserve these inherent supervisory powers with regard to severance and bifurcation. N.C.R. Civ. P. 42(b) provides:

> The court may in furtherance of convenience or to avoid prejudice and shall for considerations of venue upon timely motion order a separate trial of any claim, crossclaim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, crossclaims, counterclaims, third-party claims, or issues.

The legislative commentary to this rule notes that "the power of severance is an indispensable safety valve to guard against the occasion where a suit of unmanageable size is thrust on the court. Whether or not there should be a severance rests in the sound discretion of the judge." The discretion reposed in the trial judge by the rule is extremely broad. 1 T. Wilson & J. Wilson, *McIntosh N.C. Practice and Procedure* § 1341 (2d ed. Supp. 1970).

Our own rule is, in all respects pertinent to this appeal, identical to Federal Rule of Civil Procedure 42(b). Thus, it is appropriate that we consult cases construing the federal rule for guidance as to when the separation of issues is considered proper. *See* Comment, N.C.R. Civ. P. 42(b) (citing 5 Moore's Federal Practice § 42.03). We find these cases to be highly instructive.

Federal case law indicates that Rule 42(b) confers not only the authority to sever issues for independent trial before separate juries, but also the authority to sever issues within a single trial or proceeding for separate submission to the same jury. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 2388, 2391 (1971) (piecemeal trial of separate issues in a single suit is not the usual course but is authorized when the court believes that separation will achieve the purposes of the rule) (citing *Emerick v. U.S. Suzuki Motor Corp.*, 750 F. 2d 19 (3d Cir. 1984); *In re Beverly Hills Fire Litigation*, 695 F. 2d 207 (6th Cir. 1982), *cert. denied*, 461 U.S. 929, 77 L.Ed. 2d 300 (1983)).

A bifurcated trial is particularly appropriate where separate submission of issues avoids confusion and promotes a logical presentation to the jury, *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F. Supp. 1122 (S.D. Tex. 1976), and where resolution of the separated issue will potentially dispose of the entire case, *Molinaro v. Watkins-Johnson CEI Division*, 60 F.R.D. 410 (D. Md. 1973); *Laitram Corp. v. Deepsouth Packing Co.*, 279 F. Supp. 883 (E.D. La. 1968). The better practice is to retain the same jury for all issues, even though it may hear the issues at different times. 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2391 (1971).

Although Rule 42(b) has most frequently been applied in complicated tort proceedings, we see no reason why bifurcation of a caveat proceeding may not be approached in the same fashion as in other civil litigation. Inquiry should focus on whether separation of the issues furthers convenience and avoids prejudice.

Here the trial court was well within these guidelines. Judge Lewis wisely observed to counsel that "it would be too confusing for us to try to consider two other wills" and characterized the decision to bifurcate as "simply a matter of discretion on my part trying to get the matter to the jury in the most understandable fashion to keep them from having to jump on both sides of the Caveator/Propounder and getting the burden of proof all messed up."

We have recognized that the instructions on mental capacity and undue influence are potentially quite confusing. *See In re Will of Lomax*, 225 N.C. 592, 35 S.E. 2d 876 (1945). Certainly this potential is multiplied when more than one script is at issue. Bifurcation was an effective method of avoiding this pitfall while incorporating all three scripts into one proceeding. It resulted in an orderly presentation of the evidence whereby competing claims as to each script were fully heard one at a time. The seriatim approach no doubt diminished any bewilderment caused by changes in the parties' alignment and burdens of proof on different scripts.

Moreover, the interests of judicial economy and convenience were well served by separate presentation of issues as to the 1983 script. Had the jury determined that the 1983 script was in fact a valid last will and testament, the issues as to the earlier

scripts would have been mooted and the proceeding need not have continued. The judge logically may have considered submission of the issues as to other scripts premature until the 1983 issues were answered. Bifurcation was the most reasonable and sensible approach under the circumstances.

In reaching the opposite conclusion, the Court of Appeals relies on *In re Will of Charles*, 263 N.C. 411, 139 S.E. 2d 588 (1965). In *Charles* we stated that "[a]ny other script purporting to be the decedent's will should be offered and its validity determined in the caveat proceeding." *Id.* at 416, 139 S.E. 2d at 592. The Court of Appeals interprets this language as a requirement that the trial judge "simultaneously present issues to the jury on all scripts purporting to be the decedent's will," 84 N.C. App. at 592, 353 S.E. 2d at 649, and therefore as a limitation on the trial judge's discretion to bifurcate. We find the Court of Appeals' analysis of *Charles* to be misguided.

In *Charles* three paper writings purported to be the decedent's last will and testament. The first script was admitted to probate in common form, and the beneficiary under the second script filed a caveat. In response to notice of the caveat, the beneficiary under a third script sought to intervene in order to have that script considered during the caveat proceeding. The trial court denied the motion to intervene. We reversed, holding that it was improper to deny intervention, and noting that "any interested person may present to the court any script which is material to the issue whether there is a will, and if so, what is it?" 263 N.C. at 416, 139 S.E. 2d at 591. This holding preserves the right of an interested party to participate in a caveat proceeding by presenting evidence of a relevant script and attacking the validity of other scripts.

Thus *Charles* simply stands for the proposition that the trial court may not exclude from the caveat proceeding consideration of any script offered by an interested party which is relevant to the issue devisavit vel non. It does not mandate, as the Court of Appeals indicates, that the issues relating to all scripts be considered simultaneously. In fact *Charles* made no attempt to dictate how a caveat proceeding involving multiple scripts must be structured. We find nothing in *Charles* to undermine the trial judge's discretion in determining how and when issues as to each

script are to be presented. So long as all relevant scripts which have been offered for proof are included in the caveat proceeding —and here all three scripts were before the jury in deciding the issues on the 1983 script—the holding in *Charles* is satisfied.

Nor are we persuaded that bifurcation of the trial resulted in an impermissible collateral attack upon the validity of the 1983 script. We have previously stated that an attack upon the validity of a will must be direct and in the form of a caveat. The offering of another will for probate in another proceeding is considered a collateral attack. *In re Will of Puett*, 229 N.C. 8, 47 S.E. 2d 488 (1948).

Here, however, the 1982 script was not offered "in another proceeding" but as part of a single, bifurcated caveat proceeding. When a caveat is filed the superior court acquires jurisdiction of the whole matter in controversy, including both the question of probate and the issue devisavit vel non. *Morris v. Morris*, 245 N.C. 30, 95 S.E. 2d 110 (1956). Devisavit vel non requires a finding of whether or not the decedent made a will and, if so, whether *any of the scripts* before the court is that will. *In re Will of Charles*, 263 N.C. 411, 415, 139 S.E. 2d 588, 591. In a multiple-script case, it stands to reason that numerous sub-issues must be answered in order to determine this ultimate issue.

Simple bifurcation of the sub-issues does not create two proceedings. In a bifurcated trial the entire action and all issues therein remain under the control of one court; bifurcation of issues normally results in only one judgment. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2387 (1971). Here the two phases of the trial were unified. The trial judge maintained control of the matter in controversy and used the same jury in both phases. The caveat proceeding was incomplete until all issues as to relevant scripts before the court had been answered.

The decision of the Court of Appeals is reversed and this cause is remanded to that court for further remand to the Superior Court, Buncombe County, for reinstatement of the judgment.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. FLINT FITZGERALD JOHNSON

No. 502A86

(Filed 7 October 1987)

1. **Criminal Law § 69— opinion that telephone call was local—harmless error**

Assuming that the trial court erred in the admission of a witness's opinion that a telephone call received from defendant on the date of the crimes when defendant's alibi witness claimed he was in the District of Columbia was a local call made in Durham, such error was harmless in light of the testimony of other witnesses placing defendant in Durham on the date of the crimes.

2. **Rape and Allied Offenses § 5— first degree rape—serious injury to prevent escape**

The trial court did not err in submitting first degree rape to the jury on the theory that defendant inflicted serious injury upon the victim where two rapes and the assault that inflicted serious injury occurred within a one-half hour period, and defendant inflicted the injury (stab wounds and cuts) in an attempt to prevent the victim's escape from his unlawful custody since the injury was one in a series of incidents forming one continuous transaction between the rapes and the infliction of injury.

3. **Kidnapping § 1.3— first degree kidnapping—instruction on serious injury**

The trial court did not err in instructing the jury that multiple stabbing and cutting with scissors, leaving a tip of the scissors embedded in the victim's head, would constitute a serious injury for purposes of first degree kidnapping.

4. **Criminal Law § 138.7— sentencing—refusal to enter plea not considered**

The trial court's statement that it had, *inter alia*, considered the arguments of counsel in imposing sentence, when considered with the fact that the defense and prosecuting attorneys both made reference in their jury arguments to defendant's refusal to enter a plea, did not show that the trial court improperly considered defendant's decision to plead not guilty and go to trial in determining that his sentences for two rapes and kidnapping would be consecutive and in deciding the severity of the sentence for kidnapping.

5. **Criminal Law § 26.5; Kidnapping § 2— first degree kidnapping—rape—punishment for both—double jeopardy**

Double jeopardy principles preclude defendant's conviction for both first degree kidnapping and two first degree rapes where, pursuant to the court's instructions, the jury may have used one of the rapes to elevate the kidnapping from second to first degree. Upon remand for resentencing, the trial court may arrest judgment on the first degree kidnapping conviction and resentence defendant for second degree kidnapping or it may arrest judgment on one of the rape convictions.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) (1986) from judgments imposing consecutive life sentences for two convictions

of first degree rape, entered by *Lake, J.*, at the 30 May 1986 Criminal Session of Superior Court, DURHAM County. On 22 December 1986 we allowed defendant's petition to bypass the Court of Appeals in appeals from convictions of kidnapping, for which the trial court sentenced defendant to thirty years imprisonment, and two assaults, for which the trial court sentenced defendant to eight years imprisonment. Heard in the Supreme Court 9 September 1987.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of two counts of first degree rape, first degree kidnapping, assault with a deadly weapon with intent to kill inflicting serious bodily injury, and assault with a deadly weapon. He was sentenced to two consecutive life terms for the rapes, thirty years (consecutive) for the kidnapping, and eight years (consecutive) for the assaults. We find no error in the guilt phase but remand for resentencing.

The State's evidence, in pertinent summary, showed the following:

At approximately 1:00 a.m. on 2 November 1985 defendant approached the victim in a parking lot on the campus of North Carolina Central University in Durham. The victim returned to her car while talking with defendant. Defendant entered the car and procured a broken bottle, held the bottle to the victim's neck, and ordered her to drive down a dirt road and stop. Defendant then instructed her to get into the back seat.

The victim obtained a pair of scissors from the window visor, but defendant took them from her. He then forced her to remove her clothes and had involuntary sexual intercourse with her. Five minutes later he again had involuntary intercourse with her. He then forced her to return to the front seat and begin driving.

The victim, still unclothed, noticed a house with lights on. She slowed the car, jumped out, and ran toward the house. De-

fendant pulled her down from behind and began stabbing her with the scissors. An occupant of the house heard the screams, rushed from his house, and observed a black male fleeing from the scene. He helped the victim into his home, and his wife contacted law enforcement authorities.

The victim suffered numerous stab wounds and a collapsed lung.

Defendant presented several alibi witnesses who testified that he was in the District of Columbia when the alleged incidents occurred. He also presented evidence tending to refute the victim's description of him.

GUILT PHASE

[1] Defendant contends the court erred in admitting evidence which tended to show that he made a local phone call in Durham on 2 November 1985, when his alibi witnesses claimed that he was in the District of Columbia. The following exchange occurred on direct examination of a State's witness:

> Q. Okay. Now, on that Saturday afternoon were you able to tell by the phone connection whether it sounded like a local call or a long distance call?
>
> [Defense Counsel]: Objection, Your Honor. That would be so speculative it would be unreal.
>
> COURT: Overruled, if she knows.
>
> Q. . . . Well, were you able to form any opinion?
>
> A. In my opinion, they were local phone calls.
>
> Q. Now, why do you say that?
>
> A. Because with a long distance phone call you have—there's like an air sound or an echo in the phone—in the phone, and I did not hear that.

Assuming, without deciding, that the admission of this evidence was error, we hold the error harmless. The purpose of the evidence was to discredit defendant's alibi defense. The State presented considerable other evidence to the same effect. The victim positively identified defendant as her assailant. One State's witness testified that she drove defendant to the Durham bus sta-

tion on the night of 2 November 1985. Another witness testified that on 1 November 1985 defendant asked friends of the witness to drive him to the scene of the abduction. Still another testified that defendant came to his home on a Saturday morning in November and claimed to have raped a white woman; 2 November 1985 was a Saturday.

In light of the foregoing, the witness' opinion as to the local origin of her phone call from defendant was cumulative and insignificant. Defendant has failed to establish that "there is a reasonable possibility that, had the [alleged] error in question not been committed, a different result would have been reached at the trial . . . ." N.C.G.S. § 15A-1443(a) (1983). This assignment of error is thus overruled.

Defendant concedes that he did not object to the jury instructions at trial. He nevertheless contends that we should find "plain error" in two aspects of the instructions:

[2] First, he argues that the court erred in instructing that the jury could convict him of the rapes if it found, *inter alia*, that he employed or displayed a dangerous or deadly weapon or weapons (*i.e.*, a broken bottle and a pair of scissors), *or* that he inflicted serious injury upon the victim (*i.e.*, numerous stab wounds or cuts). The basis of his argument is the following:

There was insufficient evidence that he inflicted serious personal injury upon the victim "before, during, or soon after either rape." The only evidence of serious injury was that regarding the stab wounds inflicted by the use of scissors. Since these wounds were inflicted some time after both rapes, they cannot "relate back" to the rapes so as to constitute an element of the offenses. This is especially so, defendant argues, as to the first of the two alleged rape offenses. Since the jury returned a general verdict of guilty, it is impossible to determine whether the verdict is based upon a finding that defendant employed or displayed a dangerous or deadly weapon, which is supported by the evidence, or upon a finding that he inflicted serious injury upon the victim, which is not. "[A] conviction cannot stand merely because it could have been supported by one theory submitted to the jury if another, invalid theory was also submitted and the jury's general verdict of guilty does not specify the theory upon which the jury based its

verdict." *State v. Belton*, 318 N.C. 141, 164, 347 S.E. 2d 755, 769 (1986).

"A prerequisite to our engaging in a 'plain error' analysis is the determination that the instruction complained of constitutes 'error' at all." *State v. Torain*, 316 N.C. 111, 116, 340 S.E. 2d 465, 468 (1986). We conclude that the challenged instruction was not error, and therefore a "plain error" analysis is not required. *Id.*

We stated in *State v. Blackstock*, 314 N.C. 232, 242, 333 S.E. 2d 245, 252 (1985):

> [O]ur legislature intended and we therefore hold that the element of infliction of serious personal injury upon the victim . . . in the crimes of first degree sexual offense and first degree rape is sufficiently connected in time to the sexual acts when there is a series of incidents forming one continuous transaction between the rape or sexual offense and the infliction of the serious personal injury. Such incidents include injury inflicted on the victim to overcome resistance or to obtain submission, . . . in an attempt to commit the crimes or in furtherance of the crimes . . . or . . . for the purpose of concealing the crimes or to aid in the assailant's escape.

Here both rapes and the assault that inflicted serious injury occurred within a one-half hour period. Defendant inflicted the injury in an attempt to prevent the victim's escape from his unlawful custody. He probably inflicted the injury to obtain the victim's submission for the purpose of further sexual assaults, in an attempt to conceal the crimes, and in an attempt to aid in his escape. In any event, he clearly inflicted the injury "in furtherance of the crimes." *Id.* We thus hold that the injury was one in a series of incidents in the same criminal episode, forming one continuous transaction between the rapes and its infliction. *Id. See also State v. Locklear*, 320 N.C. 754, 360 S.E. 2d 682 (1987). The instructions in question thus were not error.

[3] Second, defendant argues that the court erred in instructing on the kidnapping charge that "[t]he multiple stabbing and cutting of a person with scissors, leaving a tip of said scissors embedded in the person's head, would be a serious injury." He contends that the instruction constituted "an unconstitutional preemptory [sic] instruction or directed verdict on the 'serious injury' element of the four offenses where 'serious injury' was an element."

We recently addressed a similar contention in *State v. Torain*, 316 N.C. 111, 340 S.E. 2d 465. There, the trial court instructed that a utility knife constituted a dangerous or deadly weapon for purposes of first-degree rape. We upheld the instruction, explaining:

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

State v. Torain, 316 N.C. at 122, 340 S.E. 2d at 471-72. *See also State v. Davis*, 33 N.C. App. 262, 234 S.E. 2d 762 (1977) (court may instruct that if jury believes uncontradicted evidence showing injuries that could not conceivably be regarded as anything but serious, it may find that there was serious injury).

Here, similarly, the multiple stabbing and cutting with scissors, leaving a tip of the scissors embedded in the victim's head, could not conceivably be considered anything but serious injury. The question of fact for the jury was whether defendant caused the injury which we here hold to be serious as a matter of law. The court thus properly instructed that the jury could find defendant guilty of first degree kidnapping if, *inter alia*, the State proved beyond a reasonable doubt that defendant inflicted multiple stabbing and cutting wounds with scissors. Because the challenged instruction was not error, we again are not required to engage in plain error analysis. *State v. Torain*, 316 N.C. at 116, 340 S.E. 2d at 468.

SENTENCING PHASE

[4] Defendant contends he is entitled to a new sentencing hearing because the court considered "irrelevant and improper mat-

ters"—*viz*, his decision to plead not guilty and go to trial—in determining that his sentences would be consecutive and in deciding the severity of his sentence for kidnapping. The factual basis for the argument is as follows:

Immediately prior to the sentencing hearing, defense counsel at trial (not present counsel) stated in open court:

> Your Honor, this might be the appropriate time, and I want on the record that during and from Tuesday that I have talked with [defendant] about—to allow me, which up until this time he has not allowed me to talk to the State about a potential plea, and I want to put it on the record that [defendant] has forbidden me to discuss or try to work out any potential plea in this case, even as late as of yesterday, and I just wanted him to agree to that on the record, that I did attempt for the last couple of days to [get] him to allow me to talk to the State about a potential plea, but he has indicated he had no notions of pleading to any kind of plea in this case.

The prosecuting attorney thereafter stated the following as part of his sentencing argument:

> The position of the state is that . . . if a person comes up here and confesses his sins . . . that person is entitled to some consideration, some mercy. When he comes up here and says I have done wrong, I made a mistake and asks the Court for some consideration or mercy, I think there is some authority for that, that that is a part of justice, but in this case, this defendant has said that he didn't want that. He didn't want the Court's consideration. He wanted justice, he wanted the state to prove it, and no[t] only did the state have to go to all the expense that it did and then try it to two different juries. The position of the state is that he was saying, prove it, that he was saying—that he stiffened his neck, and the position of the state is that in a case like that he is not entitlted [sic] to the same consideration as a person who comes up here and says I have done wrong.
>
> I would ask the Court to enter sentence—Our position is basically that this man should never, never, never be released from the Prison system . . . .

The trial court then stated, *inter alia*, in pronouncing sentence, that it had "considered the evidence, *the arguments of counsel*, and the statement of the defendant." (Emphasis added.) Defendant argues that since the defense and prosecuting attorneys both made reference to his refusal to enter a plea, and the court stated that it had considered the arguments of counsel, the improper arguments "must have affected the . . . sentencing determinations."

While a sentence within the statutory limit will be presumed regular and valid, such a presumption is not conclusive. *State v. Boone*, 293 N.C. 702, 712, 239 S.E. 2d 459, 465 (1977). "If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights." *Id.* "Defendant had the right to plead not guilty, and he should not and cannot be punished for exercising that right." *Id.* at 712-13, 239 S.E. 2d at 465.

In *Boone* the trial court expressly stated that it would be compelled to give defendant an active sentence due to the fact that he had pleaded not guilty and the jury had returned a verdict of guilty as charged. *Id.* at 712, 239 S.E. 2d at 465. Here, by contrast, the record reveals no such express indication of improper motivation. The trial court merely prefaced its pronouncement of defendant's sentences with the statement, routinely made at sentencing, that it had, *inter alia*, considered the arguments of counsel. Nothing in this customary statement suggests that improper considerations in those arguments influenced the sentencing decision. Trial courts retain discretion to impose consecutive sentences for multiple offenses, N.C.G.S. § 15A-1354 (1985), and it is "not . . . an unusual punishment in North Carolina" when they exercise this option in cases involving first degree rape combined with other offenses. *State v. Ysaquire*, 309 N.C. 780, 784-87, 309 S.E. 2d 436, 441 (1983). Defendant's argument has no basis in the record; this assignment of error is thus overruled.

[5] Defendant contends that double jeopardy principles preclude his conviction for both first degree kidnapping and the first degree rapes. We agree. A kidnapping is in the first degree "[i]f the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted."

N.C.G.S. § 14-39(b) (1986). The trial court instructed generally on this element in the language of the statute, and the jury returned a general verdict of guilty of first degree kidnapping. An ambiguous verdict must be construed in favor of the defendant. *State v. Belton*, 318 N.C. at 165, 347 S.E. 2d at 769. Since the jury may have used one of the rapes to elevate the kidnapping from second to first degree, the case must be remanded for resentencing. *State v. Freeland*, 316 N.C. 13, 20-24, 340 S.E. 2d 35, 39-41 (1986). *See also State v. Young*, 319 N.C. 661, 662-64, 356 S.E. 2d 347, 348-49 (1987); *State v. Belton*, 318 N.C. at 160-65, 347 S.E. 2d at 766-69; *State v. Whittington*, 318 N.C. 114, 123-24, 347 S.E. 2d 403, 408-09 (1986); *State v. Mason*, 317 N.C. 283, 292-93, 345 S.E. 2d 195, 200 (1986). The trial court may arrest judgment on the first degree kidnapping conviction and resentence defendant for second degree kidnapping or it may arrest judgment on one of the rape convictions. *State v. Freeland*, 316 N.C. at 24, 340 S.E. 2d at 41.

Defendant finally contends that double jeopardy principles bar the use of a single "serious injury" to support his convictions for first degree kidnapping, first degree rape, and assault with a deadly weapon with intent to kill inflicting serious injury. The record contains neither an exception nor an assignment of error supporting this argument, however. The argument thus is not before us for review. N.C.R. App. P. 10(a).

No error in the guilt phase; remanded for resentencing.

STATE OF NORTH CAROLINA v. ERIC GLENN LOCKLEAR

No. 92A87

(Filed 7 October 1987)

1. **Rape and Allied Offenses § 5— first degree rape—infliction of serious personal injury**

The infliction of serious personal injury element of first degree rape was shown by the State's evidence that defendant repeatedly struck the victim in the face and broke her jaw immediately before he forced her to have sexual intercourse with him. Even if the blows were not intended by defendant to overcome the victim's resistance, they were still one link in a continuous chain of events which culminated in the act of intercourse and were thus sufficient to

satisfy the infliction of serious personal injury element. N.C.G.S. § 14-27.2 (a)(2)(b).

2. Burglary and Unlawful Breakings § 5.11— breaking or entering—nonconsensual entry—sufficiency of evidence

The evidence was sufficient for the jury to find that defendant's entry into a home was nonconsensual so as to support his conviction of breaking or entering, notwithstanding defendant presented evidence that permission to enter the home was inferable because the victim expected him to return a pocketbook that she had left in his car, where the State's evidence tended to show that no arrangements were made for the return of the pocketbook and defendant did not have the pocketbook with him at the time of the incident in question, and that defendant admitted in a pretrial statement that he "was not invited inside the house by anyone."

3. Criminal Law § 73.3— statements concerning fear—state of mind exception to hearsay rule

Statements made by a rape victim to nurses who were present when she was admitted to the hospital that she was afraid of defendant and did not want defendant to be allowed near her and that she was "scared" were relevant to the issue of whether the sexual intercourse was committed by force and against her will and were admissible under the "state of mind" exception to the hearsay rule provided by N.C.G.S. § 8C-1, Rule 803(3).

4. Criminal Law § 89.3— prior consistent statements—admissibility for corroboration

A nurse's testimony concerning a conversation she had with a rape victim in which the victim described what defendant had done to her on the morning of the incident and stated that on the previous day she had been afraid to give a true account of what happened because defendant had threatened her was admissible to corroborate the victim's almost identical testimony at the trial.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by *Bowen, J.*, at the 3 November 1986 Criminal Session of Superior Court, ROBESON County, where defendant was convicted by a jury of first degree rape and nonfelonious breaking or entering. We allowed defendant's motion to bypass the Court of Appeals for review of his conviction for nonfelonious breaking or entering. Heard in the Supreme Court 8 September 1987.

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

Arnold Locklear, for defendant appellant.

EXUM, Chief Justice.

In this appeal defendant's assignments of error pertain to the sufficiency of the state's evidence and to rulings by the trial court on various evidentiary matters. We find no reversible error in defendant's trial.

At trial the state's evidence tended to show that Michelle Oxendine, the prosecuting witness, was staying overnight at the home of her brother and sister-in-law in Robeson County. Ms. Oxendine had dated the defendant for approximately nine months, but had ended the relationship two weeks before the morning of 13 August 1986. On that morning at approximately 7:30 a.m., Ms. Oxendine awoke to find the defendant standing in the doorway of her bedroom. He ordered Ms. Oxendine to get out of bed; and, clad only in her undergarments, she walked to the adjacent bedroom to get dressed.

According to Ms. Oxendine's testimony, the defendant tore her clothes off, threw her to the bed, pinned her hands down and struck her repeatedly in the face. She testified that although she attempted to resist, he forced her to have vaginal and oral intercourse with him and that she was bleeding and in pain.

Afterward, she followed defendant's order that she gather some clothes and go with him. The defendant then drove Ms. Oxendine to the hospital. They arrived there approximately three hours after the incident had occurred, and Ms. Oxendine was taken to the trauma room for treatment. During the ensuing twenty-four hours, she received stitches for an injury to her lip and underwent surgery for a broken jaw.

The defendant presented evidence tending to show that, although he struck Ms. Oxendine with his fist, he carried her to a living room couch when he realized she was injured. Further, he testified that after a short discussion and his apology they returned to the bedroom and had consensual intercourse.

[1] By his first assignment of error defendant contends the trial court erred in failing to dismiss the first degree rape charge for insufficiency of the evidence.

N.C.G.S. § 14-27.2 (1986) defines first degree rape in pertinent part as follows:

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

. . . .

(2) With another person by force and against the will of the other person, and:

. . . .

b. Inflicts serious personal injury upon the victim or another person . . . .

Defendant correctly asserts that in order to convict of first degree rape under the evidence in this case, the state must rely on proof that defendant inflicted a serious personal injury upon the victim. Defendant argues there is no evidence that the injury relied upon by the state, the fracture of Ms. Oxendine's jaw, was inflicted to overcome her resistance to his sexual advances.

There is clearly no merit to defendant's argument. The state's evidence, through the testimony of Ms. Oxendine, is that defendant fractured her jaw while she was resisting his sexual advances. This evidence is ample to support the state's theory of the case that the fractured jaw was inflicted for the purpose of overcoming Ms. Oxendine's resistance.

Furthermore, there is no requirement under N.C.G.S. § 14-27.2(a)(2)(b) that the serious personal injury be inflicted upon a rape victim during the period of time when the victim's resistance is being overcome. *State v. Blackstock*, 314 N.C. 232, 333 S.E. 2d 245 (1985). In *Blackstock*, we held that the legislature intended that "the element of infliction of serious bodily injury would no longer be limited to the period of time when the victim's resistance was being overcome or her submission procured . . . ." *Id.* at 241, 333 S.E. 2d at 251. We concluded that the element of infliction of serious injury upon the victim was satisfied when there was a series of incidents "forming one continuous transaction between the rape and the infliction of the serious personal injury." *Id.* at 242, 333 S.E. 2d at 252.

Clearly the evidence here supports the serious injury element under the rationale of *Blackstock*. The state's evidence is that defendant repeatedly struck Ms. Oxendine in the face immediately before he forced her to have sexual intercourse with

him. Even if the blows were not intended by the defendant to overcome Ms. Oxendine's resistance, they were still one link in a continuous chain of events which culminated in the act of intercourse. Thus, the blows formed "one continuous transaction between the rape and the infliction of the serious personal injury." *Id.*

Accordingly, we find this assignment of error to be without merit.

[2] By his next assignment of error defendant contends the trial court erred in failing to dismiss the felonious breaking or entering charge for insufficiency of the evidence.

N.C.G.S. § 14-54 (1986) defines both felonious and nonfelonious breaking or entering in pertinent part as follows:

> (a) Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.
>
> (b) Any person who wrongfully breaks or enters any building is guilty of a misdemeanor and is punishable under G.S. 14-3(a) . . . .

The trial judge instructed the jury that if they found beyond a reasonable doubt that defendant had entered the Oxendine home without consent, intending to commit rape, then they should find him guilty of felonious breaking or entering. He also submitted the lesser included charge of nonfelonious breaking or entering and instructed the jury that, as to this charge, there was no requirement that the state prove that defendant entered the Oxendine home with intent to commit rape. The jury found the defendant guilty of nonfelonious breaking or entering as provided in N.C.G.S. § 14-54(b).

In order to convict under this section the state must show that defendant did break or enter a building unlawfully. *State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27 (1965). Where defendant enters a building with the consent of the owner or anyone empowered to give effective consent to enter, such entry cannot be the basis for a conviction of breaking or entering. *State v. Boone*, 297 N.C. 652, 256 S.E. 2d 683 (1979). Conversely, a wrongful entry, *i.e.* without consent, will be punishable under this section. *Id.* at 655, 256 S.E. 2d 686.

Defendant contends all the evidence shows he had Ms. Oxendine's permission to enter the home on 13 August 1986. We disagree.

Although defendant presented evidence that permission to enter the home on 13 August 1986 was inferable because Ms. Oxendine expected him to return a pocketbook that she had left in his car, the state presented evidence to the contrary. The state's evidence showed no arrangements were made for the return of the pocketbook and defendant did not in fact have the pocketbook with him on the morning of the incident. Defendant admitted in a pretrial statement, offered against him by the state, that when he entered the Oxendine home that morning he "was not invited inside the house by anyone."

On a motion to dismiss the evidence must be taken in the light most favorable to the state and the state must be given the benefit of every reasonable inference deducible therefrom. *State v. Hardy*, 299 N.C. 445, 263 S.E. 2d 711 (1980). Considering the evidence in the light most favorable to the state, we conclude there was sufficient evidence from which a jury could have concluded beyond a reasonable doubt that defendant's entry into the home was nonconsensual and, therefore, wrongful. We overrule this assignment of error.

[3] Defendant complains further that the trial judge committed reversible error in admitting the testimony of medical personnel who were present when Ms. Oxendine was admitted to the hospital.

Frances Prevatte, assistant director of nursing, testified that on the morning of 13 August 1986 Ms. Oxendine told her that she was afraid of the defendant and requested that the defendant not be allowed near her. Wanda Burns, a registered nurse, also testified that on 13 August 1986 Ms. Oxendine had stated that she was "scared," but that she would not say why she was frightened. Defendant's objection to the testimony was overruled.

Defendant asserts that the statements made to the medical personnel were inadmissible as hearsay. We disagree.

N.C. R. Evid. 803 contains what is commonly known as the "state of mind" exception to the hearsay rule and provides as follows:

Hearsay exceptions; availability of declarant immaterial.

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

. . . .

(3) Then Existing Mental, Emotional, or Physical Condition.—A statement of the declarant's then existing state of mind [or] emotion . . . .

This rule is virtually identical to the federal rule. *See* Commentary, N.C. R. Evid. 803. Evidence tending to show a presently existing state of mind is admissible if the state of mind sought to be proved is relevant and the prejudicial effect of the evidence does not outweigh its probative value. *State v. Dangerfield*, 32 N.C. App. 608, 233 S.E. 2d 663, *disc. rev. denied*, 292 N.C. 642, 235 S.E. 2d 63 (1977); 1 Brandis on North Carolina Evidence § 162(a) (1982).

We are satisfied that Ms. Oxendine's statements to Nurses Prevatte and Burns were admissible under Rule 803(3); and we disagree with defendant's contention that the statements describe a past, rather than an existing, mental condition. The statements Ms. Oxendine made to Nurses Prevatte and Burns describe fear she was presently experiencing in the trauma room. Ms. Oxendine made the statements only three hours after she had been assaulted. She knew defendant was still present in the hospital, and she requested he be kept away from her. Finally, as Ms. Oxendine later testified, defendant had threatened to harm her if she told anyone what had actually happened.

Ms. Oxendine's state of mind in the trauma room was relevant to the issue of whether the sexual intercourse was committed by force and against her will. The statements, therefore, were admissible under the 803(3) exception to the hearsay rule.

[4] Defendant next challenges the admission of the testimony of Nurse Burns concerning a conversation she had with Ms. Oxendine on the day following the incident, 14 August 1986. According to Nurse Burns' testimony, Ms. Oxendine then stated that on 13 August 1986 she had been afraid to give a true account of what had happened because defendant had threatened her. Ms. Oxendine told Nurse Burns that defendant had entered her home without her knowledge, awakened her, assaulted her, had vaginal and

oral intercourse with her and had then driven her to the hospital to get medical attention. Defendant's motion to strike this testimony was denied.

Defendant argues that Nurse Burns' testimony regarding the conversation was inadmissible hearsay. Alternatively, he contends even if the testimony was used for the nonhearsay purpose of corroboration the statements were inadmissible because they were inconsistent with, and not corroborative of, the victim's testimony at trial.

Nurse Burns' testimony concerning the conversation and defendant's objections thereto are reported in the record as follows:

> Q. Did you have any conversation, then, about how she got in the condition she was in?
>
> OBJECTION.
>
> OVERRULED.
>
> A. Yes.
>
> Q. What did she tell you had happened to her?
>
> [Nurse Burns]: I asked her why she couldn't tell me the day before that she had been raped and she said that Eric had threatened her life and that she was scared—
>
> MOVE TO STRIKE.
>
> [Nurse Burns]: —to tell anybody.
>
> DENIED.
>
> [Nurse Burns]: I asked her to describe what he had done to her and she told me that he broke in the house . . . beat her . . . had sexual intercourse with her . . . and drove her to the emergency room, because he was afraid that he had hurt her bad enough that she needed medical care.
>
> MOVE TO STRIKE.
>
> DENIED.

This evidence was properly admitted as being corroborative of Ms. Oxendine's trial testimony. One of the most widely used

and well-recognized methods of strengthening the credibility of a witness is by the admission of prior consistent statements. *State v. Carter*, 293 N.C. 532, 238 S.E. 2d 493 (1977). If previous statements offered in corroboration are generally consistent with the witness's testimony, slight variations between them will not render the statements inadmissible. Such variations only affect the credibility of the evidence which is always for the jury. *State v. Case*, 253 N.C. 130, 116 S.E. 2d 429 (1960), *cert. denied*, 365 U.S. 830, 5 L.Ed. 2d 707 (1961); *State v. Walker*, 226 N.C. 458, 38 S.E. 2d 531 (1946).

Despite defendant's contentions to the contrary, Ms. Oxendine's testimony at trial was practically identical to the statements attributed to her by Nurse Burns. Ms. Oxendine testified, "Eric [defendant] told me if I told them what happened, he would get me." She also described what defendant actually did to her on the morning of the incident. This description was almost identical to the statements Nurse Burns testified Ms. Oxendine made to her.

Therefore, Nurse Burns' testimony was properly admitted for the nonhearsay purpose of corroborating Ms. Oxendine's testimony.

In defendant's trial we find no error.

No error.

STATE OF NORTH CAROLINA v. CHARLES RAY KIMBRELL

No. 83A87

(Filed 7 October 1987)

Criminal Law § 34— improper questions concerning devil worship—prejudicial error

The trial court committed prejudicial error in a prosecution for accessory before the fact to murder by permitting the district attorney to ask defendant about devil worshipping activities where the relative veracity of the State's two accomplice witnesses and the defendant was critical; no physical evidence linked defendant to the murder; both defendant and his wife gave testimony which exonerated defendant; the State's case against defendant rested in overwhelming measure on the testimony of two admitted drug addicts with crimi-

nal records who confessed to murdering and robbing the victims; and the Supreme Court could not confidently assume that the drug addicts would have been more worthy of belief than defendant had the District Attorney not been permitted to ask questions which probably inflamed the jury.

Justice MITCHELL dissenting.

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals finding no error in his trial before *Washington, J.*, at the 11 November 1985 Criminal Session of Superior Court, DAVIDSON County. *State v. Kimbrell*, 84 N.C. App. 59, 351 S.E. 2d 801 (1987). Defendant was convicted of two counts of accessory before the fact to second-degree murder and was sentenced to consecutive terms of twenty-five and fifty years imprisonment. Heard in the Supreme Court 8 September 1987.

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

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

MEYER, Justice.

The issue presented is whether the trial court committed reversible error by permitting the State, over objection, to cross-examine defendant about his knowledge of and participation in "devil worshipping" activities. The Court of Appeals found the evidence to be inadmissible under N.C.G.S. § 8C-1, Rules 610 and 403, but held that its admission did not constitute reversible error. We agree that the evidence was inadmissible. However, we find that defendant was indeed prejudiced by its admission, and we therefore reverse.

The State's evidence established that on 19 May 1984, Ricky and Pamela Norman were shot to death in their residence. James Clay ("Clay") Hunt was arrested and charged with the murder of the Normans. His sister, Donna Hunt, was subsequently arrested and charged with participation in the crimes. Both Clay and Donna Hunt testified for the State, pursuant to plea agreements.

Clay Hunt testified that from early 1983 through May 1984, he had been selling drugs (Dilaudid tablets), which defendant had

supplied. Defendant wanted Ricky Norman killed because he owed defendant a substantial sum of money, and on five or six occasions defendant asked Hunt if he would like to make some more money by killing Norman for him. On 18 May 1984, Clay and Donna Hunt visited defendant's residence to "shoot dope." Clay Hunt owed defendant approximately $1,200 at the time. Defendant offered to forgive the debt if Clay Hunt would kill Ricky Norman. Hunt agreed. Defendant instructed Clay Hunt to kill Pamela Norman as well, if she were there, since she would be a witness. Clay and Donna Hunt went to the Normans' residence to kill them, but they were not at home. On their second visit to the Norman residence, they found Ricky and Pamela at home, and Clay Hunt shot them both to death. The Hunts took approximately $1,500 in cash and some cocaine from the house.

Defendant took the stand on his own behalf. He testified that he had known the Normans but denied having had any drug-related transactions with them. He stated that the Hunts had come to his home at about midnight on 18 May 1984 and that both appeared to be under the influence of drugs. Clay Hunt told defendant that he thought he and his sister were being followed by a vehicle belonging to the Normans. Both the Hunts and defendant ingested some cocaine. The Hunts left defendant's home about thirty minutes later in Donna Hunt's car. Defendant's wife, Mary Kimbrell, corroborated defendant's testimony as to the time the Hunts arrived, as to Clay Hunt's statement that he and his sister were being followed, and as to the approximate time of their departure.

After defendant's arrest and while he was in custody, he made a statement in which he referred to his knowledge of and participation in "black magic" activities with a group that included Ricky Norman and others. At trial, the State's cross-examination of defendant was based, in part, upon defendant's prior statement. The questions which defendant challenges are as follows:

Q. Have you done any devil worshipping?

A. No, sir.

MR. KLASS: Object.

THE COURT: Overruled. EXCEPTION NO. 3

MR. ZIMMERMAN: Thank you.

Q. Have you ever been to any ceremonies?

A. No, sir.

Q. Have you seen things at night?

A. No, sir.

Q. Birds, hawks, dogs, a number of things?

A. No, sir.

Q. You don't recall telling Special Agent Leggett of the SBI that you saw those things?

A. No, sir.

Q. "I saw a goat head made out of brass in the vision"?

MR. LOHR: Objection.

THE COURT: Overruled. EXCEPTION NO. 4

Q. And you and Luther on Friday the 13th—April, Friday the 13th, you-all were supposed to go to a seance, isn't that right?

A. That's what Bobby Tucker said.

Q. Huh?

A. That's what Curtis Robert Tucker said.

Q. Well, you were supposed to go, weren't you?

MR. LOHR: Objection.

THE COURT: Overruled. EXCEPTION NO. 5

A. I was inivited [sic].

THE COURT: You may answer the question.

A. (continuing) I was invited to it, and when I got up on Main Street to go down toward Luther's house I seen some police officers going down towards Luther's, and I kept going straight.

Q. A police officer?

A. I seen two carloads going down towards Luther's.

Q. And of course that scared you?

A. Yes, sir.

. . . .

Q. Did you tell them you wanted to show them something that Bob and Luther gave you about some little swords—some little bitty swords, something about they had power?

A. That's what they told me.

MR. LOHR: Objection.

THE COURT: Overruled. EXCEPTION NO. 6

Q. Go ahead. What? Answer the question. You've got to answer the question.

A. I told them about the swords, yes, sir. I wasn't talking about myself, I was explaining about Luther Flynn at the time, if you'll remember.

Q. You had one of these black magic bibles, too, didn't you?

A. No, sir.

MR. LOHR: Objection.

THE COURT: Overruled. EXCEPTION NO. 7

Q. Who had the bible? Who had the bible?

A. Luther Flynn had the bible.

Q. Had he ever read any of it to you?

A. Yes, sir.

MR. LOHR: Objection. Objection.

THE COURT: Overruled. EXCEPTION NO. 8

Q. Were Ricky and Pam Norman involved in this black magic stuff?

A. I don't know, sir.

Q. What did that consist of? Worshipping the devil?

MR. LOHR: Objection.

THE COURT: Overruled. EXCEPTION NO. 9

A. I don't know, sir.

Q. What did that black bible Luther had have to say about it?

MR. LOHR: Objection.

THE COURT: Overruled. EXCEPTION NO. 10

Q. You can answser [sic].

A. It's just a bunch of words. I don't know. I didn't pay any attention to it.

The Court of Appeals was unanimous in finding that admission of this evidence was error under North Carolina Rules of Evidence 610[1] and 403.[2] *Kimbrell*, 84 N.C. App. at 64-65, 351 S.E. 2d at 804. The panel divided, however, in its assessment of the evidence's prejudicial effect. The question of the prejudicial effect of the evidence was the only issue addressed in the dissent, and under Rule 16(b) of the North Carolina Rules of Appellate Procedure, that issue is the only one before us.

In order to show prejudicial effect which rises to the level of reversible error, a defendant must demonstrate that "a reasonable possibility [exists] that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (1983). *See State v. Scott*, 318 N.C. 237, 347 S.E. 2d 414 (1986). Defendant has done so.

The outcome of the trial depended on the jury's perception of the relative veracity of the witnesses. Both the Hunts stood to gain by testifying against defendant because the charges against them were thereby reduced to second-degree murder. The evi-

1. "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced; provided, however, such evidence may be admitted for the purpose of showing interest or bias." N.C.G.S. § 8C-1, Rule 610 (1986).

2. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1986).

dence indicated that the Hunts could have had a personal motive to kill and rob Ricky Norman, independent of the proposition made to them by defendant. When they went to his house on 19 May 1984, the Hunts told Norman they wanted to purchase drugs, when in fact they had no money with which to pay for them. Having killed Norman and his wife and having stolen both drugs and cash, the Hunts spent the next two days feeding their drug habits and using the money to purchase more drugs. The evidence further indicated that while in jail, Clay Hunt tried to bribe defendant into paying him $1,000 in return for his not taking the stand against defendant.

Other than the evidence relating to "devil worshipping," the State's impeachment of defendant showed that he had had an extramarital affair with Donna Hunt; that he had purchased some Dilaudid tablets for her at her request; that he had sold marijuana; and that he had a criminal record consisting of two counts of misdemeanor possession of marijuana, one count of speeding, and one count of littering. However, defendant's testimony as to the events of the night of 18 May 1984, if believed, exonerated him of involvement in the Norman murders.

The State contends that defendant's denials that he engaged in "devil worshipping" ceremonies or paid any attention to the "black magic bible" mitigated any prejudicial effect that the questioning itself may have had. The State describes the questions as a minute portion of the trial upon which the jury would have been most unlikely to have based their verdict because of the substantial evidence of defendant's guilt supplied by the Hunts. We disagree. The real effect of questions about devil worship, satanic bibles, graveyard seances, and the like, which in this particular case had little or no probative value, can only have been to arouse the passion and prejudice of the jury. We do not believe that this defendant's simple denials sufficiently mitigated the damage done to his case by these questions. We find support for our conclusion in decisions from other jurisdictions. *See, e.g., People v. Brown*, 107 Ill. App. 3d, 437 N.E. 2d 1240 (1982) (trial court properly refused to allow defendant to raise witchcraft accusation against complainant in indecent liberties with a child case, since not related to crime charged); *Commonwealth v. Atkinson*, 364 Pa. Super. 384, 528 A. 2d 210 (1987) (pretrial publicity intimating that murders with which defendant was charged were connected with

satanic cults inherently prejudicial if insufficient time lapse between publication and trial). *But see State v. Waterhouse*, 513 A. 2d 862 (Me. 1986) (evidence of defendant's belief in satanism admissible to prove killer's identity and intent); *Commonwealth v. Chuck*, 227 Pa. Super. 612, 323 A. 2d 123 (1974) (where issue was witness' competency to testify, jury could be apprised of his belief in Satan).

In this case, the relative veracity of the State's two accomplice witnesses and the defendant was critical. No physical evidence linked defendant to the murders. Both he and his wife, Mary Kimbrell, took the stand and gave testimony which exonerated him from guilt. The State's case against defendant rested in overwhelming measure on the testimony of Clay and Donna Hunt, who had confessed to murdering and robbing Ricky and Pamela Norman. Both were admitted drug addicts with criminal records. We cannot confidently assume that the Hunts would have been more worthy of belief than defendant had the district attorney not been permitted to ask questions which probably inflamed the jury. Indeed, as the Court of Appeals itself pointed out, "accusations or insinuations of participation in 'devil worship' clearly carry with them a great potential for prejudicial impact on defendant's credibility." *Kimbrell*, 84 N.C. App. at 65, 351 S.E. 2d at 804.

We hold that the trial court committed reversible error in permitting the district attorney, over objection, to ask defendant questions about devil worshipping activities. Defendant is entitled to a new trial. Accordingly, we reverse and remand to the Court of Appeals with instructions to that court to remand to the Superior Court, Davidson County, for further proceedings in accordance with this opinion.

Reversed and remanded.

Justice MITCHELL dissenting.

For the reasons given by the majority in the Court of Appeals, 84 N.C. App. 59, 351 S.E. 2d 801 (1987), I am convinced that the trial court's error in permitting the questioning of the defendant as to whether he had "done any devil worshipping"—which he denied in each instance—was harmless error. Therefore, I must respectfully dissent.

INVESTORS TITLE INSURANCE COMPANY v. DAVID F. HERZIG, JERRY S. CHESSON, SOUTHEASTERN SHELTER CORPORATION, LEE L. CORUM, AND EVERETT, CREECH, HANCOCK & HERZIG, A PARTNERSHIP

No. 756PA86

(Filed 7 October 1987)

1. **Partnership § 4— title certificate by attorney—liability of law partnership—ordinary course of business—issue of material fact**

A genuine issue of material fact existed as to whether the act of a law partner in executing a title certificate in the partnership name on property owned by the partner for the purpose of obtaining a personal loan for himself was "in the ordinary course of the business of the partnership or with the authority of his copartners" so as to render the partnership liable for loss caused by the certification under N.C.G.S. § 59-43 where the evidence showed that the partner routinely executed title certificates in the partnership name to plaintiff title insurance company; the partnership received no benefit from the transaction; and the partnership agreement does not restrict the partner from certifying titles.

2. **Partnership § 4— partnership liability for contract made by partner**

Where a contract apparently made for the purpose of carrying on partnership business is executed in the partnership name by a partner, the partnership is liable for a breach of contract even though the partner was not authorized to so act, unless the other parties to the contract had knowledge of the lack of authority.

3. **Principal and Agent § 5— scope of apparent authority**

The scope of an agent's apparent authority is determined not by the agent's own representations but by the manifestations of authority which the principal accords to him.

4. **Principal and Agent § 5.1— general agent—scope of authority—burden of proving notice of restriction**

The rule that under certain circumstances a person dealing with an agent must know the extent of the agent's authority does not apply when dealing with one who is a general agent. In such case, the burden is on the principal to show that the other party had notice of a restriction upon the power of the general agent.

5. **Partnership § 4— title certificate by attorney—liability of law partnership—apparent authority—justification for belief**

In order to hold a law partnership liable for a title certificate executed by a partner in the partnership name, plaintiff title insurance company must show that in the exercise of reasonable care under the circumstances, it was justified in believing that the partnership had conferred upon the partner authority to execute the certificate on behalf of the partnership.

6. Partnership § 4; Principal and Agent § 5.2— title certificate by attorney—apparent authority to act for partnership—issue of material fact

Genuine issues of material fact existed as to whether a law partner's act of signing a title certificate in the partnership name was for apparently carrying on in the usual way the business of the partnership, whether the partner in fact had no authority to so act for the partnership, and whether plaintiff title insurance company had knowledge of this lack of authority where there was evidence tending to show that the partner signed the certificate on property owned by him for the purpose of obtaining a personal loan for himself; plaintiff title insurer knew that the certificate of title related to a personal loan for the partner; defendant law partnership had no knowledge of the partner's act and received no benefit from the transaction; defendant partnership routinely and on many occasions executed certificates of title to plaintiff signed by the partner who signed the certificate in question; defendant partnership never notified plaintiff that its partner did not have authority to execute certificates of title on behalf of the partnership; and plaintiff relied upon the fact that in certifying title to the property, the partner signed the certificate on behalf of the partnership. If the partner's act was for apparently carrying on in the usual way the business of the partnership, the partnership is bound thereby unless the partner in fact had no authority to so act for the partnership and plaintiff had knowledge of this lack of authority. N.C.G.S. § 59-39(a).

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

ON plaintiff's petition for discretionary review of the decision of the Court of Appeals, 83 N.C. App. 392, 350 S.E. 2d 160 (1986), which affirmed summary judgment for defendant partnership by *Herring, J.*, at the 30 January 1986 session of Superior Court, DURHAM County. Heard in the Supreme Court 10 September 1987.

Mount White Hutson & Carden, P.A., by James H. Hughes and Stephanie C. Powell, for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, by G. Eugene Boyce, and R. Daniel Boyce for Everett, Creech, Hancock & Herzig, defendant-appellee.

MARTIN, Justice.

We hold that summary judgment was improperly granted for defendant law firm and therefore reverse the decision of the Court of Appeals.

The rules governing the granting of summary judgment are familiar learning and it would serve no useful purpose to repeat them here. *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E. 2d 355 (1985).

The relevant facts are: Defendant Herzig, at that time a licensed attorney and partner in the firm of Everett, Creech, Hancock & Herzig, issued, in the name of the partnership, a certificate of title to plaintiff of property in Vance County owned and mortgaged by Herzig. The title insurance was for the benefit of The Planters National Bank and Trust Company, which had made a personal loan to Herzig of $30,000 secured by a mortgage on the Vance County property. The exhibits indicate that the title certificate was executed on a form of plaintiff's as follows:

Everett, Creech, Hancock & Herzig [typed]
Approved Attorneys [printed]

By s/ David Herzig
Member of Firm [printed]

Part of the property reverted because of the violation of a reversionary clause. The violation had not been disclosed to plaintiff. Herzig defaulted on the loan and the bank's loss was paid by plaintiff, for which plaintiff now sues.

Two questions arise in determining the correctness of the entry of summary judgment for the defendant partnership.

[1] First, does a genuine issue of material fact exist as to whether the act of Herzig in executing the title certificate on property owned by him and for the purpose of obtaining a personal loan for Herzig was "in the ordinary course of the business of the partnership or with the authority of his copartners." N.C.G.S. § 59-43 (1982). This statute provides:

> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

The evidence does not directly answer this question. The evidence does show that Herzig was a partner in the law firm and routinely executed title certificates in the partnership name to the plaintiff. Other evidence shows that Herzig's action was to get a personal loan for himself, that he did certify title to property he owned, that the partnership received no benefit from the transaction, and that the partnership agreement does not restrict Herzig in certifying titles.

We find that from the evidence and lack of evidence a genuine issue of material fact does exist with respect to this first question. Summary judgment was improper as to this question. *See Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974) (jury question whether law firm was liable for misappropriation of funds received by partner for investment purposes).

We must also resolve the second question: does a genuine question of material fact exist as to whether Herzig had apparent authority to sign the certificate of title as agent for the defendant law partnership.

N.C.G.S. § 59-39(a) provides:

> (a) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

[2, 3] Where a contract apparently made for the purpose of carrying on partnership business is executed in the partnership name by a partner, the partnership is liable for a breach of the contract even though the partner was not authorized to so act, unless the other parties to the contract had knowledge of the lack of authority. *Brewer v. Elks*, 260 N.C. 470, 133 S.E. 2d 159 (1963). The scope of the agent's apparent authority is determined not by the agent's own representations but by the manifestations of authority which the principal accords to him. Restatement (Second) of Agency § 27 (1958). Apparent authority is that authority

which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795.[1]

[4] Although under certain circumstances a person dealing with an agent must know the extent of the agent's authority, this rule does not apply when dealing with one who is a general agent. In such case the burden is on the principal to show that the other party had notice of a restriction upon the power of the general agent. *Id.; Bank v. Oil Co.*, 157 N.C. 302, 73 S.E. 93 (1912). Herzig, as a partner in the defendant law firm, was a general agent of the firm. Therefore, the defendant law firm has the burden to show that plaintiff had notice of a restriction upon Herzig's power to bind it.

Further, this Court has held with respect to apparent authority that where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence or by his negligent conduct made it possible for the loss to occur, must bear the loss. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795; *R.R. v. Lassiter & Co.*, 207 N.C. 408, 177 S.E. 9 (1934); *Railroad v. Kitchin*, 91 N.C. 39 (1884).

[5] Finally, in order to hold the principal liable, plaintiff must show that in the exercise of reasonable care under the circumstances, it was justified in believing that the principal had conferred upon Herzig authority to execute the certificate on behalf of the partnership. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795; *R.R. v. Lassiter & Co.*, 207 N.C. 408, 177 S.E. 9.

[6] We now turn to the application of these rules of law to this case. The certificate of title was executed in the name of the law partnership by Herzig, then a partner. Therefore, if Herzig's act was for apparently carrying on in the usual way the business of the partnership, the partnership is bound thereby, *unless* Herzig in fact had no authority to so act for the partnership *and* plaintiff had knowledge of this lack of authority. N.C.G.S. § 59-39(a) (1982).

Plaintiff knew that the certificate of title related to a personal loan for Herzig. Defendant partnership argues this is sufficient evidence to find as a matter of law that Herzig's act was not

1. This opinion contains an excellent analysis of the law of apparent authority.

for carrying on the business of the partnership. We disagree, but do find that the evidence creates a genuine issue of material fact on this question. The affidavits of defendant partnership tend to support a finding that the law firm had no knowledge of Herzig's act and that it was done solely for his personal benefit. To the contrary, plaintiff's evidence showed that the defendant partnership routinely and on many occasions executed certificates of title to plaintiff signed by Herzig. Further, plaintiff's evidence showed that defendant partnership had never notified plaintiff that Herzig did not have authority to execute certificates of title on behalf of the partnership and that plaintiff relied upon the fact that in certifying title to the property Herzig signed the certificate on behalf of the partnership.

The mere fact that the law firm did not receive any benefit from the issuance of the certificate of title is not controlling. *See Brewer v. Elks*, 260 N.C. 470, 133 S.E. 2d 159. There may be many valid partnership acts that fail to benefit a partnership.

The conflicts and lack of evidence are sufficient to defeat both the plaintiff's and the partnership's motions for summary judgment. We hold there are genuine issues of material fact as to whether Herzig's act was without authority and, if so, whether plaintiff had knowledge of such lack of authority or was reasonably justified in believing that Herzig had authority to bind the partnership in executing the certificate of title under the existing circumstances.

The decision of the Court of Appeals is reversed and the case is remanded to that court for remand to the Superior Court, Durham County, for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

TREANTS ENTERPRISES, INC. v. ONSLOW COUNTY, THE SHERIFF OF ONSLOW COUNTY IN HIS OFFICIAL CAPACITY; AND THE ONSLOW COUNTY TAX COLLECTOR IN HIS OFFICIAL CAPACITY

No. 746A86

(Filed 7 October 1987)

Constitutional Law § 14— movie mates ordinance—regulation of all companionship businesses—overbroad

An Onslow County ordinance which aimed at "movie mates" but which regulated all companionship businesses was not rationally related to a substantial government purpose in that it was overbroad and was in violation of Art. I, §§ 1 and 29 of the North Carolina Constitution.

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

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(1) from the decision of the Court of Appeals, 83 N.C. App. 345, 350 S.E. 2d 365 (1986), affirming order of *Lewis (John B.), J.*, at the 28 October 1985 session of Superior Court, ONSLOW County, permanently enjoining defendants from enforcing an ordinance of Onslow County. Heard in the Supreme Court 9 September 1987.

Jeffrey S. Miller for plaintiff-appellee.

Roger A. Moore for defendant-appellants.

MARTIN, Justice.

Plaintiff successfully sought to enjoin the enforcement of an Onslow County ordinance that imposes licensing requirements on businesses purveying male or female "companionship." The superior court's order was affirmed by the Court of Appeals on constitutional grounds. Today we affirm the decision of the Court of Appeals.

On 19 June 1985 Onslow County enacted an ordinance entitled, "AN ORDINANCE REGULATING BUSINESSES PROVIDING MALE OR FEMALE COMPANIONSHIP" (amended 1 July 1985). Like the massage parlor ordinance that preceded it, this ordinance was intended to prevent the use of ostensibly legitimate businesses as blinds for pandering and prostitution. At the time the ordinance was enacted, county officials were particularly concerned about establishments known locally as "movie mates," which provide

female companions for their male patrons while viewing movies in private rooms. But, Onslow County officials found themselves in a position which can be likened to that of ancient Hercules in his contest with the serpent Hydra. Based on their experience with massage parlors, they anticipated that an ordinance directed specifically at movie-mates establishments would merely cause operators to reconstitute their businesses in some further "adult entertainment" guise. To effectively combat prostitution, county officials sought an ordinance drawn with sufficient breadth to foil such ingenuity. The resulting ordinance regulated all "companionship businesses." A "male or female companionship business" is defined by the ordinance as one that is engaged in "providing or selling male or female companionship in exchange for money or other valuable consideration."

The provisions of the ordinance include the following: (1) all companionship businesses are to be licensed; (2) all such businesses are to be conducted on licensed premises; (3) persons convicted of a felony or crime involving prostitution within the preceding five years will be denied a license; likewise, persons subsequently convicted will suffer license revocation; (4) licensees must register the names and addresses of their employees with the sheriff; knowing employment of prostitutes is grounds for revocation of license; (5) persons under eighteen years old may not patronize companionship businesses; (6) the name, birthdate, and physical characteristics of patrons must be recorded and filed with the sheriff's department.

The ordinance was to become effective in August of 1985. However, the statute has never been enforced pending determination of its validity. In June of that year, the plaintiff, Treants Enterprises, Inc., which operates three movie-mates businesses in Onslow County, filed a complaint challenging the constitutionality of the ordinance. In October 1985 the superior court permanently enjoined defendants from enforcing the ordinance. In an opinion filed in November 1986 the Court of Appeals affirmed the order of the superior court, based upon state constitutional principles, holding that the ordinance violated article I, sections 1 and 19 of the North Carolina Constitution. Defendants' appeal is before this Court pursuant to N.C.G.S. § 7A-30(1), which provides an appeal as of right from any decision of the Court of Appeals which involves a substantial question arising under the Constitution of the

United States or the North Carolina Constitution. Defendants base their appeal only on state constitutional grounds. No federal constitutional questions are at issue. Therefore, our decision on this appeal is based solely upon adequate and independent state grounds. *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed. 2d 1201 (1983).

Evidence presented by the defendants tended to show that movie-mates establishments have harbored prostitution, crimes against nature, and the use of controlled substances. Further, the efforts of county law enforcement officials to halt these practices have been frustrated by movie-mates operators. They have taught their employees methods of detecting undercover officers and thus thwarted efforts to police these establishments. Evidence presented by defendant Onslow County also showed that its prior effort to combat organized prostitution through the massage parlor ordinance had been effective, if only to force the chameleon of adult entertainment to appear in novel hues. Since the enactment of the massage parlor ordinance in 1978, no massage parlors have operated in Onslow County.

The defendants are correct in asserting that (1) the state has the power to do whatever may be necessary to protect public health, safety, morals, and the general welfare, *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E. 2d 444 (1979); (2) the police power may be delegated by the state to its municipalities when the legislature deems it necessary to do so, *id.*; and (3) the state has indeed delegated to the counties the power to enact ordinances to regulate such businesses as movie mates in the public interest, N.C.G.S. §§ 153A-134, -135 (1983). The question before this Court, however, is not whether Onslow County has the power to combat prostitution and its associated evils, but whether the Onslow County companionship ordinance as written violates sections 1 and 19 of article I of the North Carolina Constitution.

Article I, section 1 places among the inalienable rights of the people, "life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." Section 19 of the same article provides that no person shall be "deprived of his life, liberty, or property, but by the law of the land." A single standard determines whether the Onslow County ordinance passes constitutional muster imposed by both section 1 and the "law of the land" clause of section 19: the ordinance must be rationally related to a sub-

stantial government purpose. This is the requirement article I, section 1 imposes on government regulation of trades and business in the public interest. *Roller v. Allen*, 245 N.C. 516, 96 S.E. 2d 851 (1957); *State v. Balance*, 229 N.C. 764, 251 S.E. 2d 731 (1949); *State v. Harris*, 216 N.C. 746, 6 S.E. 2d 854 (1940). The "law of the land" clause of section 19 imposes the same requirement. *In re Hospital*, 282 N.C. 542, 193 S.E. 2d 729 (1973).

We hold that the ordinance fails the above-stated constitutional test. Defendants readily admit that the ordinance is broad but deny it is overbroad. Their goal was an ordinance broad enough to prevent repetition of their experience with the massage parlor ordinance. They sought to regulate under the companionship ordinance all current and future adult-entertainment businesses that might bring prostitution into their county. Unfortunately, they hit upon a term and a category of businesses—"companionship"—which encompasses an indefinitely large number of salutary enterprises, along with the meretricious adult-entertainment establishments at which county officials took aim. According to Webster's Third New International Dictionary, a "companion" is anyone who "accompanies or is in the company of another." This term is broad enough to encompass both the salubrious and the salacious and indeed in its ordinary meaning more commonly connotes the former. The companionship ordinance, therefore, on its face purports to regulate nursing homes and companions for the elderly along with movie mates, "private room" bars, and "dial-an-escort" services.

Defendants insist that the Los Angeles "escort bureau" ordinance upheld in *People v. Katrinak*, 136 Cal. App. 3d 145, 185 Cal. Rptr. 869 (1982), provides a constitutionally valid model for what Onslow County tried to do with its companionship ordinance. Defendants argue that the ordinance there upheld was just as broad as their own ordinance, defining, as it did, "escort" as anyone who "accompanies" or "consorts" with another in public or private for a fee. We disagree. The word "escort" used in the California ordinance has a much narrower field of application than the term "companion" in the Onslow County ordinance. While "escort" connotes a companion for purposes of socializing and amusement, the Onslow County ordinance uses "companion" in a wholly unrestricted manner which embraces anyone who may for compensation accompany another for purposes of providing him or

her with aid of any kind, for example, a companion to someone infirm. The terms "escort bureau" and "escort service" are often regarded as euphemisms for prostitution, the very type of business at which the aptly named California ordinance is directed.

We hold that by reason of its overbreadth, the ordinance is not rationally related to a substantial government purpose and violates our state constitution.

Having disposed of the appeal on this issue, we do not find it necessary to discuss the other issues presented.

The decision of the Court of Appeals is

Affirmed.

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

STATE OF NORTH CAROLINA v. MICHAEL BULLOCK, SR.

No. 639A86

(Filed 7 October 1987)

1. **Criminal Law § 73.5— statements by abused children—medical treatment exception to hearsay rule**

Testimony by a pediatrician and by a psychologist as to statements and demonstrations by two children indicating that they had been sexually abused and that the perpetrator was their father, the defendant, was admissible under the medical diagnosis and treatment exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 801(c).

2. **Criminal Law § 51.1— child sexual abuse—qualification of expert**

The trial court properly qualified a witness as an expert in pediatrics and the diagnosis of child sexual abuse on the basis of evidence that the witness had been a pediatrician for twenty-six years and had regularly seen around 150 children per week; he had both taught and attended seminars on child sexual abuse; and he was on the Advisory Board of the Child Medical Examiner's Program, a state and federally funded program established to evaluate whether children have been abused.

3. Criminal Law § 73.2— medical treatment exception—statements to psychologist

Statements made by a victim of child sexual abuse during the course of diagnosis and treatment were not inadmissible because they were made to a psychologist rather than to a medical doctor.

4. Criminal Law § 113— summary of evidence, application of law not required

The trial court was not required to summarize the evidence or explain the application of the law to the evidence. N.C.G.S. § 15A-1232.

Chief Justice EXUM concurring.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) (1986) from the imposition of a sentence of life imprisonment upon his conviction of two counts of first degree sexual offense before *Pope, J.*, at the 21 July 1986 Criminal Session of Superior Court, DURHAM County. Heard in the Supreme Court 8 September 1987.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.

Nathaniel L. Belcher for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of two counts of first degree sexual offense. The trial court consolidated the cases for judgment and sentenced him to life imprisonment. N.C.G.S. §§ 14-27.4, 14-1.1 (1986).

Defendant's older son testified that, when he was between seven and nine years old, defendant had sexually assaulted him by performing fellatio on him and making him perform fellatio on defendant. The older son and a younger son testified that defendant had also sexually assaulted the younger son in the same manner when that child was four.

After the older son told his stepmother that defendant had been molesting him, defendant took him to a psychiatrist. The Durham County Department of Social Services (DSS) began an investigation of defendant for sexual abuse and arranged for the older son to be evaluated by Dr. Charles Schaffer, a pediatrician and child medical examiner. Dr. Schaffer testified that during his interview with the older son the boy indicated with anatomical dolls that defendant had sucked on his penis. Based on the boy's

statements and behavior, Dr. Schaffer diagnosed child sexual abuse and arranged for the boy to get inpatient psychiatric treatment.

DSS requested that Dr. Schaffer also evaluate the younger son. Dr. Schaffer testified that during the evaluation this boy indicated with anatomical dolls that defendant had placed his penis in the boy's mouth while holding and patting his head. Dr. Schaffer diagnosed child sexual abuse and recommended psychological treatment. DSS referred the younger son to Dr. Carolyn Schroeder, a child psychologist, to determine his psychological status and treatment needs. Dr. Schroeder testified that on one of the boy's visits to her he indicated with anatomical dolls that defendant had placed his penis in the boy's mouth.

[1] Defendant contends that the testimony of Dr. Schaffer and Dr. Schroeder should not have been admitted as substantive evidence. The testimony of both as to the children's statements was hearsay because the statements were made by one other than the declarant at trial and were offered to prove the truth of the matter asserted, *i.e.*, that defendant had sexually assaulted his sons. N.C.G.S. § 8C-1, Rule 801(c) (1986). However, the trial court admitted the testimony as substantive evidence under Rule 803(4), which provides an exception to the hearsay rule for

> [s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

N.C.G.S. § 8C-1, Rule 803(4) (1986).

The statements and non-verbal conduct in question were clearly made for the purpose of medical diagnosis and treatment. Both children talked about the abuse and demonstrated what had happened, using anatomical dolls, as part of the diagnosis and treatment process. The statements and demonstrations were, equally clearly, pertinent to medical diagnosis and treatment. In the context of child sexual abuse or child rape, a victim's statements to a physician as to an assailant's identity are pertinent to diagnosis and treatment. *State v. Aguallo*, 318 N.C. 590, 597, 350 S.E. 2d 76, 80 (1986). First, a proper diagnosis of the child's

psychological problems resulting from sexual abuse or rape will often depend on the identity of the abuser. Second, information that a child sexual abuser is a member of the patient's household is reasonably pertinent to a course of treatment that includes removing the child from the home. *Id.* Therefore, the testimony as to the statements and demonstrations by the children indicating that they had been sexually abused and that the perpetrator was their father, the defendant, were admissible under Rule 803(4).

[2] Defendant argues that Dr. Schaffer's testimony was not admissible because he had received little, if any, academic training concerning abused children. The record establishes, however, that Dr. Schaffer had extensive experience and training in the area of child sexual abuse. He had been a pediatrician for twenty-six years and had regularly seen around 150 children per week. He had both taught and attended seminars on child sexual abuse. He was on the Advisory Board of the Child Medical Examiner's Program, a state and federally funded program established to evaluate whether children have been abused. On the basis of the foregoing evidence, the trial court properly qualified Dr. Schaffer as an expert in pediatrics and the diagnosis of child sexual abuse. *See State v. Baker*, 320 N.C. 104, 108-09, 357 S.E. 2d 340, 343 (1987).

[3] Defendant further contends that Dr. Schroeder's testimony was not admissible under Rule 803(4) because she is a psychologist, not a medical doctor. We recently noted that statements made by a victim of child sexual abuse to a psychologist during the course of diagnosis and treatment are admissible under Rule 803(4). *State v. Bright*, 320 N.C. 491, 497, 358 S.E. 2d 498, 501 (1987). This contention is without merit.

[4] Finally, defendant contends that the trial judge erroneously failed to summarize the evidence or explain the application of the law to the evidence. This argument is without merit. A trial judge "shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C.G.S. § 15A-1232 (1985).

For the reasons set forth, we find that the defendant received a fair trial, free from prejudicial error.

No error.

Chief Justice EXUM concurring.

Were the Court deciding for the first time the issue of the admissibility of the testimony of Dr. Schaffer and Dr. Schroeder, I would hold this testimony admissible only for corroborative purposes for the reasons stated by then Chief Justice Billings, dissenting, in *State v. Aguallo*, 318 N.C. 590, 350 S.E. 2d 76 (1986). Since the majority opinion in *Aguallo* controls this issue favorably to the state's position and I am bound thereby, I concur in the opinion and decision here.

STATE OF NORTH CAROLINA v. PAUL MITCHELL BURGESS

No. 529A86

(Filed 7 October 1987)

Criminal Law § 75.12— statement by defendant after request for counsel—no prejudice

There was no prejudicial error in a murder prosecution from the admission of a statement by defendant made after he had requested appointment of counsel and counsel had not been appointed. The statement was not inculpatory and, although it placed defendant and the victim together at or near the time of the offense, other witnesses placed defendant and the victim together on that date.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) (1986) from a judgment imposing a sentence of life imprisonment entered by *Cornelius, J.*, upon defendant's conviction of first degree murder at the 9 June 1986 Criminal Session of Superior Court, UNION County. Heard in the Supreme Court 11 September 1987.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.

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

WHICHARD, Justice.

Defendant was convicted of the first degree murder of Byron Roger Wallace and sentenced to life imprisonment. He was also convicted of robbing Wallace with a dangerous weapon, but the

trial court merged the conviction in the robbery case with that in the murder case. We find no prejudicial error.

The State's evidence, in pertinent summary, showed the following:

The dead body of the victim was found in a wooded area off Providence Road and Kermit Braswell Road in Union County on 8 June 1985. The body was lacerated and bruised, and the skull was fractured. There was bleeding under the scalp, a collection of blood under the wound of the forehead, and another collection of blood behind the right ear. Over the brain there was a collection of blood and "hemmorhage, hematoma, and . . . some contusion or bruising of the brain."

Dr. Page Hudson, chief medical examiner for the State, opined that the cause of death was blunt trauma or blunt force to the head. He estimated that the victim had been dead "two or three days or more" when he saw the body on 9 June 1985.

Paul Braswell testified that he had met the defendant on 4 June 1985. He observed defendant, the victim, and Shannon Starnes leave the residence of Ronnie Gordon together. The defendant and Starnes returned in approximately an hour and a half without the victim.

Shannon Starnes testified that he and defendant had met at Ronnie Gordon's house. He could not remember the date. Gordon had asked him if he wanted to go with defendant "and roll an old man." Defendant had asked him if he wanted to make some money, and he told defendant he did. When he went outside to defendant's car, an old man was there. He got in the car with defendant and the old man, and they traveled up Providence Road. They went to a road "right there on the left after you pass Kermit Braswell Road" and turned around. They then went on "this sort of like a logging road on the left" and defendant said, "Whoever's got to use the bathroom get out now."

The three men exited the car, and Starnes saw defendant obtain a stick from under the seat. The stick "looked like somebody had put some metal or poured metal in it" or "like somebody had poured lead in it." Defendant hit the old man in the back of the head with the stick. Starnes first heard "sort a like a slapping and a thud." He saw the man get up and put his hand in his

pocket. Defendant was standing behind the man with the stick in his hand. When the man got up, Starnes hit him in the head with his fist. The man "went back down," and defendant then kept saying "Don't get up, Pop" and kept hitting him in the head with the stick. Starnes saw defendant hit the man three to four times.

Defendant then rolled the man over and got some money out of his pocket. He reached in the other pocket and got more. He then hit the man one more time in the head with the stick. Starnes testified: "He come down real hard, real hard. He had his hand up and come down real hard."

As they left the scene defendant said to Starnes, "You know the old man's going to die." Defendant rebuffed Starnes' suggestion that they go back to check on the man. Defendant then gave Starnes one hundred and fifty dollars.

The final State's witness, Larke Plyler, a detective in the Union County Sheriff's office, testified, over objection, that defendant had made the following statement to him:

> The defendant advised me that he had been living in Arkansas and was working as a cook for about two and a half weeks. That he left Flippin, Arkansas, to come to Gastonia to pick up his income tax check and then go on to New York. He advised me he picked up Mr. Wallace in Tennessee hitchhiking. Mr. Wallace told Mitchell Burgess that he was going to Ohio to see some of his relatives. He, Mr. Wallace, showed Paul Mitchell Burgess that he had a sum of money, and bought gas and beer while enroute to North Carolina. Paul Mitchell Burgess advised me that it was on the 4th day of June, 1985, when he and Mr. Wallace got to Gastonia, North Carolina. They went to Paul Mitchell Burgess' brother's house and no one was at home. They went to Paul Mitchell Burgess' sister's house where [his], Paul Mitchell Burgess', mother was there sick. Paul Mitchell Burgess advised me that his mother told him that she had gotten his income tax checks cashed and had sent the money to New York. Paul Mitchell Burgess advised me that he and Mr. Wallace left Gastonia and came to Charlotte where he, Paul Mitchell Burgess, stopped at a service station to use the bathroom. After using the bathroom he stated that he, Paul Mitchell Burgess, went back to his car and Mr. Wallace was gone.

> Paul Mitchell Burgess stated that he left the service station and headed towards New York, and spent the night in a motel on Highway 49, somewhere near the North Carolina/ Virginia Line. Paul Mitchell Burgess also stated to me that he did not know how Mr. Wallace got to Union County, and that he, Paul Mitchell Burgess, did not come to Union County that night.

Defendant's grandmother testified on his behalf. She stated that on 4 June 1985 defendant had come by her house in Belmont, North Carolina, and that an old man was with him. The time was "somewhere around five o'clock in the evening," and they stayed "maybe twenty-five or thirty minutes." Defendant's other evidence was in the nature of an alibi, tending to show that he was not in the area of the offense at or about the time of the victim's death.

Defendant's sole contention is that the trial court erred in admitting, over objection, the above statement to Detective Plyler. The gravamen of his argument is that he had requested appointment of counsel, counsel had not been appointed, and any statement made under those circumstances was inadmissible as violating his Sixth Amendment right to counsel. *See Michigan v. Jackson*, 475 U.S. 625, 636, 89 L.Ed. 2d 631, 642 (1986) ("if police initiate interrogation after a defendant's assertion . . . of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.").

We find it unnecessary to pass upon the merits of the argument. The statement was not inculpatory. Defendant argues that it was nevertheless prejudicial in that the District Attorney argued that it was damaging because it placed defendant and the victim together at or near the time of the offense. However, the State's witness Braswell also placed defendant and the victim together on that date; and while the State's witness Starnes could not recall the date, he too placed defendant and the victim together in the area where the victim's body was found. Even the testimony of defendant's grandmother, his own witness, placed defendant and a man who fit the victim's description together on the date of the offense within easy driving distance of the locale thereof.

In light of the foregoing evidence and of the record as a whole, assuming, *arguendo*, that the court erred in admitting defendant's statement, we hold that the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b); *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705 (1967).

We thus conclude that defendant had a fair trial, free from prejudicial error.

No error.

WILLIAM C. LAWTON, ADMINISTRATOR OF THE ESTATE OF JOHN GULLEY, SR., DECEASED v. GEORGE A. YANCEY TRUCKING COMPANY AND JOYCE RIGGS, PERSONAL REPRESENTATIVE OF THE ESTATE OF IVEY VANCE RIGGS, DECEASED

No. 145A87

(Filed 7 October 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, 84 N.C. App. 522, 353 S.E. 2d 267 (1987), finding no error in an appeal from a judgment entered by *Lee, J.*, on 11 December 1985 in Superior Court, WAKE County. Heard in the Supreme Court 10 September 1987.

McMillan, Kimzey, Smith & Roten by James M. Kimzey; Carter G. Mackie for plaintiff appellant.

LeBoeuf, Lamb, Leiby & MacRae by George R. Ragsdale and Jane Flowers Finch for defendant appellees.

PER CURIAM.

Affirmed.

STATE OF NORTH CAROLINA v. ROGER LEE GARDNER

No. 179A87

(Filed 7 October 1987)

DEFENDANT appeals as a matter of right, pursuant to N.C. G.S. § 7A-30(2), from a decision of a divided panel of the Court of Appeals, 84 N.C. App. 616, 353 S.E. 2d 662 (1987), finding no error in the judgment entered by *Long, J.*, on 21 November 1985 in Superior Court, GUILFORD County. Heard in the Supreme Court 11 September 1987.

Lacy H. Thornburg, Attorney General, by Sylvia Thibaut, Assistant Attorney General, for the State.

Ferguson, Stein, Watt, Wallas & Adkins, P.A., by Adam Stein, for defendant-appellant.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

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

BANNER v. BANNER

No. 467P87.

Case below: 86 N.C. App. 397.

Petition by Pauline R. Banner for discretionary review pursuant to G.S. 7A-31 denied 7 October 1987.

BENTLEY v. NORTHWESTERN BANK

No. 398P87.

Case below: 86 N.C. App. 376.

Petition by defendant (Bank) for discretionary review pursuant to G.S. 7A-31 denied 7 October 1987.

BOLKHIR v. N.C. STATE UNIVERSITY

No. 329PA87.

Case below: 85 N.C. App. 521.

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

BOUDREAU v. BAUGHMAN

No. 409PA87.

Case below: 86 N.C. App. 165.

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

BRITT v. N.C. STATE BOARD OF EDUCATION

No. 430P87.

Case below: 86 N.C. App. 282.

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

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

CALDWELL v. CALDWELL

No. 488P87.

Case below: 86 N.C. App. 225.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 7 October 1987.

CREEF v. CREEF

No. 429P87.

Case below: 86 N.C. App. 376.

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

DAY v. POWERS, SEC. OF REVENUE

No. 420P87.

Case below: 86 N.C. App. 85.

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

DRAIN v. UNITED SERVICES LIFE INS. CO.

No. 230P87.

Case below: 85 N.C. App. 174; 320 N.C. 630.

Motion by defendant pursuant to Rule 27, N.C. Rules of App. Procedure, for reconsideration of the petition for review of the decision of the North Carolina Court of Appeals dismissed 7 October 1987.

FRYE v. ANDERSON

No. 368P87.

Case below: 86 N.C. App. 94.

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

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

G. A. GRIER, INC. v. VESCE

No. 428A87.

Case below: 86 N.C. App. 374.

Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 7 October 1987.

GIBSON v. LAMBETH

No. 436P87.

Case below: 86 N.C. App. 264.

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

HAND v. FIELDCREST MILLS, INC.

No. 304P87.

Case below: 85 N.C. App. 372.

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

HIGHTOWER v. HIGHTOWER

No. 293P87.

Case below: 85 N.C. App. 333.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 October 1987.

HUDSON v. MASTERCRAFT DIV.,
COLLINS & AIKMAN CORP.

No. 461P87.

Case below: 86 N.C. App. 411.

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

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

IN RE APPLICATION OF MELKONIAN

No. 335P87.

Case below: 85 N.C. App. 715.

Petition by City of Havelock for discretionary review pursuant to G.S. 7A-31 denied 7 October 1987.

IN RE APPLICATION OF WAKE KIDNEY CLINIC

No. 341P87.

Case below: 85 N.C. App. 639.

Petition by appellants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1987.

IN RE MILLER v. BD. OF REGISTRATION FOR PROFESSIONAL ENGINEERS

No. 370PA87.

Case below: 86 N.C. App. 91.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1987.

J. M. HEINIKE ASSOC., INC. v. VESCE

No. 427A87.

Case below: 86 N.C. App. 372.

Motion by plaintiff to dismiss appeal for failure to show a substantial constitutional question allowed 7 October 1987.

KELLY v. PHOENIX INS. CO.

No. 388P87.

Case below: 86 N.C. App. 376.

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

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

LEMONS v. OLD HICKORY COUNCIL

No. 438PA87.

Case below: 86 N.C. App. 376.

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

MATHIS v. MAY

No. 431P87.

Case below: 86 N.C. App. 436.

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

MOORE v. N.C. DEPT. OF JUSTICE

No. 378P87.

Case below: 85 N.C. App. 720.

Notice of appeal by plaintiff from the North Carolina Court of Appeals pursuant to G.S. § 7A-30 dismissed 7 October 1987. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1987.

NEAL v. CRAIG BROWN, INC.

No. 412P87.

Case below: 86 N.C. App. 157.

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

PEOPLES SECURITY LIFE INS. CO. v. HOOKS

No. 437PA87.

Case below: 86 N.C. App. 354.

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

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

RILEY v. RILEY

No. 493P87.

Case below: 86 N.C. App. 636.

Petition by plaintiff for writ of supersedeas and temporary stay denied 23 September 1987.

STATE v. FARIS

No. 196P87.

Case below: 84 N.C. App. 702.

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

STATE v. HERRON

No. 460P87.

Case below: 81 N.C. App. 680.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 October 1987.

STATE v. JACKSON

No. 434P87.

Case below: 86 N.C. App. 377.

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

STATE v. MILLER

No. 342P87.

Case below: 86 N.C. App. 112.

Petition by defendant (Lundburg) for discretionary review pursuant to G.S. 7A-31 denied 7 October 1987.

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

STATE v. MILLER

No. 418P87.

Case below: 86 N.C. App. 233.

Petition by defendant for writ of certiorari to the Court of Appeals denied 7 October 1987.

STATE v. MORRISON

No. 306P87.

Case below: 85 N.C. App. 511.

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

STATE v. PERRY

No. 410PA87.

Case below: 86 N.C. App. 233.

Petition by defendant for writ of certiorari as to additional issues denied 7 October 1987.

STATE v. REID

No. 439P87.

Case below: 86 N.C. App. 377.

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

STATE v. SMITH

No. 380P87.

Case below: 86 N.C. App. 233.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 9 October 1987.

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

STATE v. STEELE

No. 459P87.

Case below: 86 N.C. App. 476.

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

STATE v. TARANTINO

No. 30PA87.

Case below: 86 N.C. App. 441.

Motion by defendant to dismiss Attorney General's appeal for lack of substantial constitutional question denied 7 October 1987. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 7 October 1987.

SURGEON v. DIVISION OF SOCIAL SERVICES

No. 426P87.

Case below: 86 N.C. App. 252.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1987. Stay dissolved and supersedeas denied 7 October 1987.

TEAGUE v. N.C. BD. OF DENTAL EXAMINERS

No. 416P87.

Case below: 86 N.C. App. 377.

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

TOWN OF LAKE WACCAMAW v. SAVAGE

No. 377P87.

Case below: 86 N.C. App. 211.

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

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

TWINE v. FARMERS BANK

No. 396P87.

Case below: 86 N.C. App. 233.

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

WELSH v. NORTHERN TELECOM, INC.

No. 271P87.

Case below: 85 N.C. App. 281; 320 N.C. 638.

Motion by defendant to reconsider petition for review of decision of the Court of Appeals dismissed 7 October 1987.

WILSON BUILDING CO. v. THORNEBURG HOSIERY CO.

No. 379P87.

Case below: 85 N.C. App. 684.

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

WRIGHT v. COUNTY OF MACON

No. 360P87.

Case below: 86 N.C. App. 113.

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

YANDLE v. MECKLENBURG COUNTY AND MECKLENBURG COUNTY v. TOWN OF MATTHEWS

No. 301P87.

Case below: 85 N.C. App. 382.

Petition by defendant (Town of Matthews) for discretionary review pursuant to G.S. 7A-31 denied 7 October 1987.

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

PETITION TO REHEAR

DiDONATO v. WORTMAN

No. 280A86.

Case below: 320 N.C. 423.

Petition by plaintiff denied 7 October 1987.

APPENDIX

CLIENT SECURITY FUND

CLIENT SECURITY FUND

On 10 October 1984, this Court, upon recommendation of the North Carolina State Bar, established the Client Security Fund. It now appears that it will not be necessary for contributions to be made to the fund for the calendar year 1988; therefore, the Court orders that the requirement of contribution to the Client Security Fund by the members of the North Carolina State Bar is waived for the calendar year 1988.

Done by order of the Court in Conference, this 3rd day of September 1987.

WHICHARD, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

§ 6.9. Appealability of Preliminary Matters and Mode of Trial

The trial court's interlocutory order ruling that plaintiffs are entitled to a jury trial is immediately appealable. *Faircloth v. Beard*, 505.

§ 19. Appeals in Forma Pauperis

A party may petition to proceed in forma pauperis in the trial de novo of cases appealed to the district court from small claims court. *Atlantic Insurance & Realty Co. v. Davidson*, 159.

The district court erred by denying defendant's petition to proceed in forma pauperis based solely on her ownership of her home. *Ibid.*

ARREST AND BAIL

§ 9. Right to Bail in General

The temporary denial of reasonable bail to defendant in a murder prosecution did not make defendant's temporary further confinement an unreasonable seizure or wrongful confinement in any constitutional sense. *S. v. Simpson*, 313.

ASSAULT AND BATTERY

§ 14.2. Sufficiency of Evidence of Assault with Deadly Weapon where Weapon Is Firearm

The evidence in a prosecution for assault and murder was sufficient to take the charges to the jury. *S. v. Smith*, 404.

ATTORNEY GENERAL

§ 1. Generally

The duty of the Attorney General to appear for and defend the State or its agencies is not in derogation of or inconsistent with the executive power vested by the Constitution in the Governor. *Martin v. Thornburg*, 533.

The last sentence of G.S. 147-17(a) gives the Governor the right to employ special counsel to represent the State without first being advised by the Attorney General that it is impracticable for the latter to represent the State. *Ibid.*

BILLS OF DISCOVERY

§ 6. Compelling Discovery; Sanctions Available

The trial court did not abuse its discretion in failing to exclude a codefendant's statement as a sanction for the State's failure to provide defendant with a copy of that statement in a timely manner pursuant to a pretrial discovery request. *S. v. Carson*, 328.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.11. Sufficiency of Evidence of Breaking or Entering and Rape

The evidence was sufficient for the jury to find that defendant's entry into a home was nonconsensual so as to support his conviction of breaking or entering, notwithstanding defendant presented evidence that permission to enter the home was inferable because the victim expected him to return a pocketbook that she had left in his car. *S. v. Locklear*, 754.

CONSTITUTIONAL LAW

§ 4. Standing to Raise Constitutional Questions

Plaintiff church was in immediate danger of sustaining injury from a city zoning ordinance requiring paved off-street parking and thus had standing to challenge the constitutionality of the ordinance on the ground of selective enforcement. *Grace Baptist Church v. City of Oxford*, 439.

Where plaintiffs alleged facts sufficient to show their standing to bring a declaratory judgment action to determine the validity of a local act, their standing did not remain an issue after the court's entry of judgment on the pleadings for defendants. *Cheape v. Town of Chapel Hill*, 549.

§ 9. Executive Powers

All lease agreements entered into by the Department of Administration on behalf of the State must be submitted to the Council of State for approval or disapproval and, while the Council of State is not authorized to require the Department of Administration to negotiate and enter any lease other than the lease proposed to it, the Council's authority is not limited to approval or disapproval where the lowest proposal is not presented to it. *Martin v. Thornburg*, 533.

The lowest rental proposal was submitted to the Council of State and the Council was therefore limited to approving or disapproving that proposal and was without statutory authorization to direct the Department of Administration to negotiate with and enter into a lease with the defendant. *Ibid.*

The statute providing that the Chief Justice of the N.C. Supreme Court shall appoint the Director of the Office of Administrative Hearings does not violate provisions of Art. III, § 5(8) of the N.C. Constitution authorizing the Governor to appoint "all officers whose appointments are not otherwise provided for," the separation of powers provision of Art. I, § 6, or the provision of Art. III, § 1 vesting executive power in the Governor. *State ex rel. Martin v. Melott*, 518.

§ 10. Judicial Powers Generally

The Administrative Procedure Act was not the proper method of challenging the constitutionality of the Supreme Court order establishing the Client Security Fund. *Beard v. N.C. State Bar*, 126.

The order of the North Carolina Supreme Court establishing the Client Security Fund did not violate constitutional provisions regarding separation of powers and taxation because the funds were not a tax and were within the Supreme Court's inherent authority. *Ibid.*

§ 14. Police Power; Morals and Public Welfare Generally

An Onslow County ordinance which aimed at movie mates but which regulated all companionship businesses was overbroad and in violation of the North Carolina Constitution. *Treants Enterprises, Inc. v. Onslow County*, 776.

§ 19. Exclusive Emoluments and Privileges

A statute which confers an exemption that benefits a particular group of people is not an exclusive emolument or privilege if the exemption is intended to promote the general welfare. *Town of Emerald Isle v. State of N.C.*, 640.

§ 20.1. Equal Protection Generally; Actions Affecting Businesses or Professions

A city ordinance requiring paved off-street parking was not selectively and discriminatorily enforced against plaintiff church in violation of the federal and state guarantees of equal protection. *Grace Baptist Church v. City of Oxford*, 439.

CONSTITUTIONAL LAW — Continued

A city zoning ordinance requiring paved off-street parking does not violate equal protection because of a "grandfather clause" by which buildings erected prior to the effective date of the ordinance are not subject to such requirement. *Ibid.*

§ 23. Scope of Protection of Due Process

A legislative act establishing pedestrian beach access facilities and closing a particular highway right of way did not deprive the Town of Emerald Isle of its vested property rights. *Town of Emerald Isle v. State of N.C.*, 640.

§ 30. Discovery

There was no error in a prosecution for rape, first degree sexual offense and kidnapping in the admission of testimony that defendant had made an inculpatory statement where the testimony was not revealed to defendant despite the State's open file policy. *S. v. Abbott*, 475.

§ 31. Affording the Accused the Basic Essentials for Defense

The trial court did not err in a prosecution for rape and murder by denying defendant's motion for funds to hire a private investigator and a jury selection expert. *S. v. Zuniga*, 233.

There was no error in the sentencing phase of a murder prosecution from the denial of defendant's motion for appointment of a psychiatrist. *S. v. Smith*, 404.

§ 32. Right to Fair and Public Trial

The trial court's sending of a message to the jury via the bailiff did not violate either the unanimity provision or the open court provision of Art. I, § 24 of the N.C. Constitution. *S. v. McLaughlin*, 564.

§ 34. Double Jeopardy

A defendant who had been convicted of first degree rape, first degree sexual offense and first degree kidnapping was erroneously sentenced on all three charges under the particular facts of the case. *S. v. Abbott*, 475.

§ 48. Effective Assistance of Counsel

Defendant was denied his right to effective assistance of counsel in a trial for rape where defense counsel's investigation and trial preparation were limited and below the standard of practice routinely engaged in by attorneys defending serious criminal cases in Wake County. *S. v. Moorman*, 387.

§ 60. Racial Discrimination in Jury Selection Process

Racial discrimination in the selection of the grand jury foreman violates state and federal constitutional provisions and vitiates the indictment without regard to whether the foreman's duties are merely ministerial and whether the alleged discrimination affected the outcome of the grand jury proceedings. *S. v. Cofield*, 297.

Defendant did not make a prima facie case of racially motivated peremptory challenges where the State accepted 40% of the blacks tendered. *S. v. Abbott*, 475.

Defendant's evidence was not sufficient to show that blacks had been systematically excluded by the method used to select jurors in Rutherford County. *S. v. McCoy*, 581.

§ 61. Discrimination in Jury Selection Process on Basis other than Race

Urban dwellers in Rutherford County do not constitute a distinct group for jury selection. *S. v. McCoy*, 581.

CONSTITUTIONAL LAW — Continued

§ 63. Exclusion from Jury for Opposition to Capital Punishment

Death qualification of the jury does not violate the U.S. or North Carolina Constitutions. *S. v. Smith*, 404.

§ 66. Right of Confrontation; Presence of Defendant at Proceedings

Defendant was entitled to a new trial for first degree murder and first degree rape where the trial court told the court reporter, "You may show that I am going to give the jury a break and that I am going to administer my admonitions to them in the jury room." *S. v. Payne*, 138.

Any error in allowing defendant's motion for a change of venue in his absence was harmless. *S. v. Zuniga*, 233.

CORPORATIONS

§ 6. Right of Stockholders to Maintain Action

A special litigation committee's decision to terminate a minority shareholders' derivative action against corporate directors is not binding upon the courts; rather, there must be a judicial inquiry on the merits of the special litigation committee's recommendation. *Alford v. Shaw*, 465.

Plaintiffs' allegations in a shareholders' derivative action were sufficient to establish excusal of demand on corporate directors and sufficiently complied with the procedural requirement of G.S. 55-55(b). *Ibid.*

Under G.S. 55-55(c), court approval is required for the disposition of all shareholder derivative suits. *Ibid.*

When G.S. 55-55 and 55-30(b)(3) are read in pari materia, they indicate that when a stockholder in a derivative action seeks to establish self-dealing on the part of a majority of the board of directors, the burden should be upon those directors to establish that the transactions complained of were just and reasonable to the corporation when entered into or approved. *Ibid.*

COSTS

§ 3. Taxing of Costs in Discretion of Court

The trial court had the inherent authority to impose sanctions less than dismissal, including the taxing of costs plus attorney fees, for a party's failure to comply with a court order. *Daniels v. Montgomery Mut. Ins. Co.*, 669.

A finding by the trial court in an action on a fire insurance policy that plaintiff's counsel failed to comply with the court's order prohibiting any reference before the jury to the fact that no criminal charges had been filed against plaintiff in connection with the fire was sufficient to support the court's order taxing plaintiff with defendant's costs, including attorney fees, after a mistrial was declared. *Ibid.*

CRIMINAL LAW

§ 6. Mental Capacity as Affected by Intoxicating Liquor

The trial court in a murder prosecution did not err by instructing the jury that voluntary intoxication would not support a defense of insanity. *S. v. Austin*, 276.

CRIMINAL LAW — Continued

§ 15.1. Pretrial Publicity or Inability to Receive Fair Trial as Ground for Change of Venue

The trial court did not err by denying defendant's motion for a change of venue or a special venire based on allegedly inflammatory newspaper articles. *S. v. Abbott*, 475.

§ 23. Plea of Guilty

The defendant in a murder prosecution did not have an appeal as a matter of right to challenge the court's acceptance of his guilty plea to second degree murder. *S. v. Bolinger*, 596.

§ 23.3. Requirement that Guilty Plea Be Voluntary and Made with Understanding

The trial court properly determined that defendant knowingly pled guilty to second degree murder; nothing in G.S. 15A-1022 requires the court to inquire whether defendant is, in fact, guilty. *S. v. Bolinger*, 596.

§ 26.5. Former Jeopardy; Same Acts or Transactions Violating Different Statutes

Defendant could properly be convicted and sentenced for both armed robbery and felonious larceny of property worth over $400. *S. v. Hurst*, 589.

Double jeopardy principles preclude defendant's conviction for both first degree kidnapping and two first degree rapes where the jury may have used one of the rapes to elevate the kidnapping from second to first degree. *S. v. Johnson*, 746.

§ 33.4. Evidence Tending to Excite Prejudice or Sympathy

There was no error in a prosecution for first degree murder where the deceased's mother identified a picture of the deceased taken three weeks before her death, testified that officers at the scene of the crime would not let her see her daughter's body, and testified that the deceased had one little boy. *S. v. Spruill*, 688.

§ 34. Evidence of Defendant's Guilt of other Offenses

There was no prejudicial error in a murder prosecution from the admission of testimony by which the State placed before the jury prior acts of misconduct by the defendant. *S. v. Nickerson*, 603.

The trial court committed prejudicial error in a prosecution for accessory before the fact to murder by permitting the district attorney to ask defendant about devil worshipping activities. *S. v. Kimbrell*, 762.

§ 34.2. Evidence of Defendant's Guilt of other Offenses; Admission as Harmless Error

A witness's testimony that defendant "keep saying that he killed him; that it wasn't the first time; that he had killed two others besides" should have been excluded because it bore only upon defendant's propensity to commit such offenses, but the admission of such testimony was not prejudicial error. *S. v. Brown*, 179.

The trial court in a murder prosecution did not commit reversible error by allowing the prosecutor to question defendant about an unrelated shooting which occurred after the shooting in this case. *S. v. Meeks*, 615.

There was no prejudicial error in a murder prosecution from the trial court's permitting the prosecution to ask a witness whether she had ever seen defendant with a gun before. *Ibid.*

CRIMINAL LAW — Continued

§ 34.7. Admissibility of Evidence of other Offenses to Show Malice

Evidence that defendant on previous occasions had assaulted the victim was competent to prove his malice toward her and was admissible. *S. v. Spruill*, 688.

§ 39. Evidence in Rebuttal of Facts Brought out by Adverse Party

In a murder prosecution arising from an incident outside a bar, the trial court did not err by allowing a witness to testify as to his opinion of defendant's intent. *S. v. Gappins*, 64.

§ 42.2. Sufficiency of Foundation for Admission of Articles Connected with the Crime

A sufficient foundation was not laid for the admission of a torn picture of a sexual offense victim and three of the victim's dolls found with the hair cut off two of the dolls and the third doll decapitated. *S. v. Kennedy*, 20.

§ 43. Photographs

There was no prejudice in a prosecution for assault and murder from the court's failure to rule before trial on defendant's motion to suppress a photo album containing personal, intimate photographs of defendant and his girlfriend. *S. v. Smith*, 404.

§ 43.4. Gruesome or Inflammatory Photographs

The trial court did not abuse its discretion in a prosecution for first degree murder by admitting photographs of decedent's body. *S. v. Smith*, 404.

§ 50.1. Admissibility of Opinion Testimony; Opinion of Expert

It was proper for the trial court to allow a psychologist and a pediatrician to testify concerning the symptoms and characteristics of sexually abused children and to state their opinions that the symptoms exhibited by the victim were consistent with sexual or physical abuse. *S. v. Kennedy*, 20.

The trial court properly allowed the N.C. Medical Examiner to state his opinion that scratch marks on a sexual offense victim's back were not consistent with self-mutilation and properly allowed a pediatrician to state her opinion that the injuries were neither accidental nor self-inflicted. *Ibid.*

There was no prejudice in a prosecution for first degree rape and murder from the erroneous admission of opinion testimony by a pathologist that bloodstains on the victim's shirt could have been caused by wiping a knife blade on the shirt. *S. v. Zuniga*, 233.

There was no error in a prosecution for first degree sexual offense, felonious child abuse and assault on a child under twelve in allowing a psychiatrist to testify on redirect examination that the perpetrator was a woman. *S. v. Bright*, 491

In a prosecution for first degree rape of a female under thirteen, the testimony of an expert geneticist that defendant was "probably" the father of the victim's child was of no assistance to the trier of fact and should have been excluded. *S. v. Jackson*, 452.

§ 51. Qualification of Experts

The trial court did not abuse its discretion in a prosecution for first degree rape and murder by admitting the testimony of an SBI "fracture match" expert concerning pieces of torn newspaper. *S. v. Zuniga*, 233.

CRIMINAL LAW — Continued

§ 51.1. Qualification of Experts; Showing Required

A pediatrician's diagnosis of sexual abuse based upon the history given to him by the victim and a pelvic examination four years after the date of the alleged offenses which revealed only that the victim's hymen was not intact was not admissible under Rule of Evidence 702. *S. v. Trent*, 610.

The trial court properly qualified a pediatrician as an expert in the diagnosis of child sexual abuse. *S. v. Bullock*, 780.

§ 53. Medical Expert Testimony in General

The trial court did not err in a prosecution for rape and incest by permitting a pediatrician to testify that his physical examination of the victim was consistent with the events described by the victim. *S. v. Baker*, 104.

The trial court erred in a prosecution for first degree sexual offense, indecent liberties, and attempted rape by admitting expert testimony that the alleged victim was suffering from post traumatic stress disorder. *S. v. Goodwin*, 147.

There was no abuse of discretion in a prosecution arising from the sexual abuse of a child in admitting a psychologist's opinion which was based on records provided by the Developmental Evaluation Center of Duke Hospital. *S. v. Bright*, 491.

§ 55.1. Blood Tests other than for Alcohol or Drugs

A question of parentage is not central to a charge of rape and G.S. 8-50.1 is not applicable. *S. v. Jackson*, 452.

§ 60. Evidence in Regard to Fingerprints

There was no prejudice in a prosecution for assault and murder from the trial court's comment after defense counsel objected to a question posed to an SBI fingerprint expert. *S. v. Smith*, 404.

§ 66.9. Identification from Photographs; Suggestiveness of Procedure

Although the group of photographs used in a pretrial identification procedure was unnecessarily suggestive, there was no substantial likelihood of misidentification so that the admission of photographic and in-court identifications of defendant by a rape victim and two other witnesses did not violate defendant's due process rights. *S. v. Pigott*, 96.

§ 69. Telephone Conversations

There was no prejudice in a prosecution for murder and assault from the trial court's refusal to allow defendant to ask certain questions designed to establish that he had placed a telephone call at a particular time when a telephone bill was introduced and passed among the jury. *S. v. Smith*, 404.

Any error in the admission of a witness's opinion that a telephone call received from defendant on the date of the crimes when defendant's alibi witness claimed he was in the District of Columbia was a local call made in Durham was harmless in light of other testimony placing defendant in Durham on the date of the crimes. *S. v. Johnson*, 746.

§ 73. Hearsay Testimony in General

The trial judge did not err in a prosecution for first degree rape and incest by excluding testimony from the victim's mother that the victim's grandmother said that she suspected the victim's grandfather had had sexual relations with the victim. *S. v. Baker*, 104.

The trial court did not err in a murder prosecution by ruling inadmissible testimony from two witnesses that defendant's supervisor had complained earlier on the day of the shooting that the deceased was harassing defendant and two co-workers. *S. v. Meeks*, 615.

§ 73.1. Admission of Hearsay Statement as Harmless Error

The trial court did not err in a murder prosecution by admitting a statement given by a witness to a deputy five weeks after the shooting where the witness testified at trial that he could not remember what happened after he heard the shots fired. *S. v. Nickerson*, 603.

There was no prejudicial error in a felonious assault prosecution from the admission of hearsay testimony that the assault victim had taken out an assault warrant on defendant and feared repercussions from him. *S. v. Hager*, 77.

§ 73.3. Statements not within Hearsay Rule; Statements Showing State of Mind

There was no prejudicial error in a murder prosecution from the admission of testimony that the victim had told State's witnesses that she was going to move out of the house she shared with defendant. *S. v. Austin*, 276.

Statements made by a rape victim to nurses in a hospital that she was afraid of defendant and that she was "scared" were relevant to the issue of whether the sexual intercourse was committed by force and against her will and were admissible under the "state of mind" exception to the hearsay rule provided by G.S. 8C-1, Rule 803(3). *S. v. Locklear*, 754.

§ 73.5. Statements not within Hearsay Rule; Medical Diagnosis and Treatment

Testimony by a pediatrician and by a psychologist as to statements and demonstrations by two children indicating that they had been sexually abused and that the perpetrator was their father was admissible under the medical diagnosis and treatment exception to the hearsay rule. *S. v. Bullock*, 780.

The trial court did not err in a prosecution for first degree rape of a female under thirteen by allowing medical personnel to testify as to statements made to them by the victim. *S. v. Jackson*, 452.

§ 75.1. Admissibility of Confession; Voluntariness; Effect of Fact that Defendant Is in Custody

The trial court in a murder prosecution did not err by ruling that defendant's confession was admissible where the magistrate before whom defendant was taken advised defendant that bond would not then be set because no letter of transmittal recommending the amount of bond or a court date accompanied the warrant from another county. *S. v. Simpson*, 313.

§ 75.2. Admissibility of Confession; Voluntariness; Effect of Statements of Officers

The confession of defendant in a murder prosecution was not the product of fear. *S. v. Simpson*, 313.

§ 75.12. Use of Confession Obtained in Violation of Defendant's Constitutional Rights

There was no prejudicial error in a murder prosecution from the admission of a statement by defendant after he had requested appointment of counsel and counsel had not been appointed. *S. v. Burgess*, 784.

CRIMINAL LAW — Continued

§ 75.15. Defendant's Mental Capacity to Confess; Intoxication

The trial court did not err in the prosecution of defendant for the murder of her infant daughter by admitting an incriminating statement made by defendant after an injection of a tranquilizer. *S. v. Perdue*, 51.

§ 80. Records

There was no error in a prosecution for first degree sexual offense, felonious child abuse, and assault on a child under twelve from the admission of certain of the victim's medical records. *S. v. Bright*, 491.

§ 83. Competency of Wife to Testify against Husband

Even if defendant's wife was improperly compelled to testify against defendant in violation of G.S. 8-57(b), such error was not prejudicial to defendant. *S. v. Britt*, 705.

§ 85. Character Evidence Relating to Defendant

The trial court did not err in a murder prosecution by allowing the prosecutor to cross-examine defendant's character witnesses about specific instances of conduct by defendant. *S. v. Gappins*, 64.

Any isolated error in a prosecution for murder and assault relating to the failure of the trial court to allow defendant's character evidence was harmless. *S. v. Smith*, 404.

§ 86.8. Credibility of State's Witnesses

There was no prejudice in a prosecution for rape of a female under thirteen from a psychiatrist's testimony that the victim was a truthful person. *S. v. Jackson*, 452.

§ 87. List of Witnesses; Direct Examination

The trial court did not err or abuse its discretion in a prosecution for first degree murder and assault by requiring defendant to furnish a list of witnesses prior to the voir dire examination of prospective jurors. *S. v. Smith*, 404.

The propriety of juror questioning of witnesses is within the sound discretion of the court, but the better practice is for the juror to submit written questions to the trial judge who should have a bench conference with the attorneys, rule on objections, and then ask the questions of the witness. *S. v. Howard*, 718.

When juror questions are asked of witnesses, it is not necessary for counsel to object in order to preserve the issue for appeal. *Ibid.*

The trial court did not err in permitting a juror's direct questioning of a defense witness during the trial for clarification of medical procedures used in this case. *Ibid.*

§ 87.1. Leading Questions

The prosecutor's question to a child sexual offense victim, "When you woke up that night after going to sleep, who was in your room?" was not an improper leading question. *S. v. Brice*, 119.

There was no prejudice in a prosecution for rape, first degree sexual offense, and kidnapping in the trial court's refusal to allow defendant to ask a leading question of an allegedly hostile witness. *S. v. Abbott*, 475.

CRIMINAL LAW — Continued

§ 87.2. Leading Questions; Illustrative Cases

The prosecutor's question as to whether a rape victim meant that "all three of the people that assaulted you before ran" was not an impermissible leading question. *S. v. Howard*, 718.

§ 88. Cross-Examination Generally

The trial court did not abuse its discretion in a prosecution for assault and murder by ruling that the attorney cross-examining a witness must also make the objections on direct examination of that witness. *S. v. Smith*, 404.

§ 88.5. Recross-Examination

The trial court did not abuse its discretion by not allowing further cross-examination of a witness to whom defendant had made an inculpatory statement even though defendant had had no opportunity to interview the witness before the first cross-examination. *S. v. Abbott*, 475.

§ 89.1. Evidence of Character Bearing on Credibility

A psychologist's testimony that a sexual offense victim responded to psychological test questions in an "honest fashion" was not an improper expert opinion as to the victim's character or credibility. *S. v. Kennedy*, 20.

§ 89.2. Corroboration

Testimony was corroborative although it contained new or additional information. *S. v. Kennedy*, 20.

§ 89.3. Prior Consistent Statements

Although a witness's testimony was more detailed than that of the prosecutrix, it was admissible for corroborative purposes where it tended to strengthen and add credibility to the testimony of the prosecutrix. *S. v. Howard*, 718.

A nurse's testimony concerning a conversation she had with the rape victim in which the victim described what defendant had done to her on the morning of the incident was admissible to corroborate the victim's trial testimony. *S. v. Locklear*, 754.

§ 92.1. Consolidation of Charges against Multiple Defendants Proper; Same Offense

The trial court did not err in joining for trial charges against defendant and his father for first degree rape and first degree sexual offense because the victim was not immediately able to identify defendant but immediately identified the father from a photographic lineup. *S. v. Carson*, 328.

§ 93. Order of Proof

The prosecutor's question to a child sexual offense victim as to who was in her bedroom when she awoke on the night in question assumed facts not in evidence, but the court did not err in permitting the prosecutor to depart from the regular order of presentation of evidence. *S. v. Brice*, 119.

§ 99.1. Court's Expression of Opinion on the Evidence during Trial

There was no prejudice in an action for first degree sexual offense, felonious child abuse, and assault on a child under twelve from the court's statement during his introductory remarks that the judge understood the child to be six years old. *S. v. Bright*, 491.

CRIMINAL LAW — Continued

§ 99.2. Court's Expression of Opinion; Remarks during Trial Generally

The court's reference to "the victim" on one occasion while listing for the prospective jurors the five offenses with which defendant was charged was not a prejudicial expression of opinion. *S. v. Kennedy*, 20.

§ 99.3. Court's Expression of Opinion; Remarks in Connection with Admission of Evidence

The trial judge did not express an opinion on the significance of SBI laboratory reports introduced by defendant when he stated that he did not want each individual juror to take the time to read the reports where the judge permitted defense counsel to read the reports to the jury in their entirety. *S. v. Howard*, 718.

§ 99.5. Court's Expression of Opinion; Conduct in Connection with Counsel

There was no basis for defendant's complaints that the trial judge assisted the district attorney during bench conferences and in front of the jury. *S. v. Bright*, 491.

§ 99.8. Court's Expression of Opinion; Examination of Witnesses by the Court

There was no error in an action arising from the sexual abuse of a child where the court posed questions to a psychologist who had treated the child. *S. v. Bright*, 491.

§ 101.4. Conduct Affecting Jury Deliberation

The trial court in a prosecution for murder and assault did not abuse its discretion by denying defendant's motion for a mistrial based on information that one of the jurors had expressed an opinion on defendant's guilt prior to the close of the evidence. *S. v. Smith*, 404.

The trial court's sending of a message to the jury via the bailiff did not violate either the unanimity provision or the open court provision of Art. I, § 24 of the N.C. Constitution. *S. v. McLaughlin*, 564.

The trial judge erred when he denied the jury's request to review certain testimony by sending a message to the jury through the bailiff rather than addressing the jury as a whole in open court as required by G.S. 15A-1233(a), but such error was not prejudicial. *Ibid.*

§ 102. Jury Argument

The trial court erred in the sentencing phase of a murder prosecution by refusing to allow more than one of defendant's attorneys to participate in the final argument to the jury. *S. v. Simpson*, 313.

§ 102.6. Particular Conduct and Comments in Argument to Jury

There was no prejudice in a first degree murder prosecution from the prosecutor's argument that a verdict of guilty of first degree murder was the only way that the law could take care of defendant. *S. v. Hager*, 77.

The trial judge was not required to act ex mero motu in a first degree murder prosecution where the district attorney argued that the jury should find defendant guilty of first degree murder rather than felony murder. *Ibid.*

The trial judge was not required to act ex mero motu in a first degree murder prosecution where the prosecutor's argument on guilt and sentencing merely explained how the bifurcated trial process operates. *Ibid.*

In a first degree murder prosecution in which defendant argued that he acted in self-defense, the trial court did not err by failing to sustain defendant's objection

CRIMINAL LAW — Continued

to the prosecutor's argument on defendant's failure to present evidence of the victim's character. *Ibid.*

It was not improper for the prosecutor to state during closing arguments in a murder prosecution that he wouldn't have called defendant's husband for the world. *S. v. Perdue*, 51.

There was no prejudicial error in a murder prosecution where the District Attorney read from a Supreme Court opinion a quotation regarding amnesia. *S. v. Austin*, 276.

The prosecutor's remarks in his jury argument in a first degree murder case reminding the jury of the victim's family's need for justice that only it could render was not error requiring the court to intervene *ex mero motu*. *S. v. Brown*, 179.

The prosecutor's jury argument concerning the sanctity of the home in a first degree murder case was founded upon the evidence and was not improper. *Ibid.*

The prosecutor's argument during the sentencing phase of a capital case concerning the rights of the victim's family, if erroneously admitted, was *de minimis*, and the trial court did not abuse its discretion in failing to correct the error *ex mero motu*. *Ibid.*

The prosecutor's argument during the sentencing phase of a capital case which reminded the jury that they are the voice and conscience of the community was not improper. *Ibid.*

Although the prosecutor may have strained the rational connection between evidence and inference in commenting upon defendant's production of only one of his six siblings to testify in his behalf and in suggesting that defendant's lack of schooling was his own fault, he did not strain it so far as to require *ex mero motu* intervention by the trial court. *Ibid.*

The prosecutor's comments in a capital case portraying defendant as one who dared to play God and who selfishly deprived the victim of his opportunity to "get right with the Lord" were not so improper as to require *ex mero motu* intervention by the trial court. *Ibid.*

The prosecutor's argument at the sentencing hearing in a prosecution for murder by lying in wait that the victim had no chance to plead with defendant for his life was a proper description of the offense as it had occurred. *Ibid.*

The trial court did not err by not intervening *ex mero motu* in a prosecution for first degree rape and murder where the prosecutor argued at the close of the guilt phase that there was emotion in the case and that the victim was a "little child of God." *S. v. Zuniga*, 233.

The prosecutor's argument in a rape and murder trial that "we can't let this murder go unavenged" was not grossly improper. *Ibid.*

There was no error in a prosecution for rape and murder where the State argued that "if there is anything wrong with [the evidence], it would never have gotten to where you could look at it anyway." *Ibid.*

The trial court did not err by not intervening *ex mero motu* in a prosecution for rape and murder where the prosecutor seemed to suggest that defendant enjoyed killing his victim. *Ibid.*

A prosecutor's argument was not improper where a fair reading of the argument was that the prosecutor was anticipating a defense argument rather than apologizing for the weakness of his case. *Ibid.*

There was no error in a prosecution for rape, first degree sexual offense, and kidnapping in the prosecutor's argument to the jury concerning a conversation the witness had with defendant prior to the rape. *S. v. Abbott*, 475.

CRIMINAL LAW — Continued

There was no error in a prosecution for rape, kidnapping, and first degree sexual offense from the prosecutor's argument concerning defendant's unemployment. *Ibid.*

The prosecutor's jury argument that defendant did not call as a witness any one of the fifteen persons who were present at the time of the alleged offense because they probably would not back up his story did not impermissibly shift the burden of proof to defendant. *S. v. Howard*, 718.

§ 102.7. Jury Argument; Comment on Character and Credibility of Witnesses

The prosecutor's statement that a defense witness "would have come in here and placed her hand on the Bible and told you she had been to the moon and it was made of cheese if she thought it could help [defendant]" did not inject the prosecutor's personal opinion into the jury argument and was not prejudicial. *S. v. Brice*, 119.

The trial court did not err in a murder prosecution by admitting the prosecutor's argument regarding the credibility of a serologist. *S. v. Perdue*, 51.

There was nothing improper in a prosecutor's argument in a prosecution for rape and murder concerning the credibility of a witness. *S. v. Zuniga*, 233.

§ 102.8. Jury Argument; Comment on Failure to Testify

The prosecutor's argument concerning defendant's apparent lack of contrition did not constitute an improper comment upon defendant's failure to testify. *S. v. Brown*, 179.

§ 102.9. Jury Argument; Comment on Defendant's Character and Credibility Generally

The trial court did not err in a prosecution for the murder of defendant's infant daughter by allowing the prosecutor to comment in his closing argument as to what a good parent would do when confronted by an officer investigating her infant's death. *S. v. Perdue*, 51.

The prosecutor's argument during the sentencing phase of a capital case concerning defendant's apparent lack of contrition did not improperly place this characteristic before the jury for consideration as an aggravating factor and did not inject the prosecutor's own opinions into his argument. *S. v. Brown*, 179.

Remarks by the prosecutor which disparaged mitigating circumstances that reflect on a defendant's character as opposed to those that reflect on the particular crime were not prejudicial. *Ibid.*

Any impropriety in a prosecutor's apparent argument that defendant would commit another crime if acquitted was cured by the court's subsequent instructions. *S. v. Zuniga*, 233.

§ 102.12. Jury Argument; Comment on Sentence or Punishment

The prosecutor's argument urging the jury to recommend death because not to do so would be unfair to other convicted murderers sentenced to death was not so grossly improper as to require *ex mero motu* intervention by the trial court. *S. v. Brown*, 179.

In his argument that the diminished capacity mitigating circumstance should not be found by the jury in a capital case, the prosecutor's references to mental illness and whether defendant "knew" what he was doing, while irrelevant under the evidence presented, had no prejudicial impact sufficient to require *ex mero motu* intervention by the trial court. *Ibid.*

CRIMINAL LAW – Continued

There was no prejudicial error in the sentencing phase of a prosecution for first degree murder in a prosecution argument which defendant contended improperly urged the jury to consider an aggravating factor that was not submitted by the judge. *S. v. Zuniga*, 233.

There was no error in the sentencing phase of a prosecution for first degree murder when the prosecutor argued that "justice is making sure that Bernardino Zuniga is not ever going to do this again." *Ibid.*

The trial court did not abuse its discretion by not intervening *ex mero motu* in the sentencing phase of a first degree murder prosecution where the prosecutor made scriptural references. *Ibid.*

§ 102.13. Jury Argument; Comment on Judicial Review

The prosecutor's argument in a capital case that, no matter what sentence the jury recommended, defendant would "still be here in 90 days" did not constitute an improper remark on defendant's right to appellate review that required *ex mero motu* intervention by the trial court. *S. v. Brown*, 179.

The prosecutor's argument during the sentencing phase of a capital case concerning defendant's commission of sixteen offenses before a prior prison sentence expired did not constitute an improper comment on the possibility of parole if defendant received a life sentence so as to require *ex mero motu* intervention by the trial court. *Ibid.*

The prosecutor's arguments in a capital case that the Bible approves punishment and condemns defendant's acts and that G.S. 15A-2000 is a statute of judgment equivalent to Biblical law that a murderer shall be put to death were not so improper as to require *ex mero motu* intervention by the trial court. *Ibid.*

§ 103. Function of Court and Jury in General

The trial court did not err during a prosecution for murder and assault by stating to prospective jurors that their only concern was to determine whether the defendant was guilty of the crime charged or any lesser offense. *S. v. Smith*, 404.

§ 106. Sufficiency of Evidence

The evidence was not insufficient in a prosecution for a sexual offense and indecent liberties because the child victim was unable to testify without leading questions. *S. v. Brice*, 119.

§ 117.1. Instructions on Credibility of Witnesses

The trial court's instructions on the credibility of lay and expert witnesses were sufficient, and the court did not err in failing to give defendant's requested instruction that the jury was permitted to completely disregard or reject the testimony of expert witnesses. *S. v. Kennedy*, 20.

§ 122.2. Additional Instructions upon Jury's Failure to Reach Verdict

The Supreme Court declines to adopt a rule requiring the trial court in a capital case to instruct a deadlocked jury in accordance with G.S. 15A-1235. *S. v. Brown*, 179.

§ 124. Sufficiency and Effect of Verdict in General

Defendant was not deprived of his right to a unanimous verdict because each of the three short-form indictments charged in identical language a first degree sexual offense by defendant against the same victim on the same date. *S. v. Kennedy*, 20.

CRIMINAL LAW – Continued

§ 131.2. New Trial for Newly Discovered Evidence; Showing Required; Sufficiency of Showing

A defendant may be allowed a new trial on the basis of recanted testimony if the court is reasonably well satisfied that the testimony given by a material witness is false, and there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial. *S. v. Britt*, 705.

Defendant was not entitled to a new murder trial under the standard for newly discovered evidence or under the rules for recanted testimony because an eyewitness recanted his trial testimony and filed an affidavit corroborating defendant's trial testimony. *Ibid.*

§ 135.4. Sentence in Capital Cases; Separate Sentencing Proceeding

The trial judge did not err in sentencing defendant to life imprisonment for first degree murder without holding a separate sentencing procedure where the prosecutor announced at the beginning of the trial that there was no evidence of any aggravating circumstance. *S. v. Britt*, 705.

The jury's recommendation at the end of the penalty stage of a first degree murder prosecution was unanimous even though one juror became emotionally upset and hesitated before indicating her concurrence by nodding her head. *S. v. Spruill*, 688.

§ 135.6. Sentence in Capital Cases; Separate Sentencing Proceeding; Competency of Evidence

Defendant's copious criminal record was admissible in his sentencing hearing for first degree murder to rebut evidence of his good character. *S. v. Brown*, 179.

The trial court in a capital case did not err in instructing the jury that evidence from the guilt phase was competent for its consideration in the punishment phase. *Ibid.*

There was no prejudicial error in the penalty phase of a prosecution for first degree murder from a deputy's hearsay testimony that most people defendant had worked for had had trouble with him stealing, and testimony that people said defendant had assaulted his females several times went to character or reputation and was admissible. *S. v. Spruill*, 688.

§ 135.7. Sentence in Capital Cases; Separate Sentencing Proceeding; Instructions

The trial court did not err in responding to the jury foreman's question during the sentencing phase of a capital case as to the meaning of "extenuating" in a nonstatutory mitigating circumstance by reading the definition from a dictionary. *S. v. Brown*, 179.

It was error for the trial court to instruct the jury that it must determine the substantiality of the aggravating factor in light of mitigating circumstances "found" to exist. *Ibid.*

The trial court did not err in the sentencing phase of a first degree murder prosecution by instructing the jury that "you will listen to each element" after the court sustained an objection to defendant's argument that each individual should stand firm in their convictions regardless of what the community expected. *S. v. Zuniga*, 233.

The trial judge in the sentencing phase of a first degree murder prosecution did not err by failing to give defendant's proposed instructions on the nature of mitigation, the life sentence as the norm for first degree murders, and the meaning of the age mitigating factor. *Ibid.*

CRIMINAL LAW — Continued

The trial court committed plain error warranting a new sentencing hearing in a murder prosecution where the court, in response to an inquiry from the jury, gave instructions which probably conveyed the erroneous impression that a unanimous decision for either death or life imprisonment was required. *S. v. Smith*, 404.

§ 135.8. Sentence in Capital Cases; Separate Sentencing Proceeding; Aggravating Circumstances

The State's introduction of the record of defendant's conviction of discharging a firearm into occupied property was sufficient to support the trial court's submission as an aggravating factor for murder by lying in wait that defendant had a prior conviction of a felony involving the use of violence to a person. *S. v. Brown*, 179.

The death penalty statute does not violate a defendant's right to equal protection where the same evidence may underlie a case of murder by premeditation and deliberation and a case of murder by lying in wait because a lesser included offense is available under the former charge but not under the latter. *Ibid.*

The aggravating factor that defendant had a prior conviction of a felony involving the use of violence to a person is not unconstitutionally vague and overbroad. *Ibid.*

The evidence in a first degree murder prosecution supported the aggravating factor that the killing was especially heinous, atrocious or cruel. *S. v. Spruill*, 688.

§ 135.9. Sentence in Capital Cases; Separate Sentencing Proceeding; Mitigating Circumstances

Requiring juries in a capital case to reach unanimous decisions regarding the presence or absence of mitigating circumstances does not render the sentencing proceeding arbitrary and capricious. *S. v. Brown*, 179.

There was no prejudicial error in the sentencing phase of a prosecution for first degree rape and murder from the trial court's failure to submit the mitigating factors that defendant had no history of violence or violent acts and that he was raped while in prison. *S. v. Zuniga*, 233.

The trial court did not err in a prosecution for first degree murder by submitting the mitigating circumstance of mental or emotional disturbance without the requested peremptory instruction. *S. v. Spruill*, 688.

§ 135.10. Sentence in Capital Cases; Review

A sentence of death imposed on defendant for a murder perpetrated by lying in wait outside the victim's home was not disproportionate to the penalty imposed in similar cases considering the crime and the defendant. *S. v. Brown*, 179.

Defendant in a first degree rape and murder prosecution failed to show that the jury recommended death based on passion or prejudice. *S. v. Zuniga*, 233.

The death sentence was not disproportionate to the crime where the only aggravating factor was that the murder was committed while defendant was engaged in the commission of first degree rape. *Ibid.*

There was nothing in the record of a first degree murder prosecution to suggest that the sentence of death was imposed under the influence of passion, prejudice or other arbitrary factors and the death penalty was not excessive or disproportionate. *S. v. Spruill*, 688.

CRIMINAL LAW — Continued

§ 138.7. Severity of Sentence; Particular Matters Considered

The trial court's statement that it had considered the arguments of counsel in imposing sentence, when considered with the fact that the defense and prosecuting attorneys both made reference in their jury arguments to defendant's refusal to enter a plea, did not show that the trial court improperly considered defendant's decision to plead not guilty and go to trial in determining his sentences. *S. v. Johnson*, 746.

§ 138.14. Severity of Sentence; Consideration of Aggravating and Mitigating Factors in General

The trial court in a second degree murder prosecution did not abuse its discretion in balancing aggravating and mitigating factors and sentencing defendant to life imprisonment. *S. v. Bolinger*, 596.

§ 138.16. Severity of Sentence; Aggravating Factors; Position of Leadership

The trial court did not err by finding as an aggravating factor for convictions of felonious assault and robbery that defendant occupied a position of leadership or dominance. *S. v. Hager*, 77.

§ 138.21. Severity of Sentence; Aggravating Factors; Especially Heinous, Atrocious or Cruel Offense

The trial court did not err by finding as an aggravating circumstance to a felonious assault that the offense was especially heinous, atrocious or cruel. *S. v. Hager*, 77.

§ 138.32. Severity of Sentence; Mitigating Factors; Duress, Coercion, Threat or Compulsion

The trial court did not err in a second degree murder prosecution by failing to find that the murder was committed under duress, coercion, threat, or compulsion. *S. v. Bolinger*, 596.

§ 138.38. Severity of Sentence; Mitigating Factors; Strong Provocation or Extenuating Relationship with Victim

The trial court did not err by failing to find the mitigating factor of strong provocation in a murder prosecution. *S. v. Meeks*, 615; *S. v. Bolinger*, 596.

§ 161. Necessity for Exceptions and Assignments of Error in General

Defendant's argument that a non-testimonial identification order violated the federal constitution was not properly before the court. *S. v. Zuniga*, 233.

§ 169.3. Error in Admission of Evidence; Error Cured by Introduction of other Evidence

Defendant was not prejudiced by two leading questions posed to a witness on redirect examination where the witness had already given testimony of similar import without objection. *S. v. Brice*, 119.

§ 169.5. Harmless and Prejudicial Error in Admission of Evidence; Particular Cases; Error Held not Prejudicial

There was no prejudicial error in a murder prosecution in allowing the decedent's father to testify as to decedent's hobbies and talents. *S. v. Gappins*, 64.

§ 178. Law of the Case

The North Carolina Supreme Court's original ruling in a prosecution for murder and rape that a search was lawful remained the law of the case where

HOMICIDE — Continued

§ 14.3. Burden of Proof on State; Use of Presumption of Malice

The trial court did not err by instructing the jury that malice could be inferred from an attack by hand without other weapons when the attack was made by a mature man or woman against an infant. *S. v. Perdue*, 51.

§ 18.1. Particular Circumstances Showing Premeditation and Deliberation

The trial court did not err in a murder prosecution by instructing the jury on premeditation and deliberation where the three victims suffered multiple wounds from a semi-automatic rifle capable of being fired rapidly. *S. v. Austin*, 276.

There was sufficient evidence in a prosecution for rape and murder from which the jury could have found premeditation and deliberation. *S. v. Zuniga*, 233.

§ 21.5. Sufficiency of Evidence of First Degree Murder

There was sufficient evidence to submit premeditated and deliberated murder to the jury and to support the jury's verdict of guilty. *S. v. Hager*, 77.

In a prosecution of a mother for the murder of her child, the State presented sufficient evidence of premeditation and deliberation, malice, and that the child died as the result of the criminal agency of another. *S. v. Perdue*, 51.

The evidence in a prosecution for murder and assault was sufficient to take the charges to the jury. *S. v. Smith*, 404.

§ 21.6. Sufficiency of Evidence of First Degree Murder; Homicide by Lying in Wait

The State's evidence was sufficient to support defendant's conviction of first degree murder perpetrated by lying in wait. *S. v. Brown*, 179.

§ 24. Instructions on Presumptions and Burden of Proof Generally

The theory of lying in wait did not rely upon a conclusive presumption of premeditation and deliberation in violation of defendant's due process rights. *S. v. Brown*, 179.

§ 24.1. Instructions on Presumptions Arising from Use of Deadly Weapon

The trial court did not err in a murder prosecution by instructing the jury that the law implied that the killing was done with malice if the State proved beyond a reasonable doubt that the defendant had intentionally killed the victim with a deadly weapon. *S. v. McCoy*, 581.

§ 25.1. Instructions on Felony Murder Rule

The trial court did not commit plain error in a first degree rape and murder prosecution in its instruction on the merger principle. *S. v. Zuniga*, 233.

§ 28.1. Duty of Trial Court to Instruct on Self-Defense

The trial court did not err by failing to instruct the jury on self-defense or on voluntary manslaughter based on imperfect self-defense. *S. v. Gappins*, 64.

§ 28.2. Instructions on Self-Defense; Existence of Necessity to Take Life

The Court of Appeals improperly awarded a new trial in a homicide prosecution based on the trial court's failure to charge the jury on self-defense. *S. v. Blankenship*, 152.

§ 30. Submission of Guilt of Lesser Offenses

The trial court did not err in a prosecution for first degree rape and murder by not instructing the jury on second degree murder as a lesser offense. *S. v. Zuniga*, 233.

HOMICIDE — Continued

§ 30.1. Submission of Guilt of Second Degree Murder where Homicide Committed by Lying in Wait

In a prosecution for first degree murder by lying in wait, evidence concerning defendant's intoxication and the provocation of an old grudge reflected upon intent to kill, which was irrelevant, and did not require the trial court to submit an issue as to second degree murder. *S. v. Brown*, 179.

INDICTMENT AND WARRANT

§ 5. Validity of Proceedings before Grand Jury as Affected by Irregularities in Endorsement and Return of Bill of Indictment

Failure of the trial court to dismiss prior indictments at the time of defendant's arraignment upon a superseding indictment as mandated by G.S. 15A-646 did not render the superseding indictment void or defective. *S. v. Carson*, 328.

There was no requirement that defendants represented by counsel be served with copies of superseding indictments in order for the indictments to be "filed" within the meaning of G.S. 15A-646. *Ibid.*

There was no merit to defendants' contention that superseding indictments were not "filed" within the meaning of G.S. 15A-646 because the trial court failed to rule on defendants' objections to proceeding on those indictments until all of the evidence in the case had been presented. *Ibid.*

INSURANCE

§ 135.1. Fire Insurance; Subrogation to Rights of Mortgagee

In an action to recover under a fire insurance policy, the trial court erred in entering judgment on the pleadings for defendant insurer on its counterclaim for amounts defendant paid to the mortgagees of the real property which was destroyed by fire. *Daniels v. Montgomery Mut. Ins. Co.*, 669.

JOINT VENTURES

§ 1. Generally

A development agreement between the Town of Chapel Hill and a development company did not create a joint venture and thus did not establish a joint venture not for a public purpose in violation of Art. V, § 2 of the N.C. Constitution. *Cheape v. Town of Chapel Hill*, 549.

JUDGES

§ 5. Disqualification of Judges

The trial judge should have been recused where the evidence showed that the judge had written a letter to the district attorney requesting that the grand jury be asked to consider criminal charges against both defendants based on testimony he had heard when presiding over the trial of a third person. *S. v. Fie*, 626.

§ 7. Misconduct in Office

A superior court judge is censured by the Supreme Court for conduct prejudicial to the administration of justice because of his inappropriate comments and injudicious response to comments by a spectator during the nonjury acceptance of guilty pleas and sentencing hearing involving two defendants. *In re Griffin*, 163.

JURY

§ 1. Nature and Extent of Right to Jury Trial

A shareholders' derivative action is a civil action for which Art. IV, § 13 of the N.C. Constitution guarantees the right to a jury trial. *Faircloth v. Beard*, 505.

§ 3. Number of Jurors

The trial court did not err in refusing to declare a mistrial because a potential juror who was ultimately disqualified from service was allowed to remain in the jury room with passed jurors prior to impanelment while arguments were heard on the State's challenge of the juror for cause. *S. v. Kennedy*, 20.

§ 6.2. Voir Dire Examination; Form of Questions

There was no gross impropriety requiring the trial judge to intervene in the absence of objection where the prosecutor asked potential jurors if they would be able to recommend death "for what defendant did to this little girl." *S. v. Zuniga*, 233.

§ 6.3. Propriety and Scope of Voir Dire Examination Generally

It was proper for the prosecutor to ask prospective jurors whether the possible punishment for five first degree sexual offense charges would prevent them from returning a verdict of guilty. *S. v. Kennedy*, 20.

The voir dire examination of a prospective juror ultimately excused for cause which elicited information that the prospective juror had been at a prison camp with defendant did not prejudice two jurors in whose presence the voir dire was conducted so as to require the trial court to intervene *ex mero motu*. *S. v. Brown*, 179.

§ 6.4. Voir Dire Examination; Questions as to Belief in Capital Punishment

The trial court did not err in a prosecution for first degree rape and murder by removing potential jurors opposed to the death penalty without a particularized questioning of the jurors. *S. v. Zuniga*, 233.

§ 7.8. Particular Grounds for Disqualification

The trial court did not err in excusing a juror for cause on the ground that he was unable to perform his duties as a juror. *S. v. Kennedy*, 20.

§ 7.9. Particular Grounds for Disqualification and Challenge; Prejudice and Bias; Preconceived Opinions

The statute allowing a challenge for cause against a prospective juror who would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina was intended to apply not only to death qualification of prospective jurors in capital cases but also generally to qualifying jurors in all cases. *S. v. Kennedy*, 20.

§ 7.11. Particular Grounds for Disqualification and Challenge; Scruples against Capital Punishment

Although the voir dire testimony of a prospective juror indicated her ambivalence toward the death penalty, she was properly excused for cause where her testimony demonstrated that she would be unable to render a verdict in accordance with the court's charge and the laws of the state. *S. v. Brown*, 179.

KIDNAPPING

§ 1.3. Instructions

The trial court did not err in instructing that multiple stabbing and cutting with scissors, leaving a tip of the scissors embedded in the victim's head, would constitute a serious injury for purposes of first degree kidnapping. *S. v. Johnson*, 746.

§ 2. Punishment

Double jeopardy principles preclude defendant's conviction for both first degree kidnapping and two first degree rapes where the jury may have used one of the rapes to elevate the kidnapping from second to first degree. *S. v. Johnson*, 746.

MASTER AND SERVANT

§ 67. Workers' Compensation; Heart Failure

Plaintiff's cardiac arrest occurred by accident within the meaning of the Workers' Compensation Act where plaintiff was employed at the Brunswick Nuclear Power Plant in a job that sometimes required him to enter the reactor building wearing a radiation suit which medical experts implicated in his cardiac arrest because of his inability to dissipate heat. *Dillingham v. Yeargin Construction Co.*, 499.

§ 69. Workers' Compensation; Amount of Recovery Generally

Plaintiff was entitled to either scheduled benefits for an eye injury under G.S. 97-31 or permanent partial disability benefits under G.S. 97-30 and could select the remedy offering the more generous benefits. *Gupton v. Builders Transport*, 38.

An employer was entitled to credit for payments made to an injured employee under a private disability plan against the amount owed as workers' compensation. *Foster v. Western-Electric Co.*, 113.

§ 97.1. Workers' Compensation; Judgment of Appellate Court; Remand

Where the Industrial Commission applied the incorrect "some evidence" standard rather than the correct preponderance of the evidence standard in a workers' compensation case, the Court of Appeals erred in remanding the case to the Commission for clarification of its opinion rather than for new findings and conclusions applying the correct legal standard. *Ballenger v. ITT Grinnell Industrial Piping*, 155.

§ 101. Unemployment Compensation; "Employees" within Coverage of Law

A magistrate is a "member of the judiciary" within the meaning of G.S. 96-8(6)i so as to be excluded from unemployment compensation benefits. *Bradshaw v. Administrative Office of the Courts*, 132.

MUNICIPAL CORPORATIONS

§ 2. Annexation

The adoption of a resolution of intent is the critical date for determining whether a municipality utilizing involuntary annexation procedures has prior jurisdiction over the same territory being considered for voluntary annexation by a different municipality. *Town of Hazelwood v. Town of Waynesville*, 89.

§ 22.2. Validity of Municipal Contracts

A development agreement between the Town of Chapel Hill and a development company did not create a joint venture and thus did not establish a joint ven-

PARTNERSHIP

§ 4. Rights and Liabilities of Partners as to Third Persons Ex Contractu

A genuine issue of material fact existed as to whether the act of a law partner in executing a title certificate in the partnership name on property owned by the partner for the purpose of obtaining a personal loan for himself was "in the ordinary course of the business of the partnership or with the authority of his copartners" so as to render the partnership liable for loss caused by the certification under G.S. 59-43. *Investors Title Ins. Co. v. Herzig*, 770.

A genuine issue of material fact existed as to whether a law partner acted within his apparent authority in signing a title certificate in the partnership name on property owned by the partner for the purpose of obtaining a personal loan for himself so as to render the partnership liable for loss caused by the certification. *Ibid.*

PRINCIPAL AND AGENT

§ 5.2. Authority in Particular Matters

A genuine issue of material fact existed as to whether a law partner acted within his apparent authority in signing a title certificate in the partnership name on property owned by the partner for the purpose of obtaining a personal loan for himself so as to render the partnership liable for loss caused by the certification. *Investors Title Ins. Co. v. Herzig*, 770.

QUASI CONTRACTS AND RESTITUTION

§ 1.2. Unjust Enrichment

In an action for restitution and fraud arising from the operation by plaintiffs of a farm owned by defendants, one plaintiff introduced evidence which, if believed, entitles her to restitution for any damages she might prove. *Britt v. Britt*, 573.

RAPE AND ALLIED OFFENSES

§ 3. Indictment

Indictments charging first degree sexual offenses in accordance with G.S. 15-144.2 without specifying which sexual acts were committed were sufficient to put defendant on notice of the accusations. *S. v. Kennedy*, 20.

The Court of Appeals erred by arresting judgment on a rape indictment on the ground of a fatal variance between the indictment and proof where the indictment alleged force and the evidence showed that the victim had been asleep when intercourse began. *S. v. Moorman*, 387.

An indictment alleging the rape of "a child under the age of 13 years" did not allege a criminal offense for a rape which allegedly occurred before the 1 October 1983 amendment of G.S. 14-27.2. *S. v. Trent*, 610.

§ 4. Relevancy and Competency of Evidence

It was proper for the trial court to allow a psychologist and a pediatrician to testify concerning the symptoms and characteristics of sexually abused children and to state their opinions that the symptoms exhibited by the victim were consistent with sexual or physical abuse. *S. v. Kennedy*, 20.

The trial court properly allowed the N.C. Medical Examiner to state his opinion that scratch marks on a sexual offense victim's back were not consistent with self-mutilation and properly allowed a pediatrician to state her opinion that the injuries were neither accidental nor self-inflicted. *Ibid.*

RAPE AND ALLIED OFFENSES — Continued

A psychologist's opinion testimony that the victim was greatly afraid of her father and her testimony as to behavior and statements by the victim which formed the basis of this opinion was properly admitted in a prosecution of defendant for sexual offenses allegedly committed against his daughter. *Ibid.*

In a prosecution for first degree sexual offense, felonious child abuse, and assault on a child under twelve, the trial judge did not err by denying defendant's motions to strike testimony from a social worker that she was aware of the juvenile court determination that defendant had abused the child. *S. v. Bright*, 491.

A pediatrician's diagnosis of sexual abuse based upon the history given to him by the victim and a pelvic examination four years after the date of the alleged offenses which revealed only that the victim's hymen was not intact was not admissible under Rule of Evidence 702. *S. v. Trent*, 610.

§ 5. Sufficiency of Evidence

The State's evidence was sufficient to support defendant's conviction of first degree sexual offense and taking indecent liberties with a minor. *S. v. Brice*, 119.

The trial court did not err by denying defendant's motion to dismiss a charge of first degree rape where the evidence showed that the victim had been penetrated by a human penis, that she was seven years old when the intercourse occurred, and that defendant was twenty-seven years old. *S. v. Zuniga*, 233.

The trial court did not err in submitting first degree rape to the jury on the theory that defendant inflicted serious injury upon the victim where stab wounds and cuts were inflicted upon the victim after the rapes occurred in an attempt to prevent the victim's escape from defendant's unlawful custody. *S. v. Johnson*, 746.

The infliction of serious personal injury element of first degree rape was shown by the State's evidence that defendant repeatedly struck the victim in the face and broke her jaw immediately before he forced her to have sexual intercourse with him. *S. v. Locklear*, 754.

§ 6.1. Instructions on Lesser Degrees of Crime

The trial court in a prosecution for first degree sexual offenses was not required to submit to the jury the lesser included offense of assault on a female. *S. v. Kennedy*, 20.

Defendant was not entitled to an instruction on the lesser offense of attempted first degree rape in a prosecution for first degree rape of a female under thirteen. *S. v. Jackson*, 452.

RULES OF CIVIL PROCEDURE

§ 41.2. Dismissal in Particular Cases

The trial court had the inherent authority to impose sanctions less than dismissal, including the taxing of costs plus attorney fees, for a party's failure to comply with a court order. *Daniels v. Montgomery Mut. Ins. Co.*, 669.

A finding by the trial court in an action on a fire insurance policy that plaintiff's counsel failed to comply with the court's order prohibiting any reference before the jury to the fact that no criminal charges had been filed against plaintiff in connection with the fire was sufficient to support the court's order taxing plaintiff with defendant's costs, including attorney fees, after a mistrial was declared. *Ibid.*

The trial court did not err in granting defendant's motion to dismiss plaintiff's action to recover under a fire insurance policy because plaintiff refused to comply

UTILITIES COMMISSION — Continued

There was competent, material and substantial evidence in a general rate case to support the Utilities Commission's inclusion of the entire McGuire Nuclear Station in Duke Power Company's rate base despite agreements with municipal power agencies and cooperatives which gave them the right to receive power from the McGuire Station. *Ibid.*

§ 35. Establishment of Rate Base; Property Included; Over-Adequate Facilities

The evidence in a general rate case supported the Utilities Commission's conclusion that Catawba Unit 1 did not represent excess generating capacity. *State ex rel. Utilities Comm. v. Eddleman*, 344.

§ 38. Establishment of Rate Base; Current and Operating Expenses

The Utilities Commission did not err in a general rate case by normalizing the nuclear capacity factor component of CP&L's generation mix for the test periods to reflect the average lifetime nuclear capacity factors actually achieved by CP&L as of the end of each of the test periods in question. *State ex rel. Utilities Comm. v. Carolina Power & Light Co.*, 1.

The evidence supported the Commission's findings in applying accounting methods proposed by a witness for CP&L rather than by other expert witnesses in calculating the fuel costs and rates that CP&L should have collected during the disputed periods. *Ibid.*

The Commission properly calculated fuel adjustments in accordance with the formula approved in a prior Supreme Court opinion. *Ibid.*

The Utilities Commission did not err in a general rate case involving the sale of some of the capacity of Duke Power Company's Catawba Nuclear Station to municipal power agencies and cooperatives by refusing to levelize the operation and maintenance component of the buyback costs. *State ex rel. Utilities Comm. v. Eddleman*, 344.

§ 39. Establishment of Rate Base; Current and Operating Expenses; Taxes

The Utilities Commission acted within its discretion and in conformance with applicable judicial precedent when it decided not to adopt the Attorney General's proposal for interest synchronization. *State ex rel. Utilities Comm. v. Eddleman*, 344.

The Utilities Commission did not abuse its discretion by refusing to order Duke Power Company to seek private letter rulings from the IRS. *Ibid.*

§ 41. Rates; Fair Return Generally

The Utilities Commission properly exercised its discretion in a general rate case by setting a rate of return within the range of those recommended by witnesses for Duke Power and for the Public Staff. *State ex rel. Utilities Comm. v. Eddleman*, 344.

§ 55. Review of Findings

Findings by the Utilities Commission in a general rate case satisfied G.S. 62-79 even though the findings and conclusions were mislabeled. *State ex rel. Utilities Comm. v. Eddleman*, 344.

The statutory function of the Supreme Court is not to determine whether there was evidence to support a position the Commission did not adopt, but whether there was substantial evidence in view of the entire record to support the position the Commission did adopt. *Ibid.*

WORD AND PHRASE INDEX

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