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SUPREME COURT OF NORTH CAROLINA

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IN MEMORIAM

WALTER E. BROCK
ASSOCIATE JUSTICE
2 JANUARY 1979-1 DECEMBER 1980

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OF
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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

MORGAN REED CATES, BY HIS GUARDIAN AD LITEM, WACHOVIA BANK & TRUST COMPANY, N.A.; AND JOYCE REED CATES, INDIVIDUALLY v. STANLEY C. WILSON; JEFFREY A. TODD; AND STANLEY C. WILSON AND JEFFREY A. TODD, A PARTNERSHIP

No. 24PA87

(Filed 5 November 1987)

1. Damages § 10— collateral source rule—evidence of past Medicaid payments

The collateral source rule prohibits the defendants in a medical malpractice case from offering evidence that past Medicaid payments have mitigated plaintiffs' damages since Medicaid provides for a right of subrogation in the State to recover sums paid to plaintiffs, and evidence of a collateral source is improper when plaintiff will not receive a double recovery. N.C.G.S. § 108A-57.

2. Damages § 10— collateral source rule—future public benefits

The collateral source rule bars the defendants in a medical malpractice action from offering evidence demonstrating that plaintiffs can mitigate their damages by using future public benefits since (1) forcing plaintiffs to depend on public coffers stands at odds with the compensatory goal underlying our tort system; (2) the lack of certainty characterizing the availability of public resources renders it unwise to allow mitigation of damages premised on their continued existence; (3) utilization of many public benefits hinges on a plaintiff's continued indigency, and a plaintiff could face the possibility of having damage awards reduced based on the presumed availability of benefits when in fact the award itself, albeit reduced, rendered plaintiff ineligible for benefits; and (4) as between defendants who tortiously inflict injury and innocent taxpayers who fund public programs, the loss should fall on the tortfeasor.

3. Damages § 10— collateral source rule—gratuitous familial aid

The collateral source rule prohibits the defendants in a medical malpractice action from offering evidence that gratuitous services and payments by

the minor plaintiff's grandmother will mitigate plaintiffs' damages since forced dependence on those services is antithetical to the goal of damage awards in our tort system, and the continued availability of gratuitous familial aid is uncertain.

4. **Damages § 10— collateral source evidence—prejudicial error**

In a medical malpractice action by a mother and a child born with cerebral palsy and mental retardation, the trial court's erroneous admission of collateral source evidence of past and future Medicaid benefits, AFDC payments and child support constituted prejudicial error entitling plaintiffs to a new trial on issues of liability and damages, although the jury at the original trial found no liability by defendants and thus did not reach the damages issue, since defense counsel argued strenuously that whatever injuries plaintiffs suffered had been and would be compensated in full by public services, and it cannot be said that the jury's consideration of the liability issue was unaffected by the collateral source evidence.

5. **Evidence § 14; Physicians, Surgeons and Allied Professions § 15.2— waiver of physician-patient privilege—information and opinions**

Plaintiffs waived their physician-patient privileges as to non-party treating physicians whom defendants called as expert witnesses when plaintiff mother testified on direct examination concerning her communications with these physicians and plaintiffs failed to object to testimony by these physicians giving detailed descriptions of the nature of plaintiffs' injuries. Furthermore, this waiver extended not only to information obtained by the treating physicians but also to opinions held by the treating physicians formed as a result of information gained during their treatment of plaintiffs.

Justice MITCHELL concurring in result.

Justice MEYER joins in the concurring opinion.

ON discretionary review of a decision of the Court of Appeals, 83 N.C. App. 448, 350 S.E. 2d 898 (1986), vacating the judgment entered by *Walker, J.*, and the verdict, at the 14 August 1985 Civil Session of Superior Court, GUILFORD County, and ordering a new trial. This Court granted limited discretionary review on 8 April 1987. Heard in the Supreme Court 10 September 1987.

Clark & Wharton by David M. Clark and John R. Erwin; Colson, Hicks & Eidson by Mike Eidson for plaintiff appellees.

Henson, Henson, Bayliss & Coates by Perry C. Henson and Jack B. Bayliss, Jr., for defendant appellants.

Petree, Stockton & Robinson by J. Robert Elster, amicus curiae.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan by James D. Blount, Jr., and William H. Moss, for North Carolina Medical Society, amicus curiae.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog by Robert M. Clay, Susan K. Burkhart and Theodore B. Smyth, for North Carolina Association of Defense Attorneys, amicus curiae.

Harris, Bumgardner & Carpenter by Nancy C. Northcott and Don H. Bumgardner, for North Carolina Academy of Trial Lawyers, amicus curiae.

EXUM, Chief Justice.

This is a medical malpractice action. The questions presented are whether evidence was admitted at trial in violation of (1) the collateral source rule and (2) the physician-patient privilege. The Court of Appeals concluded evidence was improperly admitted on both counts and ordered a new trial. We disagree with the Court of Appeals' conclusion that the physician-patient privilege was violated; but we agree that evidence was admitted in violation of the collateral source rule. Thus, we modify and affirm the Court of Appeals' decision.

Plaintiff Joyce Cates was a regular patient of defendant Dr. Stanley Wilson. She testified that in January of 1978 she sought his help in reducing her weight. At the time, Ms. Cates weighed 241 pounds and stood 5'8" tall. Ms. Cates also testified she saw Dr. Wilson on several subsequent occasions in 1978. In June and July Dr. Wilson treated Ms. Cates for yeast infections. In August Dr. Wilson referred her to a neurologist and neurosurgeon to correct numbness in her hands caused by carpal tunnel syndrome. Also in August Ms. Cates complained of jumping sensations in her abdomen. In November, Dr. Wilson treated Ms. Cates for urinary problems.

Ms. Cates testified that on 25 February 1979 she experienced periodic intervals of sharp back pain. Her mother, Julia Cates, made an appointment for her to see Dr. Wilson on 27 February 1979. Ms. Cates declared that on the morning of 27 February she experienced a green discharge pouring from her vagina. She proceeded to see Dr. Wilson who, for the first time, administered a pregnancy test. Ms. Cates tested positive. Dr. Wilson then

ordered a sonogram which revealed that the baby was ready to be born. Dr. Wilson referred Ms. Cates to Dr. Charles Lomax, an obstetrician. Dr. Lomax and his partner, Dr. Robert Wein, admitted Ms. Cates to the hospital. She gave birth, by cesarean section, to plaintiff Morgan Cates in the early evening of 27 February 1979. Morgan Cates was born mentally retarded and with cerebral palsy.

At trial the court granted defendants' motion for a directed verdict against Joyce Cates at the close of all the evidence. The jury found that Morgan Cates suffered no injury as a result of any negligence on the part of Dr. Wilson. Judgments for defendants were entered on this verdict against each plaintiff.

I.

The first question presented is whether introduction by defendants of evidence that gratuitous public benefits served, and will serve, to mitigate plaintiffs' damages violates the collateral source rule. We hold it does, whether the evidence is brought out in defendants' case in chief or on cross-examination of plaintiffs' witnesses.

At the outset of the instant case plaintiffs brought a motion in limine to prohibit reference to the fact that Medicaid paid a portion of plaintiffs' medical expenses. The court denied the motion and at trial allowed defendants to show first, that Medicaid had paid all of Morgan's medical bills at the time of trial, and second, that Medicaid would continue to pay for many of them in the future. Defendants also elicited evidence regarding other welfare programs which helped defray some of the expenses caused by Morgan's medical condition. On cross-examination of Julia Cates, Morgan's grandmother, defendants demonstrated, over objection, that Morgan's father pays $30.00 a week in child support, and that Joyce Cates receives monthly welfare checks under the "Aid For Dependent Children" program (AFDC). Cross-examination also revealed, this time without objection, that Julia allows Joyce and Morgan to live with her free of charge, helps them meet expenses, and provides an automobile for transporting Morgan to school.

Plaintiffs called Dr. Paul Deutsch, an expert in evaluating the needs of handicapped persons, who testified concerning the costs

of Morgan's current and future needs. On direct examination Dr. Deutsch testified that a local public school, Gateway Education Center, provided excellent training for mentally and physically handicapped persons until age 22. He described its funding through Public Law 94-142, declaring that although this has been a reliable public resource, no one can guarantee its continued availability.

On cross-examination defendants questioned Dr. Deutsch concerning the availability of Intermediate Care Facilities (ICFs) to meet Morgan's future residential needs. Dr. Deutsch testified that these facilities, administered by the state and funded by Medicaid, functioned as residences for mentally retarded indigents. He declared that while ICFs might meet Morgan's basic needs, Morgan's overall best interest would be better served by home care rather than institutional care. He went on to note that while both public programs provide for the care of the mentally handicapped, eligibility for ICFs hinges on indigency. Special education funded under Public Law 94-142 is available to all, regardless of financial status.

Dale Metz, the director and principal of Gateway Education Center, testified for defendants concerning the treatment offered Morgan at Gateway. Metz also testified concerning the availability of ICFs in the Greensboro area. He described a proposed residential facility sponsored by the Greensboro Cerebral Palsy Association for which Morgan might qualify. Metz characterized the proposed facility as "very much in the tentative stages."

The Court of Appeals held that admission of the above described evidence violated the collateral source rule. It went on to find the error prejudicial. We affirm these aspects of the decision below.

In *Young v. R.R.*, 266 N.C. 458, 466, 146 S.E. 2d 441, 446 (1966), this Court explained the collateral source rule. According to this rule a plaintiff's recovery may not be reduced because a source collateral to the defendant, such as "a beneficial society," the plaintiff's family or employer, or an insurance company, paid the plaintiff's expenses. *Id.* Rather, an injured plaintiff is entitled to recovery "'. . . for reasonable medical, hospital, or nursing services rendered him, whether these are rendered him gratuitously or paid for by his employer.'" *Id.* (quoting *Roth v. Chatlos*, 97 Conn. 282, 288, 116 A. 332, 334 (1922)).

The instant case presents the issue of whether the collateral source rule embraces gratuitous government benefits. We hold it does, believing that this follows logically from our holding in *Young*. To facilitate application of this rule to the present case, we analyze separately the collateral source rule with respect to past Medicaid payments, future public benefits, and gratuitous care provided in the home.

[1] With regard to Medicaid payments already received we find our *Young* decision persuasive. In *Young* we held that receipt of insurance proceeds should not reduce a plaintiff's recovery. 266 N.C. at 466, 146 S.E. 2d at 446. Medicaid is a form of insurance paid for by taxes collected from society in general. "The Medicaid program is social legislation; it is the equivalent of health insurance for the needy; and, just as any other insurance form, it is an acceptable collateral source." *Bennett v. Haley*, 132 Ga. App. 512, 524, 208 S.E. 2d 302, 311 (1974).

Application of the collateral source rule to Medicaid payments also finds justification in the absence of any "windfall profit" for the plaintiff. North Carolina law entitles the state to full reimbursement for any Medicaid payments made on a plaintiff's behalf in the event the plaintiff recovers an award for damages. N.C.G.S. § 108A-57 provides in pertinent part:

> (a) Notwithstanding any other provisions of the law, to the extent of payments under this Part, the State, or the county providing medical assistance benefits, shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of such assistance, or of his personal representative, his heirs, or the administrator or executor of his estate, against any person. . . .
>
> (b) It shall be a misdemeanor for any person seeking or having obtained assistance under this Part for himself or another to willfully fail to disclose to the county department of social services or its attorney the identity of any person or organization against whom the recipient of assistance has a right of recovery, contractual or otherwise.

(Cum. Supp. 1985). Our decisions establish the principle that evidence of a collateral benefit is improper when the plaintiff will not receive a double recovery. *See Spivey v. Wilcox Co.*, 264 N.C.

387, 390, 141 S.E. 2d 808, 811-12 (1965). Because Medicaid provides for a right of subrogation in the state to recover sums paid to plaintiffs, we find that the principle enunciated in *Spivey* applies in the instant case as well.

[2] Concerning future public benefits we hold that the collateral source rule bars defendants from offering evidence demonstrating that plaintiffs can mitigate their damages by using public resources. We base our holding on three grounds.

First, forcing plaintiffs to depend on public coffers, a situation foreseeable under a contrary rule, stands at odds with the compensatory goal underlying our tort system. The goal of the law of damages is to place an injured party in as nearly the same position as he would have been had he not been injured. *Phillips v. Chesson*, 231 N.C. 566, 58 S.E. 2d 343 (1950). Forced dependence on public charity because of injuries tortiously inflicted puts the injured party in a position more disadvantageous than if he were freed from this dependence. Full compensation that frees the injured party from dependence on charity is more in keeping with the compensatory goal of tort recovery. As one commentator has noted:

> The plaintiff should be able to recover the cost of future medical services, since he is likely to prefer private care, and it is his "right" to have it. It may be that he will employ the free care for which he is eligible and thereby receive a "windfall," but . . . at the time of suit there is no way of knowing what he will choose to do.

Sedler, *The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and the Functional Approach (Part II)*, 58 Ky. L.J. 161, 186 (1970).

The second reason for applying the collateral source rule to future public benefits is that the lack of certainty characterizing the availability of public resources renders it unwise to allow mitigation of damages premised on their continued existence. All public programs exist subject to legislative approval. While some programs maintain more stability than others, injured plaintiffs cannot count on their continued availability. In the present case, for instance, none of the future public benefits introduced by the defendants—ICFs funded by Medicaid, special education funded

by the federal government, and Aid for Families with Dependent Children—will necessarily continue for Morgan's lifetime. The state and federal governments may restrict or withdraw Medicaid benefits. *See, e.g.*, 42 U.S.C.A. § 1396 *et seq.* (Cum. Supp. 1986) (providing that state plans not complying with federal law will receive no federal funding); *see also Harris v. McRae*, 448 U.S. 297, 308, 65 L.Ed. 2d 784, 799-800 (1980) (upholding state refusal to fund nonessential abortions with Medicaid funding after Congress withdrew financial support). Similarly, the federal government may abandon special education and welfare programs for any number of reasons, not the least of which is the need to balance an ever more unbalanced federal budget. To encourage juries to mitigate damages based on tenuous public resources forces plaintiffs, like the foolish house builder in the parable, to rebuild lives on shifting sands. The floods may come, and the winds blow, and great will be the fall.

The third reason that the collateral source rule should apply to future public benefits is that utilization of many of these benefits hinges on a plaintiff's continued indigency. In the event of a meaningful recovery, however, a plaintiff may no longer qualify. Thus, a plaintiff could face the possibility of having damage awards reduced based on the presumed availability of benefits, when in fact the award itself, albeit reduced, renders plaintiff ineligible for benefits. The instant case exemplifies such a possible scenario. Defendants stressed continually, on direct and cross-examination, that under the Medicaid program Morgan's future residential needs could be met by ICFs. Similarly, defendants brought out on cross-examination that monthly AFDC and parental support checks defray the cost of Morgan's care. Based on such evidence, without a full explanation of state and federal requirements for participation, the jury might reasonably have concluded that plaintiffs would have received a double recovery unless their damages were reduced by an amount corresponding to the welfare's value. In fact, even a modest recovery by plaintiffs might have made them ineligible to benefit from these resources. *See Medicaid Eligibility Manual* § 2375, published by the State of North Carolina Department of Human Resources, Division of Medical Assistance, Income Maintenance Section (1987).

Finally, as between defendants who tortiously inflict injury and innocent taxpayers who fund programs such as Medicaid, we think it better that the loss fall on the tort-feasor.

[3] With regard to the application of the collateral source rule to future care provided in Morgan's home, we find our decision in *Young* controlling. In *Young* we held that evidence of gratuitous services and payments by a family member should not serve to mitigate a plaintiff's damages. 266 N.C. at 466, 146 S.E. 2d at 446. Family members perform gratuitous services for their injured relative's benefit, not the tort-feasor's. As with other future benefits, forced dependence on these services, rather than the independence associated with a plaintiff made whole, is antithetical to the goal of damage awards in our tort system. Furthermore, like government sponsored welfare programs, uncertainty characterizes the continued availability of gratuitous familial aid. For these reasons we decline to depart from our holding in *Young*.

[4] Defendants argue that even if, as a general matter, it violates the collateral source rule to introduce evidence of publicly provided special education, admission of this evidence in the instant case was not erroneous because plaintiffs "opened the door" by bringing the matter up first. Defendants make a similar argument with regard to home care provided by Julia Cates. These arguments may have merit, but we decline to address them in this case. Plaintiffs did not "open the door" with regard to past and future Medicaid benefits. Plaintiffs also preserved for appeal their objections to admission of evidence concerning AFDC and child support. We find that the erroneous admission of evidence regarding Medicaid, AFDC, and child support in itself requires a new trial. We therefore uphold the decision of the Court of Appeals without analyzing whether plaintiffs can prevail on appeal because of other violations of the collateral source rule.

Our prior cases, as well as those from other jurisdictions, demonstrate that the erroneous admission of collateral source evidence often must result in a new trial. *See, e.g., Eichel v. New York Central R.R. Co.*, 375 U.S. 253, 11 L.Ed. 2d 307 (1963); *Spivey v. Wilcox Co.*, 264 N.C. 387, 141 S.E. 2d 808; *Fincher v. Rhyne*, 266 N.C. 64, 145 S.E. 2d 316 (1965). The likelihood of prejudice is great because the evidence tends to suggest to the jury that the outcome of the trial is immaterial to the party benefiting

from the collateral source. *Fincher*, 266 N.C. at 68, 145 S.E. 2d at 319. This has long been recognized with regard to liability insurance. According to this Court's decision in *Fincher*, no circumstance "is more surely calculated to cause a jury to render a verdict against the defendant, without regard to the sufficiency (weight) of the evidence, than proof that the person against whom such verdict is sought is amply protected by indemnity insurance." *Id.* at 69, 145 S.E. 2d at 319. Similarly, the United States Supreme Court acknowledged that evidence of the "receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact." *Eichel*, 375 U.S. at 255, 11 L.Ed. 2d at 309. The prejudice stems from the probability that juries will consider the availability of collateral sources as indicative of the lack of any real damages. *See generally* Sedler, *The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and the Functional Approach (Part I)*, 58 Ky. L.J. 36, 47-56 (1970).

In spite of this Court's traditional reticence to find the erroneous admission of collateral source evidence nonprejudicial, defendants argue that evidence related solely to damages could not have prejudiced plaintiffs on the issue of liability. Defendants contend the jury never reached the damages issue because it decided not to find defendants liable for Morgan's condition. Defendants maintain it is unduly speculative to presume that the inadmissible evidence influenced the jury on their decision regarding liability. We disagree.

A review of the closing arguments to the jury reveals that defendants capitalized on the evidence of collateral sources to argue that plaintiffs suffered no damages. Defense counsel asserted there is "not one penny of loss that you all have heard that Morgan Cates or his mother has paid for this child that they wouldn't have paid for a normal child. Not one penny." He went on to declare that plaintiffs failed to prove "that this child would suffer a penny with its Medicaid, its Aid to Dependent Children, its own father looking after it and supporting it." He also stated that "until [Morgan]'s 22 he'll get the free care right there, the daily care at one of the best facilities in the country. And after that these ICFs are very well provided for and the care is excellent there." Defense counsel thus argued strenuously that whatever injuries the plaintiffs suffered, they had been, and would be, compensated in full by public sources.

In light of this kind of argument and the nature of the collateral source evidence which was so freely admitted, we find unpersuasive defendants' contention that the jury's consideration of the liability issues was unaffected by this evidence. We agree with the conclusion of Judge Wells, writing for a unanimous Court of Appeals, that defendants' emphasis throughout the trial on the "numerous gratuitous avenues of compensation [that] existed for plaintiffs' benefit substantially eroded plaintiffs' verdict-worthiness by suggesting to the jury that plaintiffs were already fully compensated and were trying to obtain a double recovery." 83 N.C. App. at 455, 350 S.E. 2d at 903.

II.

[5] The second question presented is whether a plaintiff who has waived his physician-patient privilege as to nonparty treating physicians may preclude these physicians from testifying as experts for the defendant. We hold he may not. Once a plaintiff waives his right to prohibit disclosures of confidences by his physicians he may not assert the physician-patient privilege to prevent them from testifying as experts for his opponent.

Plaintiffs called one of the defendants, Dr. Stanley Wilson, as their first witness. Questioning Wilson as an adverse witness, plaintiffs elicited detailed testimony regarding each occasion on which he communicated with Joyce Cates, from their initial meeting on 9 February 1978, through every subsequent contact until 27 February 1979. They asked him to explain each diagnosis he made, and every treatment he prescribed. Plaintiffs introduced Dr. Wilson's medical records into evidence. Plaintiffs also introduced into evidence all of Joyce Cates' and Morgan Cates' medical records.

Joyce Cates testified concerning the occasions on which she consulted Dr. Wilson, as well as her other treating physicians. Once again, the testimony covered each office visit and telephone call in meticulous detail. Ms. Cates described her changing physical condition, and Dr. Wilson's corresponding diagnoses. Ms. Cates also testified concerning her consultation with Dr. Martin A. Hatcher, the neurologist who treated her for carpal tunnel syndrome. She recounted his examination and diagnosis. She then

described the surgery that Dr. Hatcher and Dr. Stephen C. Robinson, a neurosurgeon, performed to alleviate the carpal tunnel syndrome. Finally, Ms. Cates testified concerning her initial visit with Drs. Robert Wein and Charles Lomax, the obstetricians to whom Dr. Wilson referred Ms. Cates upon diagnosing her as pregnant. She related the details of Dr. Wein's examination, as well as his and Dr. Lomax's decision to admit her to the hospital.

Plaintiffs called three expert witnesses, each of whom testified in detail using the medical records prepared by plaintiffs' treating physicians. Dr. Samuel H. Shelbourne, a pediatric neurologist, reviewed Morgan Cates' condition immediately prior and subsequent to delivery. He posited that Morgan's brain damage might have been averted had he been delivered earlier on 27 February. Dr. Shelbourne based his opinion, in large measure, upon a review of medical records from Moses Cone Hospital. Some of these records were prepared by Dr. Samuel Ravenel, a pediatrician who examined Morgan Cates in the intensive care nursery at Moses Cone. Dr. Harlan Giles, an obstetrician-gynecologist, analyzed the records prepared by Dr. Wein and concurred with Dr. Shelbourne. Dr. Julian Keith, a family practitioner, reviewed medical records prepared by Dr. Wilson, as well as those from Moses Cone Hospital, and concluded that Dr. Wilson fell below the standard of care for family practice physicians by not ordering a pregnancy test prior to 27 February 1987.

Defendants responded to plaintiffs' expert testimony by calling ten expert witnesses, five of whom treated Joyce or Morgan Cates during the course of events pertinent to the pending suit. Drs. Wein and Lomax testified as experts in the field of obstetrics and gynecology, declaring that the events of 27 February made no difference in Morgan Cates' condition. Drs. Robinson and Hatcher opined that Dr. Wilson's performance did not fall below the accepted standard of care when he failed to order a pregnancy test upon finding that Joyce Cates had carpal tunnel syndrome. Dr. Ravenel testified that in his opinion the outcome would not have differed had Joyce given birth earlier on 27 February.

Plaintiffs did not object to the testimony of any of the five treating physicians insofar as it concerned a recitation of the facts surrounding Joyce's and Morgan's physical conditions. Similarly,

plaintiffs registered no objection when these physicians described the course of treatment conducted on the plaintiffs' behalf. When, however, defendants asked these physicians for their expert opinions, plaintiffs objected, claiming that such expert testimony violated the physician-patient privilege.

Plaintiffs pressed their objection on appeal. The Court of Appeals found that the plaintiffs had waived the physician-patient privilege "regarding '*information*' obtained by their treating physicians in the course of treatment and diagnosis." *Cates*, 83 N.C. App. at 460, 350 S.E. 2d at 906. The court went on to hold that this waiver did not necessarily extend to "opinion testimony." The court noted the strong public policy, as expressed in N.C.G.S. § 8-53, favoring protecting confidentiality between physician and patient. On this basis it held that absent an express waiver, a trial court may permit opinion evidence by non-party treating physicians only after finding, pursuant to the statute, that the proper administration of justice necessitates such testimony. 83 N.C. App. at 460, 350 S.E. 2d at 906.

The question before us is whether the Court of Appeals erred in establishing a rule whereby plaintiffs who waive their physician-patient privilege as to "information" may nevertheless preclude their physicians from giving opinion testimony. We hold it did.

Communications between physician and patient received no protection at common law. *State v. Martin*, 182 N.C. 846, 849, 109 S.E. 74, 76 (1921). North Carolina protects the physician-patient relationship by statute. N.C.G.S. § 8-53 provides, in pertinent part:

> No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, and no such information shall be considered public records under G.S. 132-1. . . . Any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to G.S. 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice.

(1986). Decisions of this Court make clear that the physician-patient privilege extends beyond information orally communicated by the patient to the physician. It also embraces "knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe." *Smith v. Lumber Co.*, 147 N.C. 62, 64, 60 S.E. 717, 718 (1908). Beyond this, however, our cases have refused to go. As this Court declared in *Sims v. Charlotte Liberty Mutual Insurance Co.*, "[w]e are not disposed to extend the privilege beyond the plain sense of the text of the statute, but we are required to give effect to that." *Sims*, 257 N.C. 32, 37, 125 S.E. 2d at 326, 330 (1962).

The law is established that a patient may waive his physician-patient privilege. 1 Brandis on North Carolina Evidence § 63 (1962). The waiver may be express or implied. *Capps v. Lynch*, 253 N.C. 18, 22, 116 S.E. 2d 137, 141 (1960).

In *Capps*, this Court considered what constitutes waiver by implication, concluding that the issue must be resolved "largely by the facts and circumstances of the particular case on trial." *Capps*, 253 N.C. at 23, 116 S.E. 2d at 141. Certain situations, however, necessarily constitute an implied waiver. Waiver by implication will be found where

> the patient calls the physician as a witness and examines him as to patient's physical condition, where patient fails to object when the opposing party causes the physician to testify, or where the patient testifies to the communication between himself and physician.

Id. The patient also waives his privilege by implication when he "voluntarily goes into detail regarding the nature of his injuries and either testifies to what the physician did or said while in attendance." *Id.*

The principle underlying our decision in *Capps* is that when a patient discloses, or permits disclosure of, information gained by the physician during the physician-patient relationship, the rationale for the physician-patient privilege evaporates. The purpose of North Carolina's statutory privilege is "to induce the patient to make full disclosure that proper treatment may be

given, to prevent public disclosure of socially stigmatized diseases, and in some instances to protect patients from self-incrimination." *Sims*, 257 N.C. at 36, 125 S.E. 2d at 329. The privilege belongs to the patient. *Capps*, 253 N.C. at 22, 116 S.E. 2d at 141. So long as the patient insists on it, the privilege remains intact. When, however, the patient breaks the fiduciary relationship with the physician by revealing, or permitting revelation of, the substance of the information transmitted to the physician, the patient has, in effect, determined it is no longer important that the confidences which the privilege protects continue to be protected. Having taken this position, the plaintiff may not silence the physician as to matters otherwise protected by the privilege.

In the instant case, the plaintiffs impliedly waived their physician-patient privileges as to each of the treating physicians defendants called as expert witnesses. The consultations between plaintiffs and these physicians received, at plaintiffs' instance or permission, thorough public exposure and scrutiny. Joyce Cates testified on direct examination concerning her communications with these physicians. She recounted her deteriorating physical condition and the corresponding course of treatment the physicians prescribed. Plaintiffs did not object when defendants called these physicians as witnesses and elicited from them detailed descriptions of the nature of plaintiffs' injuries. Applying the test for waiver enunciated by this Court in *Capps*, we conclude the plaintiffs waived their physician-patient privileges as to the nonparty treating physicians whom defendants called as expert witnesses.

We hold further that this waiver extended to any opinions held by these treating physicians formed as a result of information gained during their treatment of the plaintiffs. The distinction between information and opinion drawn by the Court of Appeals has never been made by this Court. Plaintiffs cite no case making a similar distinction, nor have we found any. We decline to draw such a line.

Strictly construing the statute protecting communications between physicians and patients, as required by *Sims*, we find no statutory basis for allowing a patient to waive his privilege as to information gained by his physician while maintaining it as to his physician's opinions. 257 N.C. at 37, 125 S.E. 2d at 330. The

statute itself suggests no division between opinion and information, and no such division is necessary to give effect "to the plain sense of the text." *Id.* As noted already, the statute's plain sense serves to protect a patient from public disclosure of the details of his relationship with his physician. A patient who discloses that which he has a right to keep confidential loses the right to claim the statute's protection.

A second reason that we decline to adopt the divisible waiver permitted by the Court of Appeals is its possible misuse by plaintiffs in personal injury actions. A divisible waiver could enable plaintiffs to elicit from their physicians factual details underlying their cases and then preclude these physicians from placing this information in a legally relevant context. When a patient dissolves the fiduciary relationship with his physician by disclosing or permitting disclosure of details of their consultations, he should not, in fairness, be allowed to prevent the physician from stating an opinion which might aid the trier of fact in assessing the merits of the patient's case. To hold otherwise would enable patients to use the privilege not defensively to protect their confidences but offensively to suppress the truth in litigation. *Capps*, 253 N.C. at 24, 116 S.E. 2d at 142.

Defendants and *amici* suggest that this Court, following the lead of commentators, legislation, and decisions in other jurisdictions, should hold the physician-patient privilege is waived whenever a patient files a lawsuit in which his physical condition is an element of the claim or defense. *See, e.g.*, 8 Wigmore, *Evidence* § 2389 (McNaughton rev. 1961). The concurring opinion argues likewise, noting that this is the rule "in most jurisdictions."[1] Since we have concluded that a waiver occurred under the circumstances of this case on the authority of *Capps*, we decline to go so far. Such a holding would be unnecessarily contrary to the *Capps* test for determining waiver. In *Capps* we declared, "[t]he question of waiver is to be determined largely by the facts and circumstances of the particular case on trial."

1. According to the *amicus* brief submitted by the North Carolina Association of Defense Attorneys, 27 states have this rule by legislative enactment and 6 by judicial decision. *Amicus Curiae Brief*, North Carolina Association of Defense Attorneys, at 11-12.

Capps, 253 N.C. at 23, 116 S.E. 2d at 141. This case presents no compelling reason for departing from this test.[2]

For the reasons stated we affirm the Court of Appeals decision as herein modified.

Modified and affirmed.

Justice MITCHELL concurring in result.

I concur in the result reached and in most of the reasoning contained in the scholarly and thoughtful opinion of the majority. I write separately, however, to express my disagreement with the ground upon which the majority resolves the question of the plaintiff's waiver of the physician-patient privilege. The majority follows *Capps v. Lynch*, 253 N.C. 18, 23, 116 S.E. 2d 137, 141 (1960) in applying the rule that questions involving waiver of the physician-patient privilege are to be determined largely by the facts and circumstances of the particular case on trial. I am of the view that *Capps* was wrongly decided on this point and that we should not perpetuate the error further. Accordingly, I would take this opportunity to overrule *Capps* in this regard and apply the rule recognized by a majority of jurisdictions—which I think clearly is the correct rule—that the "*bringing of an action* in which an essential part of the issue is the existence of physical ailment should be a *waiver* of the privilege for all communications concerning that ailment." 8 J. Wigmore, *Evidence* § 2389 (McNaugh-

2. Plaintiffs argue that defense counsel, in the preparation of this case, abused plaintiffs' physician-patient privilege by conducting, before trial, ex parte discussions with plaintiffs' treating physicians. We are unable to review these contentions because plaintiffs never pressed this grievance at trial and the trial court made no rulings directed to this point. As we read the record, plaintiffs never objected to the expert opinion testimony, nor moved to strike it, on the ground of the allegedly improper ex parte conferences. There are no assignments of error pertinent to this point. Appellate courts ordinarily do not review matters which were not first considered and ruled on by the trial court.

> The law does not require trial judges to be clairvoyant and omniscient. Neither does it permit defense counsel to play hide and seek with objections. The trial court, upon inquiry, is entitled to know the ground upon which an objection is interposed; and if counsel specifies one ground, he cannot be heard to urge a different ground on appeal.

State v. Cumber, 280 N.C. 127, 131, 185 S.E. 2d 141, 144 (1971).

ton Rev. 1961); *see also* Annotation, *Commencing Action Involving Physical Condition of Plaintiff or Defendant or Decedent as Waiving Physician-Patient Privilege as to Discovery Proceedings*, 21 A.L.R. 3d 912 (1968 & Supp. 1987).

The fact that the treating physician's knowledge and the condition of the plaintiff form the central issues in cases such as this, makes information concerning relevant medical treatments and conditions subject to discovery and use at trial. The rule applied in most jurisdictions is that in such cases, the physician-patient privilege is waived when the patient files a lawsuit which places his medical condition in controversy. *See, e.g., Mull v. String*, 448 So. 2d 952 (Ala. 1984); *Trans-World Investments v. Drobney*, 554 P. 2d 1148 (Alaska 1976); *Mathis v. Hildebrand*, 416 P. 2d 8 (Alaska 1966); *Collins v. Bair*, 252 N.E. 2d 448 (Ind. App. 1969); *State ex rel. McNutt v. Keet*, 432 S.W. 2d 597 (Mo. 1986); *DeCastro v. New York*, 54 Misc. 2d 1007, 284 N.Y.S. 2d 281 (1967); *Sagmiller v. Carlsen*, 219 N.W. 2d 885 (N.D. 1974); *Alexander v. Farmers Mutual Auto Ins. Co.*, 25 Wis. 2d 623, 131 N.W. 2d 373 (1964); *Awtry v. United States*, 27 F.R.D. 399 (S.D.N.Y. 1961); *Burlage v. Haudensheild*, 42 F.R.D. 397 (N.D. Iowa 1967).

A lawsuit is not a parlor game; it is a solemn search for truth conducted by a court of law. In my view, the "patient-litigant exception" precludes a party who has placed his medical condition in issue from invoking the physician-patient privilege to prevent the court from reaching the truth of the very issue he has raised. In this regard, a party simply "cannot have his cake and eat it too." *San Francisco v. Superior Court*, 37 Cal. 2d 227, 231 P. 2d 26, 28 (1951) (Traynor, J.).

This case presents a propitious opportunity to overrule our prior erroneous holding in *Capps* and to adopt the "patient-litigant exception" to the physician-patient privilege. By so doing, we would adopt the correct view and bring North Carolina into line with the majority of jurisdictions. This approach would not change the result in the present case, but would serve to give both Bench and Bar advance notice that we were adopting the only fair and just rule for such cases. I vote to do so now.

Justice MEYER joins in this concurring opinion.

STATE OF NORTH CAROLINA v. GEORGE RICHARD FISHER

No. 624A85

(Filed 5 November 1987)

1. **Kidnapping § 1; Constitutional Law § 34— double jeopardy—first degree kidnapping and attempted first degree rape**

Defendant's convictions for first degree kidnapping and attempted first degree rape were remanded for arrest of judgment on one of the convictions where the trial judge charged the jury that it could find defendant guilty of first degree kidnapping if they found that defendant sexually assaulted the victim.

2. **Criminal Law § 66.9— photographic identification—not impermissibly suggestive**

The trial court in a prosecution for murder, rape, and kidnapping did not err by concluding that the pretrial identification procedures through which a witness identified defendant were not so unnecessarily suggestive and conducive to irreparable mistaken identification as to violate defendant's right to due process where the witness initially identified defendant from a news photograph, went to the police, was shown a photographic lineup that included defendant, and later that day was shown a second lineup of six photographs of defendant. Assuming that the pretrial identification procedures were unnecessarily suggestive, they were not impermissibly suggestive when weighed against findings that the witness had a good look at defendant's face in daylight, the witness's description matched defendant's, the witness was positive of his identification and never identified anyone other than defendant, the identification took place only eight days after the witness saw the man he identified as defendant, and the witness had taken his medication for a lithium imbalance on the day he saw defendant and was "just fine."

2. **Searches and Seizures § 4— blood test results—no motion to suppress prior to trial—right to contest admissibility not waived**

The defendant in a prosecution for murder, rape, and kidnapping did not waive his right to contest the admissibility of tests of blood samples taken from him by not making his motion before trial where it was uncontroverted that the State did not obtain a search warrant before taking samples from defendant and, although defendant received copies of the laboratory reports and therefore had notice that the State had the evidence, he never received any notice that the State intended to use the evidence. N.C.G.S. § 15A-975.

4. **Searches and Seizures § 4— blood sample without a search warrant—admissible**

The trial judge did not err in admitting test results of blood samples taken from defendant under the good faith exception to the exclusionary rule where a copy of a valid nontestimonial identification order was not presented by the district attorney at trial but defendant had moved to suppress the results of later samples pursuant to N.C.G.S. § 15A-279(f), which prohibits the taking of evidence pursuant to a nontestimonial identification order if the per-

son subject to the order has been previously subject to a nontestimonial identification order. Furthermore, defendant did not take exception to findings that defendant had been taken to the hospital to have the samples in question taken pursuant to a nontestimonial identification order or that his motion to suppress based on a prior nontestimonial identification order had been allowed.

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

Justice MITCHELL concurring.

Justice MARTIN dissenting in part.

Justice MEYER joins in the dissenting opinion.

APPEAL by defendant from sentences of life imprisonment for murder in the first degree, twenty years imprisonment for attempted first degree rape and forty years imprisonment for first degree kidnapping, to run consecutively. Defendant was tried before *Judge Edwin S. Preston, Jr.*, and a jury at the 5 August 1985 Criminal Session of Superior Court, ORANGE County. Heard in the Supreme Court 15 April 1987.

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

Ann B. Petersen for defendant-appellant.

FRYE, Justice.

Defendant contends on this appeal that his convictions and sentences for both first degree kidnapping and attempted first degree rape violated the double jeopardy clause of the United States Constitution. We agree and remand for resentencing as set forth in this opinion. Defendant also contends that his identification by the State's witness Thomas Brown and the results of a blood sample taken from him on 2 February 1985 were erroneously admitted. We disagree, and find no error with respect to these issues.

No detailed account of the facts of this case is necessary for an understanding of the issues presented on this appeal. Summarily stated, the evidence introduced by the State at defendant's trial showed that on Wednesday, 30 January 1985, the body of Jean Fewel, born Kar Har Cheung, was discovered near Finley

Golf Course in Chapel Hill, North Carolina. She was hanging from a tree by a rope tied around her neck. The cause of death was strangulation. Examination of Miss Fewel's body and her clothes revealed semen stains and the presence of sperm in her vagina and anus, but the Assistant Chief Medical Examiner could find no indication of trauma.

Ms. Fewel, who was eight years old, was in the process of being adopted by her adoptive parents, residents of Chapel Hill. She had last been seen by her brother on the morning of her death, standing beside a car with the hood raised. A man was leaning over the car engine.

Defendant was indicted on 25 March 1985 in separate bills of indictment for murder, first degree rape, and first degree kidnapping of Miss Fewel. The three offenses were consolidated for trial. The case came on for trial as a capital case at the 5 August 1985 Criminal Session of Superior Court, Orange County. At the close of the State's evidence in the guilt phase, the trial judge dismissed the charge of first degree rape and allowed the State to continue on a charge of attempted first degree rape. The jury found defendant guilty as charged on each offense.

Pursuant to N.C.G.S. § 15A-2000, a separate sentencing hearing was held. The jury found as an aggravating circumstance that the murder was committed during an attempted first degree rape. The jury specifically did not find the submitted aggravating circumstance that the murder was especially heinous, atrocious or cruel. The jury also found numerous mitigating circumstances. It found that the mitigating circumstances were insufficient to outweigh the aggravating circumstance but did not find the aggravating circumstance sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstances. Accordingly, the jury returned a recommendation of life imprisonment. The trial judge sentenced defendant to life imprisonment for the offense of first degree murder, twenty years for the attempted first degree rape, and forty years for the first degree kidnapping, the sentences to run consecutively.

Defendant appealed his conviction for first degree murder to this Court. His motion to bypass the Court of Appeals on the lesser offenses was allowed on 22 April 1986.

I.

[1] Defendant first contends that the prohibition against double jeopardy precludes him from being convicted of both first degree kidnapping and attempted first degree rape. For the reasons stated in our decision in *State v. Belton*, 318 N.C. 141, 347 S.E. 2d 755 (1986), we agree.

In the trial judge's instructions to the jury at the close of the guilt phase of defendant's trial, the judge charged that the jury could find defendant guilty of first degree kidnapping if, *inter alia*, they found that defendant sexually assaulted the victim. In *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35 (1986), we held that a criminal defendant could not be convicted of both first degree kidnapping and a sexual assault when the latter was used to prove an element of the kidnapping. The State argues in the instant case that it presented evidence from which the jury could have inferred that defendant also committed first degree sexual offense as well as attempted first degree rape, and that this unindicted sexual offense could have been used by the jury to supply the "sexual assault" element of first degree kidnapping despite the lack of any instructions to that effect. Nevertheless, we are unable here, as we were unable in *Belton*, to say that the jury must have understood that it could only convict for first degree kidnapping by using the unindicted sexual assault, rather than the attempted rape, to supply the sexual assault element of the crime of first degree kidnapping. We hold that our decision in *Belton* controls in the instant case and that defendant's convictions of both first degree kidnapping and attempted first degree rape cannot stand. On remand, the trial court may either arrest judgment on the attempted first degree rape charge or arrest judgment on the first degree kidnapping charge and resentence defendant for second degree kidnapping. *See State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35; *State v. Dudley*, 319 N.C. 656, 356 S.E. 2d 361 (1987).

II.

[2] Defendant next argues that the in-court identification of him by the State's witness Thomas Brown, as the man Brown saw driving the victim down Churchill Street in Chapel Hill on the morning of her death, was reversible error. Defendant contends that this identification was the product of impermissibly sug-

gestive pretrial identification procedures. The test for determining whether pretrial identification procedures were impermissibly suggestive 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). As defendant correctly notes, determination of this question involves a two-step process. First, the Court must determine whether the pretrial identification procedures were unnecessarily suggestive. If the answer to this question is affirmative, the court then must determine whether the unnecessarily suggestive procedures were so impermissibly suggestive that they resulted in a substantial likelihood of irreparable misidentification. *Manson v. Brathwaite*, 432 U.S. 98, 53 L.Ed. 2d 140 (1977); *State v. Flowers*, 318 N.C. 208, 347 S.E. 2d 773 (1986); *State v. Headen*, 295 N.C. 437, 245 S.E. 2d 706 (1978). Whether a substantial likelihood exists depends on the totality of the circumstances.

> The factors to be considered . . . include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Manson, 432 U.S. at 114, 53 L.Ed. 2d at 154.

Upon defendant's objection to Brown's identification, the trial judge held a *voir dire* to determine its admissibility and ruled that Brown's identification was admissible. In support of his ruling, the trial judge made findings of fact and conclusions of law. He made the following findings, *inter alia*:

> 12. Mr. Brown observed that the driver of this car was a man wearing a plaid shirt who had blond hair, a beard and wore thick-framed glasses. Later on February 7, 1985, he gave this description to law enforcement officers.
>
> 13. Having seen Jean Fewel and the driver on January 30, 1985, Mr. Brown was watching television when he saw the of-

ficers 'bringing the defendant to the initial hearing of the charges.' That was when he was certain about who he had seen on January 30. Prior to seeing any account of the crime or any photographs of the defendant on television, Mr. Brown had told his brother John, what he had seen. When he saw the defendant on the television, he said 'that's him!' He also 'saw that they had found the girl and everything.'

14. Mr. Brown saw the News and Observer for February 5, 1985 (Defendant's Voir Dire Exhibit Number Five for Identification), which had a photograph of George R. Fisher wearing handcuffs and coming out of a building with police officers.

Defendant has taken no exception to these findings. Accordingly, the question before this Court is whether the findings support the trial judge's conclusions that the pretrial identification procedures used were not "so unnecessarily suggestive and conducive to irreparable mistaken identification as to violate defendant's right to due process" and that Brown's in-court identification was of independent origin.

Defendant contends that the pretrial identification procedures used in his case rise to the level of being impermissibly suggestive. He notes that Brown initially identified him from a news photograph. Brown then went to the police and was shown two photographic lineups by the police who were aware that Brown had seen the news photograph. Brown was shown first a photographic lineup that included defendant and later that day was shown a "second lineup" of six photographs of defendant.

First, we note that the Fourth Circuit has intimated that suggestive pretrial identification procedures that do not result from state action do not violate defendant's due process rights. *United States v. Davis*, 407 F. 2d 846 (4th Cir. 1969).

Second, we have examined the first photographic lineup seen by the witness Brown, and we do not believe that it was unnecessarily suggestive. The photographs were in black-and-white and had similarly sized white borders. All of the photographs in the lineup were of white males. Each of the men depicted had a beard and mustache. None had either very short or very long hair. All were wearing casual clothes, and all wore glasses. De-

fendant's glasses were only slightly thicker than those of the other men. Two of the men had unmistakably dark hair; two were unmistakably blond. The trial judge found that the police officers in no way suggested that Brown select defendant's photograph, or indeed that a photograph of the man Brown saw was in the lineup. As this Court has said before, "[D]ue process does not require that all participants in a lineup be identical, all that is required is that a lineup be a fair one and that the officers conducting it do nothing to induce the witness to select one participant rather than another." *State v. Grimes*, 309 N.C. 606, 610, 308 S.E. 2d 293, 295 (1983).

Third, defendant's complaint about the second lineup appears to be only that all six photographs were of defendant. Nothing else about this lineup appears to have been suggestive.

Assuming, *arguendo*, that the progress of the pretrial identification procedures from a news photograph to the first photographic lineup, which contained one photograph of defendant and photographs of similarly attired men, to the second lineup, composed entirely of photographs of defendant, was unnecessarily suggestive; nevertheless, these procedures could only be impermissibly suggestive if, taken together, they gave rise to a very substantial likelihood of irreparable misidentification. The trial judge found that the witness " 'got a real good look at [the man's] face' " in daylight when he saw the man with the victim on the morning of 30 January 1985. The description Brown gave of this man, although quite general, matches defendant. The trial judge found that Brown was positive of his identification and had never identified anyone other than defendant. The identification took place only eight days after Brown saw the man he identified as defendant. The only other circumstance of note in this case is that Brown suffers from lithium imbalance; the trial judge found, however, that on 30 January 1985, Brown had taken his medication and was " 'just fine.' " When the suggestiveness of the pretrial identification procedures, even taken together, is weighed against these factors, it is clear that the procedures do not "give rise to a very substantial likelihood of misidentification." *State v. Harris*, 308 N.C. at 163, 301 S.E. 2d at 94. *Accord State v. Corbett*, 309 N.C. 382, 307 S.E. 2d 139 (1983). The trial judge did not err in so concluding. Our inquiry therefore ends at this point. *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982).

III.

Finally, defendant argues that the trial court erred in admitting into evidence test results of a blood sample drawn from defendant on 2 February 1985.

In support of his ruling on defendant's motion to suppress this evidence, the trial judge made findings of fact. Essentially, he found that Captain Howard Pendergraph of the Chapel Hill Police Department and S.B.I. Agent Troy Hamlin took defendant to Memorial Hospital in Chapel Hill on 2 February 1985. A physician there took a blood sample, a pubic hair sample and a saliva sample from defendant "pursuant to a non-testimonial identification order." It is uncontroverted that similar samples were again taken from defendant in May, 1985, pursuant to a nontestimonial identification order. Defendant received copies of the laboratory reports on both sets of samples.

The trial judge also found that at the trial defendant moved to suppress the results of the second sample "pursuant to G.S. 15A-279(f)." That statute provides, "[a] nontestimonial identification order may not be issued against a person previously subject to a nontestimonial identification order unless it is based on different evidence which was not reasonably available when the previous order was issued." N.C.G.S. § 15A-279(f) (1983). According to the findings of fact, defendant's motion was allowed. The State later sought to introduce the results from the first group of samples, taken on 2 February 1985. Defendant moved to suppress this evidence, and the trial judge denied this motion on the grounds that defendant had waived his right to contest the admissibility of the evidence for failure to comply with the advance notice requirement of N.C.G.S. § 15A-975(a).

Defendant takes no exception to the trial judge's findings of fact.

[3] Defendant contends on appeal that the test results of the blood sample taken on 2 February 1985 were inadmissible because the sample was the result of a warrantless search and seizure in violation of his constitutional rights. He also contends that he did not waive his right to contest the admissibility of this evidence.

N.C.G.S. § 15A-975 provides that motions to suppress evidence must be made prior to trial unless "the State has failed

to notify the defendant's counsel . . . of its intention to use the evidence, and the evidence is . . . (2) Evidence obtained by virtue of a search warrant." N.C.G.S. § 15A-975(b) (1983). It is uncontroverted that the State did not obtain a search warrant before taking samples from defendant. Defendant's attorney argued before the trial judge that although he had received copies of the laboratory reports on both groups of samples, and therefore had notice that the State *had* the evidence, he had never received any notice that the State intended to *use* the evidence from the 2 February 1985 group of samples. The State does not contend otherwise. Accordingly, we agree with defendant that one of the exceptions to the general rule set forth in N.C.G.S. § 15A-975 applies in the instant case. Defendant did not waive his right to contest the admissibility of the test results of the blood samples taken from him on 2 February 1985. *Cf. State v. Maccia*, 311 N.C. 222, 316 S.E. 2d 241 (1984) (setting forth the general rule; no exception applicable).

[4] In *State v. Welch*, 316 N.C. 578, 342 S.E. 2d 789 (1986), this Court held that although the withdrawal of a blood sample from the defendant without a search warrant violated the defendant's right under the fourth amendment to the United States Constitution, the good-faith exception carved out by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897, 82 L.Ed. 2d 677 (1984), applied to the officers in *Welch* who acted in reliance upon a nontestimonial identification order issued pursuant to the requirements of N.C.G.S. § 15A-271 to -282. Defendant in the instant case argues that no good-faith exception can apply here because the State failed to show the existence of a valid nontestimonial identification order for the 2 February 1985 taking of blood samples. Defendant's contention is predicated upon the failure of the district attorney to present a copy of such an order at trial.

We disagree with the defendant. The trial judge found as a fact that defendant moved to suppress the results of the May 1985 samples pursuant to N.C.G.S. § 15A-279(f). That statute only prohibits the taking of evidence pursuant to a nontestimonial identification order if the person subject to the order has been "previously subject" to a nontestimonial identification order. N.C.G.S. § 15A-279(f) (1983). Thus, defendant's own motion to suppress the results of the second set of samples presupposes the ex-

istence of a prior nontestimonial identification order. The trial judge found that this motion was allowed. The trial judge also found that Captain Pendergraph took defendant to Memorial Hospital on 2 February 1985 to have the samples in question taken "pursuant to a nontestimonial identification order." Although defendant contends before this Court that the State failed to show the existence of any order, defendant has nevertheless taken no exception to any of these findings of fact. They are accordingly binding upon this Court on appeal. *See State v. Lampkins*, 283 N.C. 520, 196 S.E. 2d 697 (1973). We hold that our decision in *State v. Welch* also controls the result in the instant case and the trial judge did not err in admitting the test results of the blood samples taken from defendant on 2 February 1985. *See* 316 N.C. 578, 342 S.E. 2d 789.

One final matter must be resolved in connection with this issue. On 7 November 1986, the State moved to amend the record on appeal to include a copy of the May 1986 nontestimonial identification order, the application for this order, and an affidavit by the district attorney. This Court allowed the State's motion on 18 November 1986, before the defendant's time to respond had elapsed. Defendant requested the Court to reconsider its order allowing the amendment and moved to strike the amendment and any references in the State's brief to matters contained therein. In support of his motion, defendant attached affidavits from his trial attorney and from the district attorney. This Court deferred action on defendant's motion and allowed it to be argued at oral argument. Defendant's motion is allowed. The amendment to the record allowed by this Court on 18 November 1986 and all references in the State's brief to matters therein are stricken.

For the reasons discussed herein, we find no error in defendant's trial, except that the case must be remanded to the Superior Court, Orange County, for resentencing in either the first degree kidnapping or the attempted first degree rape offense, in a manner not inconsistent with this opinion.

No. 85CRS556 Murder in the First Degree—No error.

No. 85CRS557 Attempted First Degree Rape—Remanded.

No. 85CRS558 First Degree Kidnapping—Remanded.

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

Justice MITCHELL concurring.

I continue to believe that the reasoning of Justice Martin's dissent, which I joined, in *State v. Belton*, 318 N.C. 141, 347 S.E. 2d 755 (1986), is correct and that *Belton* was wrongly decided on the double jeopardy question which is before us again in this case. As *Belton* represents the current status of the law on the question, however, I feel compelled to vote to apply it at this time. Because I am unable to say with certainty that the jury here used the sexual assault for which the defendant had not been indicted to supply the sexual assault element of the crime of first degree kidnapping, I am unable to distinguish this case from *Belton* with regard to the double jeopardy question. Accordingly, I concur in the opinion of the majority.

Justice MARTIN dissenting in part.

I continue to adhere to my dissent in *State v. Belton*, 318 N.C. 141, 347 S.E. 2d 755 (1986), on the double jeopardy issue; therefore, I respectfully dissent as to part I of the majority opinion.

Furthermore, even under *Belton*, a close reading of the evidence and the charge of the trial judge demonstrates that defendant's double jeopardy rights were not violated. Here, as in *Belton*, there was substantial evidence of a sexual assault on little Jean Fewel separate and apart from the attempted rape in the first degree. Dr. Deborah L. Radisch, a pathologist who performed the autopsy on Jean Fewel, testified that she found male sperm inside the vulva and vagina of the victim, as well as inside her anus. This testimony was also supported by the physical findings introduced into evidence. It is inescapable that at least two sexual assaults were committed on the victim. Dr. Radisch testified that the semen could have been placed in the vagina by being transferred to the vagina on some object smaller than an adult penis. There is no way that this semen could have been placed inside the vagina and inside the anus of this eight-year-old child without the acts being sexual offenses in violation of N.C.G.S. § 14-27.4. By so doing, defendant committed two sexual assaults on this child.

In the charge on attempted rape, the trial judge stated the testimony with respect to defendant's ejaculating in the pubic area of Jean Fewel, based upon the finding of semen in her vulva and vagina, as evidence of that charge. Nowhere in the charge on attempted rape did the trial judge mention the evidence of semen found in her anus.

Had the trial judge charged the jury, in part, on the kidnapping charge, as follows, there would be no question that the judgments would be proper:

> . . . and fifth, that Jean Fewel had been sexually assaulted. In determining this fifth element you may not consider the alleged attempted first degree rape. You must find the existence of another sexual assault on Jean Fewel separate and apart from the alleged attempted first degree rape. If the state has satisfied you beyond a reasonable doubt that defendant deposited semen inside the anus of Jean Fewel, aged eight years, by use of his penis or otherwise, that would constitute a sexual assault.

In charging the jury on kidnapping the trial judge said, in part:

> Fourth, that this removal was a separate, complete act, independent of and apart from the felony of attempted first degree rape; and fifth, that Jean Fewell [sic] had been sexually assaulted.
>
> So I charge that if you find from the evidence beyond a reasonable doubt that on or about January the 30th, 1985, George Fisher unlawfully put Jean Fewell into his car and carried her from near her home to the Old Mason Farm Road, Chapel Hill, and that Jean Fewell had not reached her 16th birthday and that her parents did not consent to this removal, and that this was done for the purpose of facilitating George Fisher's commission of the felony of attempted first degree rape, and that this removal of Jean Fewell was a separate, complete act, independent of and apart from the felony of attempted first degree rape, and that Jean Fewell had been sexually assaulted, it would be your duty to return a verdict of guilty of first degree kidnapping.

This part of the charge was repeated in the instructions on felony murder.

It was thus clear to the jurors that they must find that the taking and removal of the child was a separate and complete act, independent of and apart from the attempted rape. It was also clear to the jury that it must find that defendant committed a sexual assault on the victim in order to convict him of kidnapping in the first degree. With these two requisites presented side by side to the jury, any rational juror would know that there must be proof of a sexual assault upon the victim other than the attempted rape. Evidence of such additional sexual assault was overwhelming. Under these instructions, this Court is not required to make the assumptions complained of in *Belton*. There is no ambiguity to be construed in favor of the defendant. Under these circumstances, I do not find any violation of double jeopardy principles.

I concur in the remainder of the majority opinion.

Justice MEYER joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. WILLIAM KELLY STRICKLAND

No. 569A86

(Filed 5 November 1987)

1. Constitutional Law § 63— death qualified jury—constitutional

The trial court did not err in a prosecution for murder, kidnapping, and discharging a firearm into an occupied motor vehicle by death qualifying the jury.

2. Criminal Law § 63.1— mental capacity of defendant—lay opinion admissible

The trial court did not err in a prosecution for murder, kidnapping, and discharging a firearm into an occupied vehicle by allowing the State to ask defendant's estranged wife whether defendant knew the difference between right and wrong on the date of the killing. Lay opinion concerning the mental capacity of a defendant in a criminal case is admissible; however, assuming error, there was no prejudice because defense counsel asked on cross-examination whether the witness had told defendant's sisters that defendant had run around his yard naked and urinated on trees like a dog, whether defendant had been in a mental hospital, whether he awakened his family at night to go

"bird blinding," whether he drove his truck down the road at excessive speeds with the doors open and his family inside, and whether he had injured his head during a motorcycle accident. Defense counsel also asked another witness whether defendant was in his right state of mind at some point prior to the killing and whether he had a reputation in the community for being crazy. N.C.G.S. § 8C-1, Rule 701.

3. **Criminal Law § 64— lay opinion that defendant intoxicated—no error**

The trial court did not err in a prosecution for murder, kidnapping and discharging a firearm into an occupied vehicle by allowing the State to ask defendant's companion whether defendant was intoxicated on the night of the murder where the companion had had an opportunity to observe defendant.

4. **Criminal Law § 65— testimony that companion believed defendant's threat—admissible**

In a prosecution for murder, kidnapping, and discharging a firearm into an occupied vehicle, testimony by defendant's companion on the night of the murder that he believed defendant's statement that defendant would get him next if he told anybody because the companion felt that if defendant "knocked off" a lady, he would knock off a man was not prejudicial in the context of the witness's prior testimony detailing defendant's offenses. N.C.G.S. § 8C-1, Rule 602, N.C.G.S. § 8C-1, Rule 701, N.C.G.S. § 15A-1443(a).

5. **Criminal Law § 63— defendant's sanity—opinion of companion**

The trial court did not err in a prosecution for murder, kidnapping and discharging a firearm into an occupied vehicle by allowing the prosecutor to ask defendant's companion on the night of the shooting whether defendant was in his right mind and knew the difference between right and wrong or in allowing the witness's answers that defendant had been the same since he had known him and that defendant would have shot him if he had been out of his mind. The witness clearly had an opportunity to form an opinion as to defendant's mental capacity. N.C.G.S. § 8C-1, Rule 701.

6. **Criminal Law § 89.10— impeachment of witness—prior assaults**

The trial court in a prosecution for kidnapping, murder, and discharging a firearm into an occupied vehicle did not err by refusing to allow defendant to cross-examine his companion on the night of the murder about certain assaults the companion had allegedly committed. N.C.G.S. § 8C-1, Rule 608(b).

7. **Kidnapping § 1.2— unlawful confinement—evidence sufficient**

The trial court did not err by not dismissing a kidnapping charge at the close of all the evidence where the evidence showed that defendant shot at the victim's car several times, got into the car and slapped her twice, and the car then pulled down a dirt road. Viewed in the light most favorable to the State, there was evidence which permitted a reasonable inference that defendant unlawfully confined the victim in the car. N.C.G.S. § 14-39 (1986).

8. **Criminal Law § 63— failure to instruct on insanity—no error**

The trial court did not err in a prosecution for murder, kidnapping, and discharging a weapon into an occupied vehicle by not charging the jury on the

defense of insanity where the evidence showed that defendant's behavior was often antisocial and unacceptable, but did not support defendant's contention that he was incapable of knowing the nature and quality of his actions or of distinguishing right from wrong in relation to those actions.

9. Homicide § 28.6— murder—defense of intoxication—refusal to instruct—no error

The trial court did not err in a first degree murder prosecution by refusing to instruct on voluntary intoxication and to submit the possible verdict of second degree murder on the basis that voluntary intoxication negated the specific intent necessary for first degree murder where the evidence showed only that defendant had had two drinks earlier in the evening and was insufficient to show that he was incapable of forming the intent necessary for first degree murder.

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 first degree murder before *Small, J.*, at the 27 May 1986 Criminal Session of Superior Court, WAYNE County. On 24 February 1987 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 forty years imprisonment, and discharging a firearm into an occupied motor vehicle, for which the trial court sentenced defendant to ten years imprisonment. Heard in the Supreme Court 12 October 1987.

Lacy H. Thornburg, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

R. Gene Braswell, S. Reed Warren, and Glenn Alton Barfield for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of first degree murder, kidnapping, and discharging a firearm into an occupied motor vehicle. He was sentenced to life imprisonment for the murder, forty years (consecutive) for the kidnapping, and ten years (consecutive) for firing into the motor vehicle. We find no error.

The State's evidence, in pertinent summary, showed the following:

Defendant and his wife, Myra Strickland, were separated. On 9 July 1985, Bishop Edith H. Dickerson, Ms. Strickland's minister, picked her up from her mother's house in Wilson and drove her to

church in Rocky Mount for the evening service. After the service, at about 10:00 p.m., Bishop Dickerson and Ms. Strickland left the church. They saw defendant's car parked across the street with defendant sitting inside. Robert Bayman, defendant's friend, was walking down the street. The women drove behind defendant's car, then went back to the church. While Ms. Strickland called the police, defendant walked up to the church and Bishop Dickerson met him at the door. Defendant told her that he had heard that she was a lesbian and that he would "get [her]." He left when she refused to let him in the church. The two women then left and drove to Wilson. On their way, defendant's car passed them. Bayman was driving and defendant was in the passenger seat. Bishop Dickerson dropped Ms. Strickland off at her mother's home between 10:30 and 10:45 p.m.

Defendant had asked Bayman to drive him to Rocky Mount that evening to see a girlfriend. They met at a bootlegger's house, where they each had one drink. Bayman testified that defendant was not drunk at that time. Bayman and defendant then drove to another house, where they had a second drink. While there, defendant shot a pistol several times between his legs and over his shoulder. They left at about 8:30 p.m.

When they arrived in Rocky Mount, they stopped at a place where defendant said he was going to visit a woman. Defendant walked off. After a few minutes he rushed back to Bayman, telling him to run. They drove to a gas station, where defendant asked Bayman to hide the car and wait. Defendant pointed a gun at Bayman, telling him to get out of the car because he was going to kill someone. When Bayman refused to get out, defendant ordered him to follow a car that had passed. He followed this car, which was Bishop Dickerson's, to Ms. Strickland's mother's house. Ms. Strickland got out and Bishop Dickerson drove away. Bayman continued to follow her car. After several miles, defendant asked Bayman to pull up beside her car. Defendant aimed a gun out of his window, telling Bishop Dickerson to stop. The cars jostled for position on the road, during which time defendant fired several shots at Bishop Dickerson's car and threatened Bayman with the gun.

When Bishop Dickerson stopped her car, defendant got inside and slapped her twice. Her car then pulled down a dirt road. Bay-

man followed in defendant's car. When Bayman drove around a curve in the road, he saw Bishop Dickerson's car in some trees. He saw defendant get out of the car and empty shells from his gun into his hand. Defendant stated, "She is dead now." Bayman said, "[M]an, you didn't kill that lady." Defendant answered, "[Y]es, I did." Bayman saw Bishop Dickerson in the car with a wound in her chest. She appeared to be dead. Bayman and defendant drove to a convenience store in Wilson. When police cars pulled up, defendant ran away.

An assistant medical examiner who performed an autopsy on Bishop Dickerson testified that a "bullet wound track" perforated the upper part of her heart and aorta, causing her to die from massive internal bleeding.

Although defendant did not call any witnesses at trial, he attempted to show, through cross-examination of the State's witnesses, that he was insane at the time of the offenses.

[1] Defendant first assigns as error the trial court's denial of his pretrial motion to prohibit the prosecutor from "death qualifying" the jury. Defendant contends that the court's "blanket" denial of this motion violated his right to trial by a jury composed of a representative cross-section of the community. He argues that the court should not have ruled on this motion until the State attempted to excuse particular prospective jurors because they were opposed to capital punishment, and that the court should have made an individual evaluation of each person to see if he or she would impose the death penalty.

Defendant's argument has no merit. The United States Supreme Court recently held that the federal constitution does not prohibit states from "death qualifying" juries in capital cases. *Lockhart v. McCree*, 476 U.S. ---, 90 L.Ed. 2d 137 (1986). We have held that the practice of "death qualifying" juries in capital cases violates neither the United States Constitution nor the North Carolina Constitution. *State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986).

[2] Defendant further contends that the court erred by allowing the State to ask Myra Strickland whether defendant knew the difference between right and wrong during June 1985 and by allowing Ms. Strickland to answer. Defendant argues that the question

and answer have no probative value because, first, the terms "right and wrong" are relative, and, second, when a defendant raises the insanity defense, the proper question is not whether the defendant knew right from wrong generally, but whether he or she had the mental capacity "to distinguish between right and wrong at the time and in respect of the matter under investigation." *State v. Benton*, 276 N.C. 641, 652, 174 S.E. 2d 793, 800 (1970) (quoting *State v. Jones*, 229 N.C. 596, 598, 50 S.E. 2d 723, 724 (1948)) (prosecutor not permitted to ask psychiatrist on cross-examination whether defendant knew the difference between right and wrong on the day of the killing).

We conclude that our decision in *State v. Boone*, 302 N.C. 561, 276 S.E. 2d 354 (1981), governs this case. In *Boone*, the district attorney asked the defendant's father on cross-examination whether defendant knew right from wrong. The father answered that "at times he knew the difference between right and wrong." We held that the trial court did not err in admitting the question and answer because lay opinion concerning the mental capacity of a defendant in a criminal case is admissible. *Id.* at 565, 276 S.E. 2d at 357. Similarly, the trial court in the present case did not err when it allowed the State to ask Ms. Strickland whether defendant knew the difference between right and wrong in June 1985 and when it allowed Ms. Strickland's affirmative response.

We note that the adoption of N.C.G.S. § 8C-1, Rule 701, did not effect a substantive change in the law regarding the admissibility of lay opinions of sanity. The witness here had first-hand knowledge regarding defendant's sanity and her opinion could have been helpful to the jury. *See State v. Davis*, 321 N.C. 52, 361 S.E. 2d 724 (1987).

Assuming, *arguendo*, that the trial court erred, the error was harmless. On cross-examination, defense counsel asked Ms. Strickland whether she had told defendant's sisters that defendant had run around his yard naked and urinated on trees like a dog, whether defendant had been in a mental hospital, whether he waked his family up at night to go "bird blinding," whether he drove his truck down the road at excessive speeds with the doors open and his family inside, and whether he had injured his head during a motorcycle accident. Further, defense counsel asked

Robert Bayman whether defendant was in "his right state of mind" at some point prior to the killing and whether he had a reputation in the community for being crazy. Some of the incidents about which defense counsel asked Bayman and Ms. Strickland allegedly occurred prior to June 1985, even months and years earlier. In light of these questions and the evidence elicited thereby, the question to Ms. Strickland of whether defendant knew right from wrong in June 1985, and her affirmative response, could not have prejudiced defendant. N.C.G.S. § 15A-1443(a).

Several of defendant's assignments of error address the direct and cross-examination of State's witness Robert Bayman.

[3] Defendant first complains that the court erred by allowing the State to ask Bayman whether, in his opinion, defendant was intoxicated on 9 July 1985. Defendant contends that the State did not lay a proper foundation for the admission of Bayman's opinion because the evidence at trial had not shown that Bayman had had an adequate opportunity to observe defendant before they left the bootlegger's house. In *State v. Dawson*, 228 N.C. 85, 88, 44 S.E. 2d 527, 529 (1947), we held that:

> A lay witness is competent to testify whether or not in his opinion a person was drunk or sober on a given occasion on which he observed him. The conditions under which the witness observed the person, and the opportunity to observe him, go to the weight, not the admissibility, of the testimony.

Bayman testified that he was with defendant at the bootlegger's house and saw defendant take a drink. Since Bayman had the opportunity to observe defendant, he was competent to give his opinion as to whether defendant was intoxicated at that time.

[4] During direct examination, Bayman testified that when he and defendant left the crime scene, defendant said, "[I]f you tell anybody . . . I am going to gets [sic] you next." When the prosecutor asked Bayman whether he believed defendant, Bayman replied, "I said, yes, I believe him because I felt like if he knocked a lady off he would knock a man off." Defendant contends that Bayman's statement was inadmissible under Rule 602 of the North Carolina Rules of Evidence because Bayman had no personal knowledge that defendant "knocked off" Bishop Dickerson; he had

not actually seen defendant kill her. He contends that the statement was also inadmissible under Rule 701 because Bayman's opinion was not "helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C.G.S. § 8C-1, Rule 701 (1986).

Assuming, without deciding, that the admission of this evidence was error, we hold that the error was harmless. In the context of Bayman's prior testimony detailing defendant's offenses, his statement that defendant "knocked off" Bishop Dickerson could not have been prejudicial. N.C.G.S. § 15A-1443(a).

[5] Defendant further contends that the trial court erred by allowing the prosecutor to ask Bayman whether in his opinion, based upon what he saw defendant do from the time they pulled behind Bishop Dickerson's car until defendant ran from the convenience store, defendant was in his right mind and knew the difference between right and wrong. Defendant also contends that the court erred by allowing Bayman's replies that defendant was in his right mind "[b]ecause ever since I been knowing him, he was the same as he were then" and "because at the time that he aimed the gun at me, he would have shot me if he had been out of his head." Defendant argues that since Bayman applied the incorrect standard in forming an opinion as to whether defendant was "in his right mind," his testimony could not have been helpful to the determination of defendant's mental capacity, and that it thus should have been excluded under Rules 701(b), 402 (relevance) and 403 (probative value outweighed by danger of prejudice).

We hold that the court did not err. A lay witness may testify in the form of an opinion if the opinion is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C.G.S. § 8C-1, Rule 701 (1986). "A lay witness, from observation, may form an opinion as to one's mental condition and testify thereto before the jury." *State v. Moore*, 268 N.C. 124, 127, 150 S.E. 2d 47, 49 (1966); *see also State v. Brower*, 289 N.C. 644, 663, 224 S.E. 2d 551, 564 (1976). Bayman testified at trial that he had known defendant three to five years, and that he was with him several hours on 9 July 1985. Clearly, Bayman had the opportunity to form an opinion as to defendant's mental capacity. In *State v. Moore*, we held that the trial court erred by refusing to allow a

witness to answer defense counsel's question as to whether the defendant was acting like a man "not in his right mind." 268 N.C. at 127, 150 S.E. 2d at 49. Likewise, it would have been error not to allow Bayman to testify similarly here.

[6] Neither do we find error in the trial court's refusal to allow defense counsel to cross-examine Bayman about certain assaults Bayman allegedly committed. Rule 608(b) states in part that:

> (b) *Specific instances of conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

N.C.G.S. § 8C-1, Rule 608(b) (1986). In *State v. Morgan*, 315 N.C. 626, 635, 340 S.E. 2d 84, 90 (1986), we held that "extrinsic instances of assaultive behavior, standing alone, are not in any way probative of the witness' character for truthfulness or untruthfulness," and therefore are inadmissible under Rule 608(b).

[7] Defendant's contention that the trial court should have dismissed the kidnapping charge at the close of all evidence is also without merit. The standard of review of a trial court's denial of defendant's motion to dismiss at the close of the State's evidence is:

> whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971); *State v. Mason*, 279 N.C. 435, 183 S.E. 2d 661 (1971).
>
> If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion

> should be allowed. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967); *State v. Guffey*, 252 N.C. 60, 112 S.E. 2d 734 (1960).
> . . .
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> . . . .
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> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978); *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975).

State v. Mercer, 317 N.C. 87, 96, 343 S.E. 2d 885, 890-91 (1986) (quoting *State v. Powell*, 299 N.C. 95, 98-99, 261 S.E. 2d 114, 117 (1980)).

Unlawful confinement or restraint is an element of the crime of kidnapping. N.C.G.S. § 14-39 (1986). Defendant contends that since the evidence is insufficient to show that he unlawfully confined or restrained Bishop Dickerson, the trial court should have dismissed the kidnapping charge. The evidence shows that after defendant had shot at Bishop Dickerson's car several times, he got into the car and slapped her twice, then the car pulled down a dirt road. We conclude that, viewed in the light most favorable to the State, there is evidence which permits a reasonable inference that defendant unlawfully confined the victim in her car.

[8] Defendant further contends that the trial court erred by not charging the jury on the defense of insanity. Where a defendant's evidence discloses facts which are legally sufficient to constitute a defense to the crime with which he or she has been charged, the court is required to instruct the jury as to the legal principles applicable to that defense. *State v. Mercer*, 275 N.C. 108, 116, 165 S.E. 2d 328, 334 (1968). We hold that the evidence presented at trial does not present facts legally sufficient to establish a defense of insanity. The legal test for insanity is

> whether defendant, at the time of the alleged act, was laboring under such a defect of reason, from disease or deficiency

> of the mind, as to be incapable of knowing the nature and quality of his act, or if he does know this, was by reason of such a defect of reason incapable of distinguishing between right and wrong in relation to such act.

State v. Corley, 310 N.C. 40, 53, 311 S.E. 2d 540, 548 (1984) (quoting *State v. Vickers*, 306 N.C. 90, 94, 291 S.E. 2d 599, 603 (1982)); *see also State v. Jones*, 293 N.C. 413, 425, 238 S.E. 2d 482, 490 (1977). Defendant claims that evidence elicited on cross-examination of Ms. Strickland and Robert Bayman was sufficient to make out a defense of insanity. That evidence included testimony that defendant drove down the highway recklessly, that he woke his family up during the night to go "bird blinding," that he shot into the floor beside his wife a few times, that he beat his wife and children, and that he had a reputation in the community for being crazy. Although this evidence tends to show that defendant's behavior was often antisocial and unacceptable, it does not support defendant's argument that at the time he killed Bishop Dickerson he was incapable of knowing the nature and quality of his actions or of distinguishing between right and wrong in relation to these actions.

[9] Finally, defendant contends that the trial court erred in refusing to instruct the jury on voluntary intoxication as a defense to the first degree murder charge and in refusing to submit the possible verdict of second degree murder to the jury on the basis that voluntary intoxication negates the specific intent necessary for first degree murder. First, to support an instruction of voluntary intoxication,

> [t]he evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. *State v. Shelton*, 164 N.C. 513, 79 S.E. 883 (1913). In the absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon. *State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238 (1975).

State v. Medley, 295 N.C. 75, 79, 243 S.E. 2d 374, 377 (1978). The evidence here showed only that defendant had had two drinks earlier in the evening. This evidence was insufficient to show that defendant was so intoxicated at the time of the crime that he was

incapable of forming the intent necessary for first degree murder. This Court has held that "when the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct on the lesser offense." *State v. Williams*, 314 N.C. 337, 351, 333 S.E. 2d 708, 718 (1985) (quoting *State v. Hardy*, 299 N.C. 445, 456, 263 S.E. 2d 711, 718-19 (1980)). Since the State's evidence clearly showed every element of first degree murder, and since defendant has not shown voluntary intoxication sufficient to negate specific intent, it follows that the trial court was not required to submit the possible verdict of second degree murder to the jury. The trial court thus did not err in refusing to instruct on voluntary intoxication and to submit the possible verdict of second degree murder to the jury. *See State v. Goodman*, 298 N.C. 1, 12-14, 257 S.E. 2d 569, 578-79 (1979).

For the reasons set forth, we find that the defendant received a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JOSEPH EARLE LEWIS, JR.

No. 571A86

(Filed 5 November 1987)

1. **Constitutional Law § 48— misstatement in opening statement—no denial of effective assistance of counsel**

Defendant was not denied his constitutional right to the effective assistance of counsel in a prosecution for first degree murder, armed robbery, felonious breaking and entering, and felonious larceny because defense counsel, during his opening statement to the jury, placed before the jury evidence of other pending charges against defendant when he incorrectly stated that defendant had no other pending charges against him for breaking and entering and was contradicted by the prosecutor. Nor was there error in the trial court's instructions to the effect that the jurors should not consider the opening statements of counsel as evidence in deliberating on their verdict.

2. **Homicide § 25.2— first degree murder—conviction on premeditation and deliberation theory—failure to instruct on felony murder**

A defendant who was convicted and sentenced for first degree murder on the theory of premeditation and deliberation and who received a consecutive

sentence for armed robbery was not prejudiced by the trial court's failure to submit first degree murder on the theory of felony murder with robbery as the underlying felony since no merger would have occurred if defendant had been convicted under both theories, and the trial court would still have been free to impose a separate and consecutive sentence for armed robbery.

3. Criminal Law § 101.4— denial of jury request to review evidence—exercise of discretion

The trial judge properly exercised his discretion in compliance with N.C. G.S. § 15A-1233(a) when he denied a jury request to review a transcript of the testimony where the judge allowed the jury's request to examine photographs and then told the jurors that he would not have the court reporter read back to them from her notes because "I just don't think that's the way to do things."

APPEAL by defendant from sentences imposed by *Brannon, J.*, at the 12 September 1983 Criminal Session of Superior Court, ONSLOW County. Heard in the Supreme Court 8 September 1987.

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

Robin E. Hudson, for defendant-appellant.

FRYE, Justice.

Defendant contends on this appeal that he was denied his constitutional right to effective assistance of counsel because of his own lawyer's misstatements during opening statements to the jury. Defendant contends also that the trial judge committed reversible error when he instructed the jury regarding defense counsel's misstatements, for his failure to instruct the jury on felony murder, and for his alleged failure to exercise any discretion when denying the jury access to the trial transcripts during jury deliberations. We find no prejudicial error and hold that defendant received a fair trial.

Defendant was indicted on 26 July 1983 for felonious breaking and entering of the Farmers' Cooperative Exchange (FCX) in Jacksonville, North Carolina, felonious larceny, robbery with a dangerous weapon and first degree murder of Harry Fountain, the owner of Harry's Wheel Alignment, located also in Jacksonville, North Carolina. These offenses were consolidated for trial. Defendant was tried at the 12 September 1983 Criminal Session of Superior Court, Onslow County, before Brannon, J.

The State's evidence against defendant included testimony from several members of the victim's family, law enforcement officers, Timothy Fisher who allegedly aided and abetted in the crimes charged, and others.

Joseph Pelletier, the manager of the FCX store, testified that when he went to his store on 27 January 1983 he discovered that somebody had forcefully entered his store during the night, had moved a 500 pound safe, had left behind an acetylene torch and a splitting maul, and had taken a pair of gloves, a flashlight and some batteries. The FCX store is located next to Harry's Wheel Alignment.

Timothy Fisher, who was fifteen years old at the time of the alleged offenses, testified that he had known defendant for about two years and that they had "hung around" together. He testified that on the night of 26 January 1983 he and defendant were at Jerry's Disco in Jacksonville, North Carolina, and that defendant suggested that they "hit" some places. According to Fisher he and defendant then walked to a store across from the FCX whereupon defendant stole some cigarettes and said that they would "hit" the FCX and Harry's Wheel Alignment. Fisher further testified that he and defendant went first to the FCX around 8 p.m. Defendant told Fisher to be the "lookout," whereupon defendant broke into the FCX with a small crowbar he had in his jacket. Fisher testified that defendant stayed inside the FCX for about an hour and a half and came out with some gloves, a flashlight and a crowbar.

According to Fisher, he and defendant then went to Harry's Wheel Alignment where Fisher again served as the "lookout" while defendant went in. In a few minutes someone drove up and went into the garage, whereupon Fisher banged on the wall to let defendant know that someone was coming. Fisher testified that within fifteen minutes defendant came running out of the store. Defendant told Fisher that he had hid in the bathroom but a guy came in to wash his hands, saw defendant in the mirror, whereupon defendant hit him from behind, took his wallet and ran. Fisher further testified that as he and defendant were running towards the bus station defendant threw a crowbar into the woods behind the store and threw a wallet into an area beside a trailer park. Defendant kept all the money. After arriving at the

bus station, according to Fisher, he and defendant took a taxi to Court Street and later went separate ways. On cross-examination Fisher admitted that he had been previously charged in forty-one break-ins.

Defendant did not testify but he did present alibi evidence. Jerry Pickett, the owner of Jerry's Disco in Jacksonville, North Carolina, testified that during the evening of the alleged offenses defendant was at the disco until approximately 10 p.m. at which time he left and returned at 11:30 p.m. On rebuttal, Earl Manning, the district attorney's investigator, testified that when he initially conducted the investigation Jerry Pickett had told him that defendant came in around 6 p.m. on the day of the alleged offenses and left shortly after the disco opened and that Jerry Pickett stated he did not see defendant again until approximately 11 p.m. when defendant arrived in a cab with Timothy Fisher.

The jury returned verdicts of guilty of all submitted charges. At the sentencing hearing on the first degree murder charge the jury found one aggravating circumstance, that defendant committed the murder while he was engaged in the commission of robbery with a dangerous weapon. The jury specifically found that the offense was not especially heinous, atrocious or cruel. In determining whether there were any mitigating circumstances, the jury found that defendant had no significant history of prior criminal activity and also found other mitigating circumstances arising from the evidence. In response to the question of whether the mitigating circumstances found were insufficient to outweigh the aggravating circumstance, the jury answered "no" and accordingly recommended that defendant be sentenced to life imprisonment. The trial judge thereafter conducted a sentencing hearing with reference to the felony convictions, made appropriate findings, and sentenced defendant accordingly.

The following judgments were entered against defendant: life imprisonment for first degree murder, forty years for robbery with a dangerous weapon, ten years for felonious breaking and entering, ten years for felonious larceny, all sentences to be served consecutively. Because the time within which to perfect defendant's appeal as of right for the life imprisonment sentence had expired, defendant filed a *pro se* petition for writ of certiorari which was allowed by this Court on 18 September 1986. Defend-

ant's motion to bypass the Court of Appeals on the lesser offenses was allowed by this Court on 24 February 1987.

[1] In his first assignment of error defendant contends he was denied his constitutional right to effective assistance of counsel when his own attorney, through his misstatements, permitted the prosecutor to disclose to the jury that defendant had been previously arrested for other breaking and entering offenses, a fact defendant contends the jury would not have otherwise known. Defendant contends that this disclosure of other alleged crimes was highly prejudicial and demonstrates *per se* ineffective assistance of counsel entitling defendant to a new trial. Defendant's second assignment of error is a continuation of his first assignment of error in that defendant argues that the trial court's instructions to the jury regarding counsels' comments were inadequate to erase the purported prejudice. We consider the first and second assignments of error together.

The district attorney's opening statement briefly summarized the evidence the State intended to present. The statement referred to Timothy Fisher as "a young 15 year old boy was 15 at the time; he is now 16, and the defendant, who I think is about 26 or 27 years old." The district attorney's opening statement otherwise forecasted the State's evidence without comment upon or description of either the defendant or Timothy Fisher, the defendant's alleged accomplice. Defense counsel then began his opening statement. During this opening statement, counsel requested the jurors to carefully scrutinize Timothy Fisher's testimony:

> The District Attorney, Mr. Andrews, has made much of the fact that Timothy Fisher 15, now 16 years of age, and Joe Earle Lewis, 26 years of age, apparently were together with respect to this, thereby, of course, at least initially indicating to you that we have a very young boy and we have a mature individual. The 15, now 16 year old boy, however, I think the evidence will indicate has been arrested and charged with forty-one separate breakings and enterings and larcenies occurring here in Onslow County all on his own. The defendant in this case, Joseph Earle Lewis, has not been charged, except in this case with any breakings and enterings and larcenies occurring here in Onslow County.
>
> MR. ANDREWS: Your Honor, I object to that. Mr. Miner knows that that is not so.

MR. MINER: Excuse me, Your Honor. I believe that there is not record other than the offenses which were brought to trial or aligned with these cases.

MR. ANDREWS: I believe if he'll look at the calendar, we had a hearing on motions last week, which joined this break-in and the murder. There were other break-ins which he was charged with that were not joined with this case.

THE COURT: Ladies and Gentlemen, as I told you yesterday and I repeat again today, it will be your duty in this case as jurors have a duty in every case to decide these cases now on trial from the evidence which will come from the stand in this trial in the light of the applicable law of North Carolina that I'll instruct you on at the conclusion of the trial. You will not base your verdict on anything else.

Now, each of these esteemed lawyers by Statute is allowed to make what's known as an opening statement; that is, in fact, what they are doing. As you have been told and I repeat to you now, an opening statement is not evidence. After all, the lawyers are not sworn; they are not subject to cross-examination; they are advocates. What they are attempting to do by an opening statement is simply to give you kind of a verbal road map of what they contend the issues in the case are and what they further contend is the admissible evidence which will come out in the trial dealing with those issues. So, to the extent that an opening statement may be beyond that or appear to vary from that, so it's no longer a verbal roadmap of what's to be done at trial when [sic] you are, of course to disregard it. I assure you that both of these lawyers are very capable and none of them would attempt to do anything outside of the rules of procedure or anything in any kind of effort to mislead you. They are advocates and as advocates they are not to take anything from that. You are to decide this case from the evidence and the law. All right. Obviously what they say here is simply not evidence. It's not argument, either. It is an opening statement. You may proceed.

MR. MINER: I stand here as a very embarassed counsellor. I misspoke in the case. The point that I was intending to make —thank you, Mr. Andrews. The point I was trying to make in

> the case, this so-called young boy has 41 arrests for breaking and entering and larceny here in Onslow County. There's a plea bargain in return for his testimony in this case by which he is allowed to plead to 25 of those 41. He has not yet been sentenced for those 25 breaking, entering and larcenies to which he has pled guilty, and he will not be sentenced until after the conclusion of this trial with respect to his plea bargain. In other words, he must testify before he will be sentenced in this case, pursuant to the plea in the case.

Defense counsel closed his opening statement by suggesting possible motives for Timothy Fisher's conduct and by urging the jury to carefully evaluate Fisher's testimony:

> I'd like for you to listen very closely to the testimony of Timothy Fisher. I apologize for misspeaking to Mr. Andrews, the Court and to yourself in this case, and I hope you won't hold that misspeaking against my client. Thank you very much.

Defendant asserts that this conduct deprived him of constitutionally effective assistance of counsel because counsel's opening statement placed before the jury evidence of the defendant's other pending charges. The trial court's instructions, defendant asserts, did nothing to repair the alleged damage.

A defendant's constitutional right to counsel includes the right to the effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241 (1985). The test for determining whether a defendant in a criminal case has received effective assistance of counsel is that set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674 (1984), and the test is the same under both the federal and state constitutions. *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241. To establish that there was ineffective assistance of counsel a defendant must meet the two-prong test of *Strickland*:

> First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that coun-

sel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed. 2d 674, 693.

In the case *sub judice* defense counsel, during his opening statement to the jury, inadvertently stated that defendant had no other pending charges against him for breaking and entering. Given the context in which the statement was made, we conclude, and so hold, that the error was not so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the sixth amendment. *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674. The statement was made as a part of an obvious attempt by the defense attorney to discredit the principal witness against his client—a witness who was an experienced criminal notwithstanding his tender age. While defense counsel's overzealousness backfired when the prosecutor contradicted him in the presence of the jury, we do not consider counsel's actions in context as being constitutionally deficient. *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674; *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241. Furthermore, defendant has failed to show that his "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed. 2d 674, 693.

In reviewing the trial court's instructions to the jury, we find that the trial court correctly instructed the jury that they were not to consider the opening statements of counsel as evidence in deliberating on their verdict. The court explicitly told the jury that opening statements are not part of the evidence, that the lawyers are not sworn witnesses, nor are they subject to cross-examination. At the conclusion of its instructions the court reiterated that the jury was to decide the case from the evidence and that neither counsel's comments were part of the evidence.

Thus, we find no error in the trial court's instructions regarding counsels' comments during opening statements. Also, defendant has failed to show that the jurors' knowledge of the pending charges compromised "their ability to listen anew to and fairly judge the evidence in defendant's case." *State v. Ysaguire*, 309 N.C. 780, 784, 309 S.E. 2d 436, 439 (1985). Defendant's first and second assignments of error are rejected.

[2] Defendant next argues that the trial court's failure to submit felony murder as an underlying theory for the first degree murder constitutes plain error. In support of this proposition defendant asserts that although felony murder is not a lesser included offense of first degree murder by means of premeditation and deliberation, it is a "lower grade" offense. Therefore, argues defendant, the trial court should have submitted first degree murder based on premeditation and deliberation and on the felony murder theory with the armed robbery charge as the underlying felony. Had the jury convicted him under the felony murder theory, contends defendant, the armed robbery felony would have merged and he would not have been sentenced to an extended prison term based on the armed robbery charge.

When the evidence so warrants, a trial judge may submit a special verdict form to the jury that allows the jurors to indicate whether they find the defendant guilty of first degree murder based upon premeditation and deliberation or first degree murder based on a felony murder theory. *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981). However, if both theories are submitted to the jury and the jury finds the defendant guilty under both theories the underlying felony need not merge with the murder. *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981).

Defendant argues that he faces an extended prison sentence due to the trial court's failure to submit also the felony murder theory to the jury. The jury convicted defendant of first degree murder upon a theory of premeditation and deliberation. Had the trial court submitted both the premeditation and deliberation and the felony murder theory to the jury, defendant could have been convicted under both theories with the armed robbery as the predicate felony. However, the trial court would still have been free to impose a separate and consecutive sentence for the armed robbery offense since no merger occurs. *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732. Because defendant could have received the same sentence regardless of whether the felony murder theory was submitted to the jury, we find that defendant suffered no prejudice.

[3] In his final assignment of error, defendant argues that the trial judge failed to exercise any discretion when he denied a jury request to review a transcript of the testimony. Defendant con-

tends that the Court's decision in *State v. Lang*, 301 N.C. 508, 272 S.E. 2d 123 (1980), entitles him to a new trial.

During deliberations a jury may request a review of certain testimony and other evidence after it has retired to deliberate. N.C.G.S. § 15A-1233(a) (1983). The court may, in its discretion, have the requested testimony read to the jury. *Id.* In *Lang*, defendant was granted a new trial when it was determined that the trial court had mistakenly denied, as a matter of law, a jury request to review specific portions of the transcript. *Lang*, 301 N.C. 508, 272 S.E. 2d 123. The Court held that the trial judge's comment to the jury that the transcript was not available to them was an indication that he did not exercise his discretion to decide whether the transcript should have been available under the facts of that case. Likewise, in *State v. Ashe*, 314 N.C. 28, 331 S.E. 2d 652 (1985), the jury foreman requested a review of the trial transcript and the trial court, in denying the foreman's request, stated that "[t]here is no transcript at this point." This Court held that the defendant was entitled to a new trial because (1) it was obvious that the trial court felt it had no authority to grant the foreman's request, thus no discretion was exercised; and (2) the trial court erred in failing to summon all the "jurors into the courtroom to hear both the request and his response to it." *Id.* at 35, 331 S.E. 2d at 656-57.

In the instant case, the foreman, with the other jurors present, made a general inquiry of the court as follows:

> FOREMAN: Yes, sir. Second question I have is are we allowed to review any evidence that's been presented in the case, either by transcript or by pictures?

Judge Brannon first conferred with trial counsel and then told the jurors that they could examine the photographs or other exhibits in the jury box but could not take them into the jury room. He then gave a negative answer to a review of the transcript, telling the jurors that he would not have the court reporter read back to them from her notes, adding, "I just don't think that's the way to do things." It thus appears that the trial judge did exercise discretion. He considered both requests and, in effect, allowed one and denied the other. N.C.G.S. § 15A-1233(a) provides as follows:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be con-

ducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

Under this statute the trial judge, in his discretion, may, after notice to the prosecutor and defendant, direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. Here, the jury inquired about reviewing both prior testimony and exhibits. The trial judge, after conferring with the prosecutor and defense attorney, exercised discretion when he denied the former and allowed the latter. Judge Brannon further reminded the jurors of his earlier charge to them to depend upon their individual and collective recollection of the evidence rather than any recapitulation of the evidence by the judge or the attorneys. We hold that the trial court properly exercised its discretion in accordance with the statute.

Defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. RONNIE RAY DAVIS

No. 401A86

(Filed 5 November 1987)

1. Criminal Law § 63— insanity—lay opinion

The trial court did not err in a prosecution for first degree murder by allowing two witnesses called by the State to give their opinions as to defendant's sanity at the time of the killing where both witnesses had reasonable opportunities to form opinions regarding defendant's sanity based upon their respective experiences with defendant at a time sufficiently proximate to the crime. The law as stated in N.C.G.S. § 8C-1, Rule 701, does not appear to be significantly different from the common law admissibility requirement of first-hand knowledge.

2. Criminal Law § 63— insanity—burden of proof

The Supreme Court declined the defendant's invitation to change the presumption of sanity or the rule that requires a defendant to carry the burden of proving his insanity to the satisfaction of the jury.

3. Criminal Law § 63— insanity—M'Naghten test

The Supreme Court declined to replace the *M'Naghten* test for insanity with the American Law Institute standard.

4. Homicide § 24— murder—instructions—no error

There was no plain error in a prosecution for first degree murder where the trial court's instructions, taken as a whole, clearly charged the jury that the State bore the burden of proof of each of the elements in question and that the jury could consider circumstantial evidence from which the elements could be inferred. The instructions could not reasonably be read to raise a mandatory presumption that the elements were proved simply by proof of any of the circumstances noted in the instructions.

APPEAL by defendant from judgment entered 7 February 1986 imposing sentence of life imprisonment. Defendant was tried before *Brewer, Jr., J.*, and a jury, at the 27 January 1986 and 3 February 1986 Criminal Sessions of Superior Court, CUMBERLAND County, and convicted of first degree murder. Heard in the Supreme Court 13 October 1987.

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

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

FRYE, Justice.

On this appeal defendant brings forward several assignments of error. Defendant first contends that the trial court committed reversible error in permitting lay witnesses to state their opinions regarding defendant's sanity at the time of the alleged murder. Defendant next contends that the State should have the burden of proving that defendant was sane at the time of the alleged crime and that the *M'Naghten* test used to determine a defendant's sanity is no longer valid. In defendant's final assignment of error, he contends the trial court committed plain error when instructing the jury on intent to kill and premeditation and deliberation.

We hold that defendant received a fair trial free of prejudicial error.

Defendant was indicted for the murder of Phillip Padilla (the victim). At a pretrial hearing it was determined that no aggravating circumstances existed and the case was tried as a non-capital case. Defendant entered a plea of not guilty by reason of insanity, specifically pleading he killed the victim while under the influence of a paranoid delusion that the victim was a demon or a devil.

The State presented witnesses who testified that on 1 March 1984 defendant drove up to the victim's house as he was returning home from high school. Witnesses testified that upon seeing defendant the victim started running, whereupon defendant took a rifle from his car and began shooting the victim. According to the witnesses, when the victim fell defendant ran up to him and fired several more rounds into the victim's head, after which defendant put the rifle in his car and drove off.

The witnesses also testified that defendant had previously been involved in fights with the victim, that Berry Jackson, a business acquaintance of the defendant, had conversed and transacted business with defendant two hours before the alleged crime and had not noted anything wrong with him at that time; that after the alleged murder defendant fled the scene of the crime, drove to his father's house, told his father that he wanted to sell the alleged murder weapon and left the rifle in his father's utility room. The State's witnesses further testified that the day after the crime defendant told law enforcement officers that he had not shot anyone, that he had been working during the time of the alleged murder, and that he had sold his rifle some time ago.

During the trial defendant did not testify but did present evidence relating to his insanity defense. Defendant's wife testified that for several years prior to the shooting of the victim, defendant and the victim had a history of disputes relating to the victim's relationship with one of defendant's daughters; that defendant and the victim had had several physical altercations, had taken each other to court on several occasions and that each had been convicted of assault on the other. Defendant's wife testified further that she and defendant believed that the victim was responsible for getting their daughter involved in drugs and in skip-

ping school. She testified also that during the time the victim was dating defendant's daughter, both defendant and the daughter stated they were having visions of demons and defendant stated that angels were talking to him.

Defendant also presented expert testimony that he was suffering from paranoid delusions at the time of the crime and was incapable of distinguishing between right and wrong when he killed the victim. On cross-examination these experts testified that during their interviews with defendant his concentration, orientation, memory and intellectual functions did not demonstrate any major impairments, that they did not have complete knowledge of defendant's actions immediately before and after the crime, and that defendant knew he had killed the victim and was remorseful.

On rebuttal, the State presented expert witnesses who testified that defendant's experts' knowledge of other doctors' evaluations of defendant would tend to create a bias in favor of a concurring opinion; that the circumstances surrounding the crime are important to rendering an opinion on insanity and that they would be concerned about psychiatric evaluations that were conducted without the benefit of that information. The State also presented testimony of two lay witnesses who testified that in their opinion defendant knew the difference between right and wrong at the time of the murder.

The jury returned a verdict of guilty of first degree murder and the trial judge entered the mandatory sentence of life imprisonment. Defendant appealed to this Court as a matter of right. N.C.G.S. § 7A-27(a) (1986).

[1] In his first assignment of error defendant contends the trial court erred in allowing two lay witnesses called by the State to give their opinions as to defendant's sanity at the time of the killing. Defendant argues that the lay witnesses had no personal knowledge of defendant's alleged paranoid delusion as to the victim. Thus, argues defendant, their testimony violates the personal knowledge requirement of N.C.R. Evid. 701.

Prior to 1984 the common law regarding the admissibility of lay opinions relative to a defendant's sanity was well established:

> Anyone who has observed another, or conversed with him, or had dealings with him, and a reasonable opportunity, based thereon, of forming an opinion, satisfactory to himself, as to the mental condition of such person, is permitted to give his opinion in evidence on the issue of mental capacity, although the witness be not a psychiatrist or expert in mental disorders.

State v. Hammonds, 290 N.C. 1, 5-6, 224 S.E. 2d 595, 598 (1976) (quoting 1 Stansbury, N.C. Evidence § 127 (Brandis Rev. 1973)).

Rule 701 of the North Carolina Rules of Evidence, effective 1 July 1984, provides as follows:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.G.S. § 8C, Rule 701 (1983).

There is no reason to believe that the adoption of Rule 701 effected a substantive change in the law regarding the admissibility of lay opinions of sanity. First, the law as stated in Rule 701 does not appear to be significantly different from the common law admissibility requirement of firsthand knowledge. *See State v. Hammonds*, 290 N.C. 1, 5-6, 224 S.E. 2d 595, 598. Second, the Commentary to Rule 701 indicates that if Rule 701 made any change in the law, it was intended to permit more, not less, lay opinion testimony. Under the common law, lay opinion was allowed only where a shorthand expression of facts was necessary, McCormick on Evidence § 11 (3rd ed. 1984), whereas Rule 701(b) adopts the standard that lay opinion need only be helpful in clarifying a witness' testimony or helpful to determine a fact in issue. Third, federal courts, which have been operating under an identical rule since 1975, have held that lay opinions regarding a defendant's sanity continue to be admissible. *United States v. Brown*, 792 F. 2d 466 (4th Cir. 1986). Therefore, under Rule 701 the lay opinions regarding defendant's insanity are admissible if they are based on firsthand knowledge and if they are helpful to the jury.

In the case *sub judice*, defendant argues that the two lay witnesses could not have had firsthand knowledge regarding defendant's sanity because neither of the witnesses was told by defendant about his alleged paranoid delusions regarding the victim. This criticism by defendant of the lay opinions presumes that defendant was in fact suffering from paranoid delusions, an invalid presumption since the issue of defendant's sanity was for the jury to determine; therefore, we confine our analysis of the admissibility of the lay opinions of defendant's sanity to the requirements of Rule 701 as set out above.

Both witness Von Cannon and witness Jackson testified that in their opinion defendant knew the difference between right and wrong at the time defendant killed the victim. To be admissible lay opinion testimony, each of these witnesses had to have personal knowledge of defendant and the opinions had to be helpful to the jury. However, the fact that neither witness had the opportunity to observe defendant immediately before the crime does not require exclusion of their testimony. *See State v. Mayhand*, 298 N.C. 418, 259 S.E. 2d 231 (1979).

Witness Von Cannon testified that she had lived next door to defendant and his family for approximately two years and had seen and spoken to defendant almost every day during this period. She never observed defendant engage in any abnormal or strange behavior, and defendant had never spoken to her about having visions of demons, devils, or angels. Witness Jackson testified that he had known defendant for approximately a year, had worked with him for about a month and a half prior to the crime, and had seen and talked to defendant approximately two hours before defendant killed the victim. Witness Jackson also testified that he observed nothing abnormal about defendant's behavior on the day of the crime nor had defendant ever told Jackson about having visions of demons, devils, or angels.

We find that both witnesses had reasonable opportunities to form opinions regarding the defendant's sanity based upon their respective personal experiences with defendant at a time sufficiently proximate to the crime. We find also that these lay opinions meet the second prong of Rule 701, that is, they were helpful to the jury in determining whether defendant was sane at the time he killed the victim. The relevant weight to be given lay

opinions is within the province of the jury. *See State v. Evangelista*, 319 N.C. 152, 353 S.E. 2d 375 (1987). We hold there was no error in the admission of this testimony.

[2] In his next assignment of error defendant contends that his motion to dismiss the charge of murder should have been granted because the evidence shows he was insane at the time of the crime and the State failed to prove he was sane. Defendant concedes that under the law in this State he was not entitled to a directed verdict because there is a presumption that every defendant is sane and a defendant has the burden of proving his insanity to the satisfaction of the jury. However, defendant asks this Court to reverse the presumption and require the State to bear the burden of disproving insanity beyond a reasonable doubt.

It is well settled in this jurisdiction that "[e]very person is presumed sane until the contrary is shown, and the defendant has the burden of proving his insanity . . . to the satisfaction of the jury." *State v. Evangelista*, 319 N.C. 152, 161, 353 S.E. 2d 375, 382. This Court has repeatedly declined to change the presumption of sanity or the rule that requires a defendant to carry the burden of proving his insanity to the satisfaction of the jury. *Id.* We decline defendant's invitation and hold that the trial court did not err by refusing to grant defendant's motion to dismiss for failure of the State to disprove defendant's insanity beyond a reasonable doubt.

[3] In his third assignment of error, defendant again requests this Court to reverse prior decisions. Defendant asks that we adopt a more lenient standard of insanity which recognizes that volitional or emotional impairments might provide a legal defense for criminal conduct. Specifically, defendant asks this Court to replace the *M'Naghten* test for insanity with the American Law Institute (ALI) test for insanity. Defendant argues that if the ALI standard was applied in the case *sub judice*, he would be found insane even if he knew he was killing the victim while "killing the demon" and knew that killing the victim was wrong.

This Court has consistently held that the *M'Naghten* test, which focuses on the defendant's capacity to distinguish between right and wrong at the time of and in respect to the crime in question, is the appropriate test for insanity. *State v. Evan-*

gelista, 319 N.C. 152, 353 S.E. 2d 375. We decline to adopt a new test and we hold that the trial court did not err in instructing the jury that defendant bore the burden of proving his insanity in accordance with the *M'Naghten* test.

[4] In his final assignment of error defendant contends the trial court's instructions on intent to kill and premeditation and deliberation violated defendant's right to due process and constituted plain error. More specifically, defendant argues the trial court's instructions could be read to mean that the jury was obligated to find that the State had proven an intent to kill and premeditation and deliberation beyond a reasonable doubt if it found that the State had proven the circumstances from which those elements might be inferred. Thus, defendant argues, the trial court's jury instructions relieved the State of its burden of proving every element of the crime.

In reviewing jury instructions for error, this Court has held that they must be considered in their entirety. *State v. Poole*, 305 N.C. 308, 289 S.E. 2d 335 (1982). When a defendant fails to voice an objection to jury instructions this Court must review the alleged error under the "plain error" standard, as set out in *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E. 2d 375, 378-79 (1983). In order to establish that the trial court committed "plain error" in its jury instructions, thus entitling a defendant to a new trial, a defendant must show that absent the alleged erroneous instructions the jury probably would have returned a different verdict. *See State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986).

Because defendant failed to object at trial to the trial court's jury instructions we must review those instructions under the "plain error" standard. In reviewing the trial court's jury instructions in their entirety, we find that the instructions clearly charged the jury that the State bore the burden of proof of each of the elements in question. The trial court correctly instructed the jury that when determining whether the State had carried its burden the jury could consider circumstantial evidence from which the elements may be inferred. We fail to see how these instructions could reasonably be read to raise a mandatory presumption that these elements were proved simply by proof of any of the circumstances noted in the instructions. Thus, we perceive no error in the instructions. We hold that the trial court's instructions do not constitute plain error.

Defendant received a fair trial free from prejudicial error.

No error.

HARRY G. SMITH v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 78A87

(Filed 5 November 1987)

Insurance § 130— fire insurance—failure to give timely proof of loss—good cause—prejudice—burden of proof

The insured under a fire insurance policy must bear the burden of proof as to "good cause" for the failure to give timely proof of loss that fully complied with policy provisions, and the insurer then must bear the burden of proof as to prejudice.

ON appeal of right from the decision of a divided panel of the Court of Appeals, 84 N.C. App. 120, 351 S.E. 2d 774 (1987), reversing a judgment entered by *Gray, J.*, on 10 March 1986 in Superior Court, AVERY County. Heard in the Supreme Court 9 September 1987.

Glover & Petersen, by James R. Glover; and Goodman & McConnell, by Daniel J. Goodman, for the plaintiff appellee.

Morris, Golding, Phillips & Cloninger, by William C. Morris, Jr. and Thomas R. Bell, Jr., for the defendant appellant.

MITCHELL, Justice.

The sole issue before us is whether the Court of Appeals erred in extending certain of the principles and reasoning of *Great American Insurance Co. v. C.G. Tate Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769 (1981), to a claim under a fire insurance policy, when the defense was failure of the claimant to render proof of loss as required by the terms of the policy. We affirm the Court of Appeals' ruling.

The plaintiff, Harry G. Smith, introduced evidence at trial tending to show that he purchased a house and surrounding property in Banner Elk, North Carolina in the early 1970s. He leased

the property to others for a number of years. In 1979 the plaintiff decided to move into the house himself. At that time he purchased a fire insurance policy from the defendant, Farm Bureau Mutual Insurance Company ("Farm Bureau"), covering the house, appurtenant structures, and miscellaneous expenses.

A square building with a concrete floor was located a few feet behind the main house. The plaintiff undertook to turn it into a "guest house." After the renovations were complete, he decided to spend the night there before having guests for the weekend.

The plaintiff stayed in the main house until about 1:00 a.m. on the night of 12 February 1981 and then retired to the "guest house." About fifteen minutes later he heard a "popping" noise. He went outside to investigate, walked all the way around the house, and saw nothing out of the ordinary. He went back to bed. In a few minutes he smelled smoke and went outside again to investigate. He was looking at the front of the house when all the lights went off. He walked further around the house and saw a "small flicker" of fire on the second floor. He ran to his mobile home located on the property to use the telephone, but the door was frozen shut.

About that time a power line running to the house started arcing and shooting sparks and flames. Traffic was stopping on the public road that went by the property. The plaintiff sent a passerby to call the fire department, and fire fighters arrived approximately thirty to forty-five minutes later. The back of the house was totally consumed when they arrived.

The house and its contents were a complete loss. The plaintiff contacted Farm Bureau and was instructed to file a proof of loss form. When he submitted the form, a number of items remained blank, including the actual cash value of the property involved, the total amount of loss to the property, and the time and origin of the loss. Farm Bureau refused to pay on the claim, alleging several defenses including the plaintiff's failure to file a proper proof of loss within sixty days as required by the policy.

The plaintiff then commenced this action by filing a complaint seeking recovery under his fire insurance policy, and the case came to trial. At the conclusion of the plaintiff's evidence, Farm Bureau rested without offering evidence and moved for a

directed verdict of dismissal on the ground that the plaintiff had failed to show that the proof of loss required by the policy was properly submitted. The trial court allowed Farm Bureau's motion for a directed verdict, and the plaintiff appealed.

A divided panel of the Court of Appeals (Judge Eagles with Judge Arnold concurring and Judge Johnson dissenting) reversed the trial court and held that the evidence presented a jury question as to whether the plaintiff's failure to comply strictly with the policy provisions should bar his recovery. The majority noted that N.C.G.S. § 58-176(c) sets out terms that by law are incorporated into every fire insurance policy issued in North Carolina. One of those provisions requires the insured to submit to the insurer a sworn proof of loss statement containing certain information within sixty days of the loss. The plaintiff acknowledged that he had failed to comply fully with that provision. Nevertheless, the Court of Appeals held that such failure was not necessarily fatal to the plaintiff's case. The majority correctly noted that, under the provisions of N.C.G.S. § 58-180.2, the failure to comply with the proof of loss provisions does not relieve the insurer of its obligation to pay under the policy if the failure was for "good cause" and did not prejudice the insurer's ability to defend. 84 N.C. App. at 122-23, 351 S.E. 2d at 776, citing *Brandon v. Insurance Co.*, 301 N.C. 366, 271 S.E. 2d 380 (1980).

Having correctly determined that N.C.G.S. § 58-180.2 was applicable, the majority noted that the statute was silent as to which party had the burden of proof on the issues of "good cause" and "prejudice." To resolve this issue, the majority in the Court of Appeals relied on this Court's decision in *Great American Insurance Co. v. C.G. Tate Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769 (1981) (*Great American I*), which held, in the context of an automobile liability policy, that the plaintiff had the burden of proving "good faith" and the insurance company had the burden of proving "prejudice." The majority in the Court of Appeals concluded that the reasoning of *Great American I* applied equally as well here.

The Court of Appeals then considered whether the plaintiff had submitted sufficient evidence of "good faith" to go to a jury. The majority relied on this Court's opinion in *Great American Insurance Co. v. C.G. Tate Construction Co.*, 315 N.C. 714, 340 S.E.

2d 743 (1986) (*Great American II*), which held that "good faith" was a subjective issue and depended on whether the insured had knowingly or purposely withheld the required information. The majority in the Court of Appeals held that the term "good cause" in N.C.G.S. § 58-180.2 includes the same kind of subjective "good faith" defined in *Great American II*. The majority then concluded that the plaintiff's evidence was sufficient to raise a jury question as to whether the plaintiff had such "good cause" for failing to supply a proof of loss that fully complied with the policy provisions. Because the plaintiff had offered sufficient evidence to raise a jury question on the issue of "good cause" and the insurance company had offered no evidence of prejudice, the trial court's order awarding a directed verdict for the defendant was reversed.

Judge Johnson filed a dissenting opinion in the Court of Appeals in which he challenged the majority's extension of the principles of *Great American I* to fire insurance cases. The dissent reasoned that, unlike *Great American I*, this case did not involve the insurer's ability to defend the insured, the insurer's obligation to indemnify the insured, or the interests of innocent third parties. The dissent stated that the plaintiff's "woefully inadequate" proof of loss form raised a "different issue" than that addressed in *Great American I*.

Farm Bureau filed notice of appeal to this Court based solely on the dissent in the Court of Appeals. Rule 16(b) of the North Carolina Rules of Appellate Procedure limits the scope of review in appeals based solely on a dissent to those issues that are specifically given as the basis for the dissenting opinion. Therefore, the only issue properly before this Court is whether the Court of Appeals correctly applied *Great American I*, even though the defendant raises other issues in its brief.

The "proof of loss provision" of the statutory standard fire insurance policy is part of a series of clauses that require the insured to provide prompt notice of the loss, separate the damaged from the undamaged property, provide an inventory of the damaged property, submit to examinations under oath, provide financial records, and, when requested, to exhibit the damaged property to insurance representatives. All of these statutory policy provisions are designed to allow the insurance company to in-

vestigate the nature and cause of the loss so as to protect its interests.

For many years this Court held that a failure to provide proof of loss as required by any insurance policy operated as a forfeiture of the insured's right to recover for a loss covered by the policy. *E.g., Boyd v. Bankers Shippers Insurance Co.*, 245 N.C. 503, 96 S.E. 2d 703 (1957); *Gardner v. Carolina Insurance Co.*, 230 N.C. 750, 55 S.E. 2d 694 (1949); *Zibelin v. Pawtucket Mutual Fire Insurance Co.*, 229 N.C. 567, 50 S.E. 2d 290 (1948). The rationale for this potentially harsh rule was that it was the obligation of the courts to enforce the contract as written, because the insurance company was entitled to the benefit of the terms it had negotiated. In 1981, however, this Court in *Great American I* rejected any such strict forfeiture approach under a liability insurance policy and applied instead the more modern approach of considering whether the failure, in good faith, to strictly comply with the contract had caused the insurer any prejudice.

The plaintiff in *Great American I* failed to comply with an insurance policy provision requiring notice of an accident "as soon as practicable." The defendant insurance company sought a declaratory judgment that, as a result, it had no obligation to defend or indemnify the plaintiff. This Court held that a delay, in good faith, by the insured in giving notice to the insurer of the accident did not relieve the insurer of its obligation to defend and indemnify, unless the delay materially prejudiced the insurer's ability to investigate and defend. The rationale for our ruling was twofold:

> The terms of an insurance contract are not bargained for in the traditional sense. Insurance policies are offered on a take-it-or-leave-it basis and, frequently, the only term over which the insured has any say is the amount of coverage. [In addition,] strict interpretation of the notice requirement leads to harsh results: failure to notify the insurer within a reasonable time, for whatever reason, relieves the insurer of its obligations to defend and indemnify, the essence of the contract, even though it may have suffered no prejudice whatsoever as a result of the delay.

Great American I, 303 N.C. at 395, 279 S.E. 2d at 774 (1981).

It is clearly established by statute, which the majority in the Court of Appeals relied on, that:

> In any action brought to enforce . . . [a fire] insurance policy subject to the provisions of this Article, any party claiming benefit under the policy may reply to the pleading of any other party against whom liability is sought which asserts as a defense, the *failure to render timely proof of loss* as required by the terms of the policy that such failure *was for good cause* and that the failure to render timely proof of loss *has not substantially harmed* the party against whom liability is sought in his ability to defend. The issues raised by such reply shall be determined by the jury if jury trial has been demanded.

N.C.G.S. § 58-180.2 (1982 & Cum. Supp. 1985) (emphasis added). This statute was enacted eight years before *Great American I* was decided. Opinions by the Court of Appeals and this Court have reached the conclusion that the effect of the statute was to alter earlier holdings which had dictated that a defect in the proof of loss under the terms of a fire insurance policy operates as a strict forfeiture of the right to recover for a loss. *E.g., Brandon v. Nationwide Mutual Fire Insurance Co.*, 46 N.C. App. 472, 265 S.E. 2d 497, *modified and aff'd*, 301 N.C. 366, 271 S.E. 2d 380 (1980).

The dissent in the Court of Appeals in the present case took no issue with the majority's conclusion that, with regard to fire insurance cases, the statute rejected the result of the older line of strict forfeiture cases. The dissent simply objected to the majority's extension of the principles of *Great American I* to fire insurance policies. Therefore, the only question before this Court on Appeal is the application of *Great American I*. App. R. 16.

Although the statute addresses the issues of "good cause" and "substantial harm" when there is a defect in the proof of loss for claims made under a fire insurance policy, it does not specifically say who has the burden of proof on such issues. As a result, the majority in the Court of Appeals relied on the reasoning of *Great American I* only for assigning the burdens of proof, and *for no other purpose*. The appeal by reason of the dissent, therefore, presents only this issue of the proper placement of the burdens of proof for our review.

In *Great American I* we held that the insured has the burden of showing "good faith" in failing to properly notify the insurance company. 303 N.C. at 399, 279 S.E. 2d at 776. Once that burden is carried, "the burden then shifts to the insurer to show that its ability to investigate and defend was materially prejudiced by the delay." *Id.* We reasoned that the insurer must bear the burden of proof on the issue of prejudice because it is in the better position to offer proof on the issue and because such allocation of the burden encourages the insurer to investigate quickly once it has actual notice. 303 N.C. at 398, 279 S.E. 2d at 776. The majority in the Court of Appeals correctly concluded that the same reasoning applied equally as well to the proof of loss provisions of a fire insurance contract. Accordingly, the majority held that the insured under the fire insurance policy must bear the burden of proof as to "good cause" for the failure to give timely proof of loss, but the insurer must bear the burden of proof as to prejudice. We agree.

For the reasons stated herein, the decision of the Court of Appeals is affirmed.

Affirmed.

CHARLES R. LOCKERT v. BILLIE E. BREEDLOVE AND ABED ZAKARIA

No. 182A87

(Filed 5 November 1987)

Process § 8— personal service on nonresident individual in state—claim of insufficient minimum contacts

The trial court properly denied defendant Breedlove's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(2), where defendant was personally served in North Carolina but claimed insufficient minimum contacts. A close reading of *International Shoe Co. v. Washington*, 326 U.S. 310, and later cases reveals that the United States Supreme Court has not abolished the transient rule of jurisdiction. N.C.G.S. § 1-75.4(1)(a).

ON appeal from a decision of the Court of Appeals, reported without published opinion, 84 N.C. App. 701, 354 S.E. 2d 34 (1987), which affirmed an order entered by *John, J.*, on 24 July 1986 in Superior Court, ROWAN County. Heard in the Supreme Court 8 September 1987.

Wishart, Norris, Henninger & Pittman, P.A., by Diana Evans Ricketts, for the plaintiff appellee.

Corriher, Whitley, Busby, Dooley & Locklear, by Robert F. Busby and James H. Dooley, Jr., for the defendant appellant Breedlove.

MITCHELL, Justice.

The sole issue before us is whether the Court of Appeals erred in affirming the trial court's denial of a motion to dismiss this action due to lack of personal jurisdiction over the defendant, Billie E. Breedlove. We conclude that the trial court had personal jurisdiction over the defendant Breedlove pursuant to N.C.G.S. § 1-75.4(1)(a). Therefore, we affirm the decision of the Court of Appeals.

The trial court's findings of fact which are determinative of the single issue before us on appeal are uncontested. The plaintiff, Charles R. Lockert, a resident of Rowan County, North Carolina, brought this suit against the defendants, Billie E. Breedlove and Abed Zakaria, seeking to recover the balance due on a promissory note signed by the defendants. The defendant Zakaria was never located or served in connection with this action.

On 31 January 1986, Breedlove was present in North Carolina and was personally served a copy of the summons and complaint in this action in accordance with N.C.G.S. § 1A-1, Rule 4(j1). Breedlove does not contend that the process or manner of service was insufficient or that her presence in the state was procured by trick, fraud or deceit.

The defendant Breedlove filed a motion to dismiss this action pursuant to N.C.G.S. § 1A-1, Rule 12(b)(2) and the due process clause of the fourteenth amendment to the Constitution of the United States. She alleged that the trial court did not have personal jurisdiction over her because she did not have sufficient minimum contacts with the State of North Carolina. The trial court denied her motion to dismiss.

Breedlove appealed to the Court of Appeals assigning as error the trial court's order denying her motion to dismiss for lack of personal jurisdiction. The Court of Appeals affirmed the trial

court's order. The defendant Breedlove appeals to this Court under N.C.G.S. § 7A-30(1).

N.C.G.S. § 1-75.4(1)(a) allows the courts of this State to exercise *in personam* jurisdiction over a person served pursuant to Rule 4(j) or Rule 4(j1) of the North Carolina Rules of Civil Procedure "[i]n any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party . . . [i]s a natural person present within this State . . . ." N.C.G.S. § 1-75.4(1)(a) (1983). Breedlove was duly served with process pursuant to Rule 4(j1) while she was in Salisbury, North Carolina on 31 January 1986. These facts bring this case squarely within the terms of N.C.G.S. § 1-75.4(1)(a). Nevertheless, Breedlove argues that for a state to exercise personal jurisdiction over a nonresident defendant in any case, certain "minimum contacts" as defined in *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95 (1945) must exist between the nonresident defendant and the forum state. She further contends that mere service of process within the forum state neither complies with nor supplants the constitutional requirement of minimum contacts.

This Court has consistently applied the minimum contacts analysis articulated in *International Shoe* to cases in which nonresident defendants were served with process outside the forum state. *See, e.g., Tom Togs, Inc. v. Ben Elias Inds. Corp.*, 318 N.C. 361, 348 S.E. 2d 782 (1986); *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E. 2d 610 (1979). We conclude that such minimum contacts analysis is not necessary, however, when the defendant is personally served while present within the forum state.

The defendant would have us hold that the presence of a person in the forum state is not sufficient to confer jurisdiction upon its courts. We are aware that some courts have made sweeping pronouncements to the effect that minimum contacts analysis is required in all cases in which the defendant is a nonresident of the forum state. *See, e.g., Waffenschmidt v. Mackay*, 763 F. 2d 711 (5th Cir. 1985), *cert. denied, Waffenschmidt v. First Nat'l Bank of Mount Vernon*, 474 U.S. 1056, 88 L.Ed. 2d 771 (1986); *Harold M. Pitman Co. v. Typecraft Software, Ltd.*, 626 F. Supp. 305 (N.D. Ill. 1986); *Mohler v. Dorado Wings, Inc.*, 675 S.W. 2d 404

(Ky. Ct. App. 1984). We conclude, however, that such cases are contrary to the Supreme Court's holdings in *International Shoe* and its progeny. We hold that the minimum contacts test is inapplicable to cases in which the defendant is personally served within the forum state. *See, e.g., Amusement Equipment, Inc. v. Mordelt*, 779 F. 2d 264 (5th Cir. 1985); *Opert v. Schmid*, 535 F. Supp. 591 (S.D.N.Y. 1982); *Aluminal Indus., Inc. v. Newtown Commercial Assoc.*, 89 F.R.D. 326 (S.D.N.Y. 1980); *Hutto v. Plagens* 254 Ga. 512, 330 S.E. 2d 341 (1985); *Humphrey v. Langford*, 246 Ga. 732, 273 S.E. 2d 22 (1980); *In re Marriage of Pridemore*, 146 Ill. App. 3d 990, 497 N.E. 2d 818 (1986).

In *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 24 L.Ed. 565 (1878), the Supreme Court recognized that eminent jurists long had agreed that personal jurisdiction could be acquired solely by service of process on the defendant in the forum state. The Court relied upon Justice McLean's statement that "[j]urisdiction is acquired in one of two modes;—first, as against the person of the defendant, by the service of process; or secondly, by a procedure against the property of the defendant, within the jurisdiction of the court." 95 U.S. (5 Otto) at 724, 24 L.Ed. at 569 (1878) (quoting *Boswell's Lessee v. Otis*, 50 U.S. (9 How.) 336, 348, 13 L.Ed. 164, 169 (1850)). The *Pennoyer* Court also relied upon Justice Story's statement that " '[w]here a party is within a territory, he may justly be subjected to its process, and bound by the judgment pronounced on such process against him.' " 95 U.S. (5 Otto) at 724, 24 L.Ed. at 569 (quoting *Picquet v. Swan*, 5 Mason 35 (1828) (No. 11,134)). Accordingly, the *Pennoyer* Court recognized, *inter alia*, what came to be known as the transient rule of jurisdiction whereby mere service of process upon a nonresident present in the forum state was sufficient to establish personal jurisdiction.

After *Shaffer v. Heitner*, 433 U.S. 186, 53 L.Ed. 2d 683 (1977), in which the Supreme Court extended the minimum contacts requirements of *International Shoe* to assertions of *quasi in rem* jurisdiction, some commentators began to express doubt as to whether the assertion of personal jurisdiction over nonresidents based solely on service of process upon them within the forum state was still proper. *See, e.g.*, Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction*, 25 Vill. L. Rev. 38 (1979-80); Vernon, *Single-Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of Shaf-*

fer v. Heitner, 63 Iowa L. Rev. 997 (1978). We conclude, however, that a close reading of *International Shoe* and later cases reveals that the Supreme Court has not abolished the transient rule of jurisdiction.

In *International Shoe*, the Court stated:

> Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L.Ed. 565, 572. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, *if he be not present within the territory of the forum*, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278. (Other citations omitted.)

International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L.Ed. 95, 101-02 (1945) (emphasis added). The language of *International Shoe* did not sound a death knell for the transient rule of jurisdiction; rather, it set out an alternative means of establishing personal jurisdiction when the defendant is "not present within the territory of the forum." 326 U.S. at 316, 90 L.Ed. at 101-02.

We note that the Supreme Court cases applying the *International Shoe* minimum contacts analysis have involved substituted process within the state, service of process outside of the state, or both. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 85 L.Ed. 2d 528 (1985) (service outside the state—defendants appeared specially); *Calder v. Jones*, 465 U.S. 783, 79 L.Ed. 2d 804 (1984) (service outside the state—defendants appeared specially); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 80 L.Ed. 2d 404 (1984) (probably both—defendants appeared specially); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed. 2d 490 (1980) (probably both—defendants appeared specially); *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed. 2d 1283 (1958) (service outside the state); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L.Ed. 2d 223 (1957) (both). None of these cases in-

volved service of process on a defendant while the defendant was present in the forum state. *But cf. Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 96 L.Ed. 485 (1952) (due process did not require decision on jurisdiction in case where nonresident *corporation* served through an officer in the forum state). Our research reveals no instance in which the Supreme Court has applied the "minimum contacts" requirement of *International Shoe* in a case in which the defendant was personally served while in the forum state. We conclude that the Supreme Court has not required any such "minimum contacts" analysis when a state asserts jurisdiction over a person who has been personally served with process while within its borders. Neither *International Shoe* nor its progeny have questioned the constitutionality of a state's exercise of personal jurisdiction based solely on personal service within its borders. *Accord Oxmans' Erwin Meat Co. v. Blacketer*, 86 Wis. 2d 683, 687-88, 273 N.W. 2d 285, 286 (1979).

The requirement that a court have personal jurisdiction is, of course, mandated by the concept of due process. *Insurance Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 72 L.Ed. 2d 492 (1982). Due process requires that the party over whom jurisdiction is exercised be given adequate notice of the suit. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313-14, 94 L.Ed. 865 (1950). Further, due process requires that "the maintenance of the suit . . . not offend 'traditional notions of fair play and substantial justice.' " *Insurance Corp. of Ireland*, 456 U.S. at 703, 72 L.Ed. 2d at 501-02 (quoting *International Shoe*, 326 U.S. at 316, 90 L.Ed. at 102).

In cases such as the present case, the defendant is given adequate notice of the suit by way of actual service of process upon her. Furthermore, maintenance of such a suit in the state in which personal service of process upon the defendant is achieved is entirely fair and just. *See Pennoyer*, 95 U.S. at 733-34, 24 L.Ed. at 572. As Justice Stevens stated in his concurring opinion in *Shaffer v. Heitner*, "If I visit another State . . ., I knowingly assume some risk that the State will exercise its power over . . . my person while there. My contact with the State, though minimal, gives rise to predictable risks." 433 U.S. at 218, 53 L.Ed. 2d at 706 (Stevens, J., concurring). When a nonresident is served in the forum state, the opposing party is not the one who selects the venue; rather, the venue is where the nonresident defendant is of

his own volition and is served. *Humphrey v. Langford*, 246 Ga. 732, 735, 273 S.E. 2d 22, 24 (1980).

For the foregoing reasons, we hold that the rule continues to be that personal service on a nonresident party, at a time when that party is present in the forum state, suffices in and of itself to confer personal jurisdiction over that party. Accordingly, the decision of the Court of Appeals affirming the trial court's denial of the defendant's motion to dismiss is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. JEROME MURPHY

No. 101A87

(Filed 5 November 1987)

1. Burglary and Unlawful Breakings § 5— sufficient evidence of breaking

The State's evidence supported submission of the breaking element to the jury in a prosecution for first degree burglary where it tended to show that police found a window screen bearing defendant's fingerprints on the ground outside an open window of the victim's apartment; they also found defendant's fingerprints on the windowsill inside the apartment; the window curtain was partially pushed back; and two flower pots on the windowsill had been upset.

2. Burglary and Unlawful Breakings § 5— sufficient evidence of nonconsensual entry

The State's evidence was sufficient to permit the jury in a first degree burglary case to find that defendant's entry into the victim's apartment was nonconsensual and thus unlawful where it tended to show that the victim had been awakened in her bed by someone climbing on top of her; the assailant choked her, she resisted, and he then raped her; and the assailant entered the victim's apartment through a window.

3. Criminal Law § 73.4— excited utterance exception to hearsay rule

Statements made by a burglary and rape victim when an officer arrived at her apartment after her assailant had fled and asked her if she could tell him what happened were admissible under the excited utterance exception to the hearsay rule provided by N.C.G.S. § 8C-1, Rule 803(2) (1986), where the eighty-nine-year-old victim had been raped approximately ten minutes before making the statements; she was crying and extremely upset and spoke while under the stress of excitement; and the statements related to a startling event.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) (1986) from a judgment imposing a life sentence upon a conviction of first degree burglary, entered by *Bowen, J.*, at the 29 October 1986 Criminal Session of Superior Court, SCOTLAND County. Heard in the Supreme Court 13 October 1987.

Lacy H. Thornburg, Attorney General, by Philip A. Telfer, Assistant Attorney General, for the State.

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

WHICHARD, Justice.

Defendant was charged with first degree burglary and first degree rape. He was found guilty of burglary but not of rape. He received a life sentence for the burglary. We find no error.

The State's evidence showed the following:

At 12:12 a.m. on 9 July 1985, Detective Johnny Joseph was called to the apartment of the victim, an eighty-nine-year-old woman. The victim told Joseph that she had been awakened by someone climbing on top of her. The assailant choked her, and she resisted. He also raped her.

Joseph found that the kitchen window of the apartment was open and the screen was lying on the ground. Another officer discovered that the window curtain was partially pushed back and two flower pots on the windowsill were upset. The victim's bedroom was in disarray, and the back door was slightly ajar. Defendant's fingerprints were found on the windowsill and screen.

Defendant's prison cellmate testified that defendant had told him that he "raped a lady." According to the witness, defendant said he "went in there to rob her [but] she didn't have but seven dollars and he raped her." Defendant told this story in the cell block several times. On cross-examination the witness testified: "[It's] not too easy to forget a man when he snickers and grins in your face for six or seven months about how he raped an old woman . . . ."

Defendant challenges the sufficiency of the State's evidence to support his conviction. He contends that the trial court erred

by denying his motion to dismiss at the close of the State's evidence.

To withstand a motion to dismiss, the State must present substantial evidence of each element of the offense charged and evidence that the defendant perpetrated the offense. *State v. Williams*, 319 N.C. 73, 79, 352 S.E. 2d 428, 432 (1987) (quoting *State v. Young*, 312 N.C. 669, 680, 325 S.E. 2d 181, 188 (1985)). 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. *Id.* If the court determines as a matter of law that the State has offered substantial evidence of each element of the charged offense, defendant's motion to dismiss is properly denied. *State v. Griffin*, 319 N.C. 429, 433, 355 S.E. 2d 474, 476-77 (1987).

[1] To convict a defendant of first degree burglary, the jury must find that he or she unlawfully broke and entered an occupied dwelling or sleeping apartment in the nighttime with the intent to commit a felony therein. *State v. Sweezy*, 291 N.C. 366, 383, 230 S.E. 2d 524, 535 (1976). Defendant contends that the State failed to prove that he broke into the victim's apartment. With respect to the breaking element, the State presented this evidence: The police found a window screen bearing defendant's fingerprints on the ground outside the open window of the victim's apartment. They also found defendant's fingerprints on the windowsill inside the apartment. The window curtain was partially pushed back, and two flower pots on the windowsill had been upset.

We addressed a similar situation in *State v. Simpson*, 299 N.C. 335, 349, 261 S.E. 2d 818, 826 (1979), where we found sufficient evidence of a breaking based on facts that a window which was customarily closed was open, the screen was on the ground, and a sawhorse had been placed under the window. The State's evidence here also showed that a window was open and the screen was on the ground. In addition, flower pots on the windowsill were disturbed, and defendant's fingerprints were on the screen and the windowsill. The evidence here thus is more persuasive than that in *Simpson*. We thus hold that the evidence, considered in the light most favorable to the State, supported submission of the breaking issue to the jury.

[2] Defendant also contends that the State did not present sufficient evidence that the entry was unlawful because it was nonconsensual. *State v. Sweezy*, 291 N.C. at 383, 230 S.E. 2d at 535. He argues that the victim's testimony that she was awakened by a man jumping on her bed does not prove that she did not give the man permission to enter her apartment.

In two other cases this Court has found sufficient evidence of nonconsensual entry despite the absence of direct testimony. In *State v. Noland*, 312 N.C. 1, 13, 320 S.E. 2d 642, 650 (1984), *cert. denied*, 469 U.S. 1230 (1985), we held that an inference of nonconsensual entry could be supported by the following evidence:

> Cindy Minton walked to her back door in response to a knock on the window. There was no evidence that the victim invited the defendant inside. The witnesses testified that they heard a bang and saw Cindy running into the house, screaming. The glass pane in the back door was broken. The defendant followed Cindy into the house, cornered her in the laundry room, and shot her.

Here, too, there was no evidence that the victim invited the defendant inside. There was evidence of an unusual entry, *i.e.*, through a window, comparable to the evidence of a broken glass pane in *Noland*. The ensuing altercations in both cases suggest that neither defendant was an invited guest.

In *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524, we held similar facts sufficient to support an inference of nonconsensual entry. The victim there was surprised by the defendant entering her enclosed porch late at night. She screamed for her husband, retreated into her home, and called the police. *Id.* at 383, 230 S.E. 2d at 535. We stated: "This is hardly the type of reception given to an invited guest in one's home." *Id.* at 383-84, 230 S.E. 2d at 535. The victim here also was surprised by the defendant and called the police immediately after he left.

We conclude that, as in *Noland* and *Sweezy*, the State has presented evidence of nonconsensual entry which, considered in the light most favorable to the State, justified submission of that issue to the jury. The burglary charge was properly for the jury, and this assignment of error is overruled.

[3] Defendant contends the trial court erred by admitting hearsay statements made by the victim. The victim died prior to trial from causes unrelated to the crime and thus could not testify. Detective Joseph, who had arrived at the victim's apartment less than ten minutes after her assailant had fled, testified, over objection, that shortly after he arrived he asked the victim "if she could tell [him] what happened" and she made the following statement:

> She stated to me that she had gone to bed and was doing some reading in the bed. She apparently had fallen asleep while reading and she was awakened by someone climbing on top of her. She said the person placed his hands on her throat and she attempted to push the hands away from her throat and the person continued to put pressure on her throat. She said then the person left. I asked her if that was all that occurred and she said, "No, he raped me."

While clearly hearsay, we hold Joseph's testimony admissible under the excited utterance exception. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." N.C.G.S. § 8C-1, Rule 803(2) (1986).

Prior to adoption of the North Carolina Evidence Code, in *State v. Hamlette*, 302 N.C. 490, 495, 276 S.E. 2d 338, 342 (1981) we held a statement made under similar circumstances admissible as a spontaneous utterance. There, the victim of a shooting identified his assailant in response to police questioning. The victim, who suffered three gunshot wounds, made the statements within thirteen minutes of the shooting. *Id.* at 495, 302 S.E. 2d at 342. We noted that "[t]he[se] statements do not in any way lose their spontaneous character because they were made in response to questions such as: 'What is wrong?' 'Who shot you?' 'How did they leave?' (Citations omitted.) This was not a situation wherein the declarant had time to reflect and fabricate untruthful answers." *Id.* We thus held that the police officer could testify as to the identification made by the victim under these circumstances. *Id.*

The Court of Appeals recently noted that a statement made under circumstances similar to those here qualified as an excited utterance. *State v. Kerley*, 87 N.C. App. 240, 360 S.E. 2d 464

(1987). In *Kerley*, the declarant had been asleep when the defendant set fire to his mattress and the entire residence. Several minutes later a state trooper arrived at the scene. The declarant, still upset and excited, rushed to the trooper and described the origin of the fire. The Court of Appeals explained that the excited utterance exception requires that (1) the statement relate to a startling event or condition, and (2) the statement be made under the stress of excitement caused by the event. *Id.* at 242, 360 S.E. 2d at 465. Acknowledging the significance of the time factor, the court quoted the Official Commentary to N.C.G.S. § 8C-1, Rule 803, which states: "With respect to the *time element* . . . the standard measurement is the duration of the state of excitement. 'How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor.' " *Id.* at 243, 360 S.E. 2d at 466. While the court held that the statement should have been excluded on other grounds, it noted that the statement fell "squarely within" the excited utterance exception. *Id.*

Here, the victim was an eighty-nine-year-old woman who had been raped approximately ten minutes before making the statement. Detective Joseph testified that she was crying and extremely upset when she gave the statement. His uncontradicted testimony establishes that the victim spoke while under the stress of excitement. Clearly, the statement related to a startling event. The fact that the victim spoke in response to a question does not defeat the trustworthiness of her utterance. *See State v. Hamlette*, 302 N.C. at 495, 276 S.E. 2d at 342. We thus hold that the trial court properly admitted this statement. N.C.G.S. § 8C-1, Rule 803(2).

No error.

LAWRENCE E. WATKINS, ADMINISTRATOR OF THE ESTATE OF MELISSA GRAY WATKINS v. LISA SUSANNE HELLINGS

No. 4PA87

(Filed 5 November 1987)

1. **Automobiles and Other Vehicles § 94.7; Negligence § 38— intoxicated driver—contributory negligence of passenger—no prejudicial error in instructions**

In an action by the administrator of the estate of a deceased automobile passenger against the driver of the automobile, it was not necessary to reach the question of whether the trial judge's instruction on contributory negligence was erroneous where the deceased passenger recruited a sober driver to accompany her to Raleigh and supplied the young driver with wine as she negotiated unfamiliar roads in a hard rain in the dark. Even assuming that the instruction on contributory negligence was erroneous, the evidence of contributory negligence was so overwhelming as to compel the jury's conclusion.

2. **Rules of Civil Procedure § 37— discovery sanctions—no request for findings—Shuford approach rejected**

The Court of Appeals erred by requiring the trial court to make negative findings of fact in an order taxing discovery sanctions for failure to make admissions where neither party made a request for findings and conclusions under N.C.G.S. § 1A-1, Rule 52(a)(2). N.C.G.S. § 1A-1, Rule 37(c).

ON defendant's petition for discretionary review of the decision of the Court of Appeals, 83 N.C. App. 430, 350 S.E. 2d 590 (1986), which ordered a new trial and, further, vacated and remanded the order of *Barnette, J.*, Superior Court, WAKE County, allowing discovery sanctions. Heard in the Supreme Court 8 September 1987.

Henson, Fuerst & Willey, P.A., by Ralph G. Willey, III and Thomas W. Henson, for plaintiff-appellee.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Ronald C. Dilthey and Sanford W. Thompson IV, for defendant-appellant.

MARTIN, Justice.

This case comes before us on appeal on two issues: whether the trial judge committed reversible error (1) in his instruction to the jury on contributory negligence and (2) in imposing discovery sanctions on the plaintiff. For the reasons explained below, we reverse the Court of Appeals and reinstate and affirm the order of the trial court imposing sanctions.

Lisa Hellings and Melissa Watkins were freshmen roommates at The University of North Carolina at Wilmington. On the night of 9 April 1983, Melissa (plaintiff's decedent) asked Lisa (defendant) to go with her to a nightclub in Raleigh. Because Melissa had been drinking wine and Lisa cola, Lisa agreed to drive Melissa's car, and each took her glass of wine or cola with her.

At Melissa's request, Lisa bought a bottle of wine when they stopped for gas en route. Melissa poured wine for both of them as they drove. After they reached Clinton, Melissa had to direct Lisa, who had never before driven from Clinton to Raleigh. By the time they reached Clinton, it was raining very hard. They continued to drink and drive until, at about 10:30 p.m., they had finished the wine. Lisa drank half the bottle, about two or three glasses. Lisa handed her empty glass to Melissa, who tossed it into the back of the car where it struck the wine bottle and broke. This startled Lisa, who groped for the overhead light in order to determine whether the glass had indeed been broken. At this point she misjudged a curve, jerked the wheel to get back on the road, and skidded across the slippery road into the opposite ditch. Melissa was fatally injured. Both girls were taken to a Dunn hospital. A blood test taken soon after her arrival at the hospital showed that Lisa had a blood alcohol level of .10 percent.

The plaintiff, father of Melissa Watkins and administrator of her estate, filed a wrongful death action against Lisa Hellings on 26 June 1984, alleging negligence. At trial, the jury found that the defendant was negligent but that Melissa Watkins was contributorily negligent. Judgment was therefore entered dismissing plaintiff's action. Subsequent to the trial, Judge Barnette heard arguments on defendant's motion for discovery sanctions. He ordered plaintiff to pay sanctions in the amount of $5,316.28 to defendant for expenses incurred in proving the truth of matters set forth in requests for admissions. On 2 December 1986 the Court of Appeals filed an opinion which granted plaintiff a new trial and also vacated and remanded the order allowing discovery sanctions on the grounds that it did not contain findings of fact. Defendant's petition for discretionary review to the Supreme Court was allowed on 8 April 1987.

[1] Plaintiff contends that the trial court erroneously instructed the jury on contributory negligence and that he is therefore en-

titled to a new trial. This Court has determined in cases such as this that three elements must be proved by a defendant to establish contributory negligence against a passenger. The defendant must prove that (1) the driver was under the influence of an intoxicating beverage; (2) the passenger knew or should have known that the driver was under the influence of an intoxicating beverage; and (3) the passenger voluntarily rode with the driver even though the passenger knew or should have known that the driver was under the influence of an intoxicating beverage. *See Davis v. Rigsby*, 261 N.C. 684, 686-87, 136 S.E. 2d 33, 34-35 (1964); *Dinkins v. Carlton and Williams v. Carlton*, 255 N.C. 137, 140, 120 S.E. 2d 543, 544-45 (1961); *Samuels v. Bowers*, 232 N.C. 149, 153, 59 S.E. 2d 787, 791 (1950). Plaintiff contends that the trial judge misled the jury as to the second above-stated element, which requires that the passenger have so-called "objective knowledge" of the driver's impairment. The trial judge instructed the jury that if the passenger knew or should have known that the driver "might or could be" impaired by alcohol, it could find contributory negligence. Defendant argues in response that the trial court's charge on contributory negligence, taken as a whole, was not misleading or erroneous, even if certain parts of it, read in isolation, might appear so.

However, on the facts of this case, we do not find it necessary to reach the question of whether the trial judge's instruction was erroneous. For, even assuming that the judge's instruction on contributory negligence was erroneous, the evidence of contributory negligence was so overwhelming as to compel the jury's conclusion. Melissa Watkins recruited a sober driver to accompany her to Raleigh. She then supplied the young driver with wine as she negotiated unfamiliar roads in a hard rain in the dark. In *Brannon v. Sprinkle*, 207 N.C. 398, 177 S.E. 114 (1934), this Court refused to grant a new trial where the trial judge had failed to instruct the jury on proximate cause in a negligence action. We noted that on the evidence the jury could reach but one conclusion and held that where "the jury can draw but one inference, a new trial shall not be granted on account of error in the charge of the trial judge." *Id.* at 407, 177 S.E. at 119. So it is here. We hold that if the trial judge committed error in his charge, it was harmless error that did not prejudice the outcome of the trial.

The facts of this case would have supported a directed verdict for defendant on the grounds that plaintiff was contributorily negligent as a matter of law. In deciding a motion for directed verdict, the trial court is to consider all the evidence in the light most favorable to the nonmoving party. A directed verdict may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the nonmovant. *Dickinson v. Pake*, 284 N.C. 576, 583, 201 S.E. 2d 897, 902 (1974). This Court has held that when a passenger voluntarily continues to ride with a driver the passenger knows to be impaired by alcohol, the passenger is contributorily negligent as a matter of law. *Bank v. Lindsey*, 264 N.C. 585, 142 S.E. 2d 357 (1965); *Davis v. Rigsby*, 261 N.C. 684, 136 S.E. 2d 33. The above-cited cases differ from the one before us only in that the drivers there were impaired prior to attempting to operate a motor vehicle. The fact that in the present case the defendant became impaired after she got behind the wheel can hardly be considered a bar to finding plaintiff contributorily negligent as a matter of law.

[2] Plaintiff also contends, and the Court of Appeals has agreed, that the trial court should not have awarded discovery sanctions. The sanctions were imposed because plaintiff refused to make requested admissions concerning State Bureau of Investigation reports on the degree of defendant's intoxication. Rule 37(c) of the North Carolina Rules of Civil Procedure provides that the court shall tax sanctions and expenses against a party who has failed to make admissions if the other party subsequently proves the truth of the matter, unless the court finds that one or more of the exceptions obtains. The four exceptions listed in Rule 37(c) are as follows:

> (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

The opinion of the Court of Appeals states that Rule 37(c) does not require the trial court to make negative findings of fact with respect to the four exceptions. However, citing W. Shuford, *N.C. Civil Practice and Procedure* § 37-13 (2d ed. 1981), that court held that the better practice is to require the trial court to make nega-

tive findings of fact with respect to the four stated exceptions in order to support an order taxing sanctions to a party. The Court of Appeals reasoned in its opinion that this is desirable because of "the risk to litigants of substantial monetary awards against them in the application" of Rule 37(c). 83 N.C. App. at 438, 350 S.E. 2d at 587. The Court of Appeals therefore vacated the trial court's order and remanded the motion for further consideration. We reverse the decision of the Court of Appeals on this issue. The Court of Appeals opinion does not take into account Rule 52(a)(2) of the North Carolina Rules of Civil Procedure. That rule states, in pertinent part, that "findings of fact and conclusions of law are necessary on decisions of any motion . . . only when requested by a party . . . ." The record does not reveal that either party made such a request of the trial judge. It has been held repeatedly by this Court that "[w]hen the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court on proper evidence found facts to support its judgment." *Estrada v. Burnham*, 316 N.C. 318, 324, 341 S.E. 2d 538, 542 (1986). We leave it to the discretion of the trial judge whether to make a finding of fact if a party does not choose to compel a finding through the simple mechanism of so requesting.

The decision of the Court of Appeals is reversed and the case is remanded to that court for remand to the Superior Court, Wake County, for reinstatement of the judgment of that court and the order imposing sanctions.

Reversed and remanded.

ROGER LONG, EMPLOYEE/PLAINTIFF v. MORGANTON DYEING & FINISHING CO., EMPLOYER, AND OLD REPUBLIC INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 168PA87

(Filed 5 November 1987)

Master and Servant § 65.1 — workers' compensation — hernia — pain not required to be simultaneous

The pain that must accompany an injury resulting in a hernia to render the injury compensable under N.C.G.S. § 97-2(18)(c) need not occur simultane-

ously with the sustaining of the injury. Therefore, plaintiff was entitled to recover compensation for a hernia resulting from an injury by accident where he experienced pain from the hernia six weeks after the date of the injury.

Justice WEBB dissenting.

Justice MEYER joins in this dissenting opinion.

ON certiorari to review the decision of a divided panel of the Court of Appeals, 84 N.C. App. 81, 351 S.E. 2d 767 (1987), affirming an opinion and award of the North Carolina Industrial Commission which denied plaintiff's claim for workers' compensation. Heard in the Supreme Court 13 October 1987.

McMurray & McMurray, by Martha McMurray-Russ, for plaintiff-appellant.

Patton, Starnes, Thompson, Aycock & Teele, P.A., by Thomas M. Starnes, for defendant-appellees.

WHICHARD, Justice.

The issue is whether the pain that must accompany an injury resulting in a hernia to render the injury compensable under N.C. G.S. § 97-2(18)(c) must occur simultaneously with the sustaining of the injury. We answer in the negative.

The Hearing Commissioner made, and the full Industrial Commission adopted, the following findings of fact:

1. On or about January 22, 1985, plaintiff, a 27 year-old single male with a high school education and service in the United States Army, had been employed as a strapper in the defendant's packing department for approximately five years. Plaintiff's duties as a strapper required that he run strapping bands around boxes containing dyed and finished cloth for shipment.

2. Plaintiff was required to lift one end of the roll of cloth to place it within the shipping box. Plaintiff was assisted in lifting these rolls of cloth from the table onto the boxes by an additional employee. Plaintiff was required to lift approximately 35 pounds in doing this job. Plaintiff had done this job for the entire time he had been employed by the defendant.

3. On January 22, 1985, plaintiff arrived at work and was instructed by his supervisor to assist other employees in lifting the rolls of cloth off of a buggy onto the table. Plaintiff was required to lean down to the buggy which was closer to the floor level than the table and lift the rolls of cloth up to the table. The rolls of cloth weighed approximately 75 to 100 pounds. Plaintiff did this all day and lifted approximately 50 rolls.

4. On the following day, January 23, 1985, plaintiff noticed a lump the size of a golf ball in his groin while in the rest room. The lump did not cause plaintiff any pain or discomfort. Plaintiff was capable of pressing the lump back into his inguinal area. Plaintiff continued to do this same lifting job for approximately two additional weeks.

5. On March 13, 1985, plaintiff went to Dr. Ralph Hogshead for examination due to the development of pain in his inguinal area. Dr. Hogshead diagnosed plaintiff as having a direct [inguinal] hernia.

6. On January 22, 1985, plaintiff's normal work routine was interrupted and plaintiff thereby sustained an injury. Plaintiff's hernia appeared the following day but was not accompanied by any pain until approximately six weeks following the date of injury.

These findings are not excepted to and thus are binding on appeal. *Pratt v. Upholstery Co.*, 252 N.C. 716, 719, 115 S.E. 2d 27, 31 (1960); *see also Mabe v. Granite Corp.*, 15 N.C. App. 253, 255, 189 S.E. 2d 804, 806 (1972). They are conclusive for the further reason that they are supported by competent evidence. *Hansel v. Sherman Textiles*, 304 N.C. 44, 49, 283 S.E. 2d 101, 104 (1981).

The Commissioner made, and the Commission adopted, the following additional "finding of fact":

7. Plaintiff has failed to prove that the hernia which he described as having occurred on January 23, 1985 and underwent surgical repair for on March 22, 1985 was accompanied by any pain.

The Commissioner then entered, and the full Commission adopted, the following conclusion of law:

> On January 22, 1985, plaintiff sustained an interruption of his normal work routine which constituted an accident. Plaintiff has failed to establish that his resulting hernia was accompanied by pain, an essential element of his burden of proof. . . . Plaintiff has therefore failed to establish a *causal connection* . . . between his injury by accident and his subsequent hernia and its repair. G.S. 97-2(18) *Lutes v. Tobacco Co.* 19 N.C. App. 380 (1973).

On the basis of the foregoing findings and conclusion, the Hearing Commissioner denied plaintiff's claim for workers' compensation. The full Commission adopted the opinion and award of the Hearing Commissioner, thus also denying compensation.

On plaintiff's appeal, the Court of Appeals affirmed. Plaintiff was entitled to appeal to this Court by virtue of Judge Johnson's dissent, N.C.G.S. § 7A-30(2), but he failed to timely perfect the appeal. On 2 June 1987 we allowed certiorari. We now reverse.

N.C.G.S. § 97-2(18) provides that in all claims for compensation for hernia resulting from an injury by accident the claimant must prove to the satisfaction of the Commission:

> a. That there was an injury resulting in hernia or rupture.
>
> b. That the hernia or rupture appeared suddenly.
>
> c. That it was accompanied by pain.
>
> d. That [it] immediately followed an accident.
>
> e. That [it] did not exist prior to the accident for which compensation is claimed.

As stated by the Court of Appeals: "To recover compensation, a plaintiff must prove the existence of each of the above five elements. *Hensley v. Cooperative*, 246 N.C. 274, 98 S.E. 2d 289 (1957). The absence of any one of them will result in the denial of compensation. *Lutes v. Tobacco Co.*, 19 N.C. App. 380, 198 S.E. 2d 746 (1973)." *Long v. Morganton Dyeing & Finishing Co.*, 84 N.C. App. 81, 83, 351 S.E. 2d 767, 769 (1987).

That plaintiff has proven four of the five elements is undisputed. The element at issue is the requirement that the injury must be "accompanied by pain." N.C.G.S. § 97-2(18)(c). The Deputy Commissioner made, and the Commission adopted, a "finding"

that "[p]laintiff has failed to prove that the hernia . . . was accompanied by any pain." The Court of Appeals concluded that this "finding" was supported by competent evidence and thus was binding. *Long v. Morganton Dyeing & Finishing Co.*, 84 N.C. App. at 82-83, 351 S.E. 2d at 769. This "finding" is more properly denominated a conclusion of law, however, since it states the legal basis for denial of plaintiff's claim. *Coble v. Coble*, 300 N.C. 708, 713, 268 S.E. 2d 185, 189 (1980). "Conclusions of law, even if stated as factual conclusions, are reviewable." *Realty Co. v. Spiegel*, 246 N.C. 458, 465, 98 S.E. 2d 871, 876 (1957).

As Commissioner Clay noted in his dissent in the Industrial Commission, the conclusion denominated as finding seven is contradictory to findings five and six. The latter findings establish that plaintiff experienced pain from his hernia, albeit approximately six weeks following the date of injury. Unless N.C.G.S. § 97-2(18)(c) is interpreted to require simultaneity between the onset of the hernia and pain therefrom, findings five and six entitle plaintiff to compensation. The statute does not, in express terms, contain a simultaneity requirement. The superimposition of such a requirement by the courts would be contrary to the long-established principle that the Workers' Compensation Act "should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation." *Johnson v. Hosiery Company*, 199 N.C. 38, 40, 153 S.E. 591, 593 (1930). We thus conclude that plaintiff has met the requirements of N.C.G.S. § 97-18(2)(c) and is entitled to compensation.

Recently ratified legislation further informs our interpretation of the provision before us. Effective 5 August 1987, the General Assembly has removed the requirement that a hernia must be accompanied by pain to be compensable. 1987 N.C. Sess. Laws ch. 729. While the amendment does not apply here, we believe it reflects both a response to medical evidence that hernias are not universally accompanied by pain[1] and an indication by the legislature that it never intended that the "accompanied by pain" provision of N.C.G.S. § 97-2(18)(c) be interpreted to deny compensation to workers such as plaintiff here who, without question,

1. There was medical testimony here that "some people have pain with hernias and some don't, some of them don't notice it, doesn't bother them . . . ."

have sustained injuries "by accident arising out of and in the course of the employment." N.C.G.S. § 97-2(6).

Accordingly, the decision of the Court of Appeals is reversed. The case is remanded to that court for further remand to the Industrial Commission for entry of an award to plaintiff.

Reversed and remanded.

Justice WEBB dissenting.

I dissent. I believe the majority has rewritten the statute in order to provide a recovery for the plaintiff. I believe the only way to read N.C.G.S. § 97-2(18) properly is that "accompanied by pain" means that when the hernia or rupture appears suddenly there is pain. I vote to affirm the Court of Appeals.

Justice MEYER joins in this dissenting opinion.

EARL DEAN HOWELL v. JOAN HURLEY HOWELL

No. 211A87

(Filed 5 November 1987)

Divorce and Alimony § 30; Rules of Civil Procedure § 60— divorce judgment—relief from bar to equitable distribution—judgment not set aside—invalid

The trial court erred by granting defendant's motion under N.C.G.S. § 1A-1, Rule 60(b)(6) asking to be relieved from the effect of a divorce judgment to the extent that it barred her from asserting a claim for equitable distribution where defendant consulted an attorney, followed the advice of her counsel, and did not respond to a complaint in Wilkes County seeking absolute divorce until after the divorce judgment was entered. Neither N.C.G.S. § 1A-1, Rule 60(b)(6) nor any other provision of law authorizes a court to nullify or void one or more of the legal effects of a valid judgment while leaving the judgment itself intact. N.C.G.S. § 50-11.

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, 85 N.C. App. 170, 354 S.E. 2d 776 (1987), *affirming* an order granting defendant's motion to set aside the effect of a divorce judgment, by *Osborne, J.*, at the 14 January 1986 Session of WILKES

County District Court. Heard in the Supreme Court 11 September 1987.

Ferree, Cunningham & Gray, P.A., by George G. Cunningham, for plaintiff appellant.

McElwee, McElwee, Cannon & Warden, by William H. McElwee, III, for defendant appellee.

EXUM, Chief Justice.

The sole issue on appeal is whether the trial court erred in granting defendant's motion to be "relieved of the effect" of a divorce judgment to the extent that the judgment barred her claim for equitable distribution. We conclude that the trial court erred in granting the motion and, therefore, reverse the Court of Appeals' decision to the contrary.

At trial, the parties stipulated that Mr. and Ms. Howell were married on 22 December 1953. During their marriage the couple acquired various items of property, including stock of unspecified value, registered in husband's name and a vested interest in husband's retirement benefits valued at $11,289.63. The couple separated on 21 April 1983.

At the motion hearing, Ms. Howell's evidence tended to show that she hired an Ashe County attorney, John Siskind, to represent her interests with reference to support, property settlement and divorce. On 2 May 1983 Mr. Siskind filed, on Ms. Howell's behalf, an action in Ashe County District Court. In this action Ms. Howell alleged, among other things, that she feared Mr. Howell would "try to change the nature or location of marital property so as to hinder her claims for equitable distribution." She prayed for temporary alimony, a writ of possession for the marital home and injunctive relief "protecting the marital property pending equitable distribution." The District Court in Ashe County issued an order granting Ms. Howell temporary alimony, a writ of possession for the marital home, and a temporary restraining order prohibiting transfer by either party of any "marital property."

In late summer of 1983 Ms. Howell learned that retirement benefits were considered marital property and were subject to equitable distribution. She then consulted Mr. Siskind about her husband's retirement benefits. She testified that Mr. Siskind as-

sured her that these retirement benefits and the stock would be included in the equitable distribution settlement.

In the summer of 1984 Mr. Howell filed this action in Wilkes County for absolute divorce based upon one year's separation. Upon Mr. Siskind's advice, Ms. Howell accepted service of the complaint and summons and brought them to Mr. Siskind's office. He told Ms. Howell that if she did not choose to contest the divorce she did not have to do anything further. Ms. Howell testified that Mr. Siskind failed to tell her the effect of a final divorce judgment on her right to equitable distribution.[1]

This effect is clearly set out in N.C.G.S. § 50-11 (1984). That statute, entitled "Effects of absolute divorce," provides in pertinent part as follows:

> (e) An absolute divorce obtained within this State shall destroy the right of a spouse to an equitable distribution of the marital property under G.S. § 50-20 unless the right is asserted prior to judgment of absolute divorce.

Under this section, a judgment of absolute divorce destroys the right to equitable distribution "unless the right is asserted prior to judgment of absolute divorce."

Ms. Howell did not respond to the complaint in her husband's divorce action, and on 28 August 1984 the District Court in Wilkes County entered judgment granting Mr. Howell an absolute divorce.

Two days after this divorce judgment was entered, Mr. Siskind filed a new and separate claim on Ms. Howell's behalf in Ashe County District Court seeking equitable distribution. This complaint alleged that a judgment of absolute divorce had been entered in Wilkes County.

On 9 October 1984 the Ashe County District Court dismissed Ms. Howell's claim for equitable distribution pursuant to Rule

1. We note that Mr. Siskind testified that he never agreed to represent Ms. Howell in an action for absolute divorce or equitable distribution. At the hearing, Mr. Siskind introduced into evidence a document entitled "Agreement to Provide Legal Services." That document was signed by Mr. Siskind and Ms. Howell. At the bottom of the document was the provision, "Does not include absolute divorce or equitable distribution—final." Mr. Siskind testified that Ms. Howell received a copy of the document.

12(b)(6) for its failure to state a claim upon which relief could be granted.

Meanwhile, on 28 September 1984, the parties entered into a consent judgment regarding Ms. Howell's 2 May 1984 Ashe County action. The consent judgment purported to settle "all pending matters and claims" which existed between the parties.[2]

On 11 December 1985 defendant filed a motion in the instant case pursuant to N.C.G.S. § 1A-1, Rule 60(b)(6), asking that she be "relieved of the effect of the divorce judgment entered in this cause on August 21, 1984 to the extent that it now bars her from asserting a claim for equitable distribution of marital property against her former husband, Earl Dean Howell." The district court granted Ms. Howell's motion, and the Court of Appeals affirmed, holding that the relief requested was permitted under Rule 60(b)(6).

Rule 60(b)(6) provides in pertinent part as follows:

> (b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after judgment, order, or proceeding was entered or taken. . . .

2. Ms. Howell testified at the motion hearing that she did not understand the effect of the consent judgment to be anything other than the discontinuance of her temporary alimony. It would be premature for us to determine whether the consent judgment would bar Ms. Howell's right to equitable distribution since, as the case now stands, this right is barred by the judgment of absolute divorce.

Since the question has not been briefed or argued, we express no opinion on whether the claims asserted in Ms. Howell's 2 May 1984 Ashe County action constitute an assertion of her right to equitable distribution "prior to judgment of absolute divorce" under N.C.G.S. § 50-11(e).

Rule 60(b)(6) is equitable in nature and authorizes the trial court to exercise its discretion in granting or denying the relief sought. *Kennedy v. Starr*, 62 N.C. App. 182, 302 S.E. 2d 497, *disc. rev. denied*, 309 N.C. 321, 307 S.E. 2d 164 (1983). The rule empowers the court to set aside or modify a final judgment, order or proceeding whenever such action is necessary to do justice under the circumstances. *Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E. 2d 148, *disc. rev. denied*, 291 N.C. 176, 229 S.E. 2d 689 (1976). The test for whether a judgment, order or proceeding should be modified or set aside under Rule 60(b)(6) is two pronged: (1) extraordinary circumstances must exist, and (2) there must be a showing that justice demands that relief be granted. *Baylor v. Brown*, 46 N.C. App. 664, 266 S.E. 2d 9 (1980).

Using the *Baylor* test, the Court of Appeals held that Ms. Howell's motion to set aside the effect of the divorce judgment to the extent that it barred her claim for equitable distribution was properly granted. The court held that, because defendant had been diligent in attempting to preserve her rights and had relied upon advice of counsel, relief from the effect of the divorce judgment could be granted under Rule 60(b)(6). We disagree on a narrow ground.

Ms. Howell did not seek to have the trial court, and the trial court did not, set aside the divorce judgment. Rather, pursuant to Ms. Howell's motion, the trial court ordered that she be given "relief from the effect of the divorce judgment . . . to the extent of allowing her to assert a counterclaim against the plaintiff for equitable distribution . . . ." Because the trial court did not set aside the divorce judgment itself, its terms and validity still abide. Likewise, the legal effects of the divorce judgment still obtain. Neither Rule 60(b)(6) nor any other provision of law authorizes a court to nullify or avoid one or more of the legal effects of a valid judgment while leaving the judgment itself intact.[3]

3. An order which purports to avoid one or more of the legal effects of a judgment is not the same as an order modifying the judgment. The modification of a judgment with several provisions involves changing one or more of these provisions; it imports adding or deleting or amending the language of the judgment. The divorce judgment in this case had only one operative provision—it granted Mr. Howell an absolute divorce. The only question before the trial court when this judgment was entered was whether to grant or not to grant the divorce. The judgment is thus not subject to modification. It is subject only to being set aside or left intact. So long as it is left intact all of the legal effects that flow from it obtain.

In so ruling we are not insensitive to the plight of Ms. Howell and, if her testimony is believed, her apparently diligent reliance on counsel's advice. We simply are unwilling to hold that a court may leave intact a judgment of absolute divorce, yet order that one or more of the legal effects of that judgment may somehow be avoided. Such a holding would empower a court to say, for example, that a divorce decree would not have the legal effect of permitting the parties to remarry or of dissolving other various rights arising out of the marital relation. These kinds of judicial rulings would negate the provisions of N.C.G.S. § 50-11 by which the legislature has prescribed the legal effects of judgments of absolute divorce. These effects are beyond the power of a court to change.

For the foregoing reasons defendant's motion should have been denied, and the Court of Appeals' decision is

Reversed.

STATE OF NORTH CAROLINA v. NORVILLE BUSSEY

No. 712A86

(Filed 5 November 1987)

1. **Criminal Law § 163— additional instructions—failure to object—plain error rule**

The plain error standard was applicable to additional instructions and remarks by the trial judge following a report that the jury was deadlocked where defendant made no objection to the additional instructions or remarks.

2. **Criminal Law § 122.2— inquiry into numerical division of jury—additional instructions—verdict not coerced**

The trial court's inquiry into the numerical division of the jury after the jury reported that it was deadlocked was not coercive in the totality of the circumstances, and the court's additional instructions were proper, where the court was confronted with a report of deadlock after the jury had deliberated only a short time on the day the jury first retired; the court made it clear that it did not wish to be told whether the majority favored guilt or innocence; the court was at all times respectful of the jury, never impugning its efforts or threatening it with being held for unreasonable periods of time to accomplish a unanimous verdict; and the court's additional instructions followed the language of N.C.G.S. § 15A-1235.

3. Criminal Law § 122.2— numerical division of jury—court's remark about "making progress"

Where the trial court was informed on the first day of deliberations that the numerical division of the jury was eight to four and, upon asking the second day if there had been any change in the jury's position, the court was told that it was then nine to three, the court's response, "You're making progress," when considered in the context of the court's previous lengthy additional instructions, could only be taken to mean that the jury was making progress toward determining whether it could conscientiously agree on a verdict and was thus not error.

APPEAL by defendant from three concurrent judgments imposing two terms of life imprisonment for convictions of rape in the first degree and sexual offense in the first degree and three years' imprisonment for conviction of common law robbery, entered by *Clark, J.*, at the 7 July 1986 session of Superior Court, CUMBERLAND County. Heard in the Supreme Court 12 October 1987.

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 defendant.

MARTIN, Justice.

For the reasons stated below, we find the defendant's assignment of error to be without merit and hold that he received a fair trial, free of prejudicial error.

The record reveals that the jury began its deliberations on 9 July 1986 after the court's customary morning break. The jury recessed for lunch and resumed its deliberations. Later, the jury sent word that it wished to pose a question to the court. The forewoman told the trial judge that the jury was "deadlocked." The judge responded by asking whether the jurors had taken any polls and was told that two polls had been taken. He then asked for "the numerical division" on each poll, cautioning the forewoman first that he wanted, "Just numbers, now. How many one side or how many the other, but don't tell me which one is voting for what." The judge was told that the split was eight and four on the first poll and remained so when the second poll was taken following further deliberations after the lunch recess. The judge

then sent the jurors back to continue their deliberations, having advised them as follows:

> Folks, I really would have some serious doubt at this time and this early in your position in your deliberations that you folks would be in a position of deadlock. It would appear to me that it would take considerable more time and discussion of the matters at issue before you before you would be able to determine such a thing as that.
>
> I realize that you do have before you a case that does offer some rather divergent testimony. As you folks have been earlier advised, it is your duty as jurors to consider that evidence and to resolve these differences if you can and to unanimously agree upon a verdict in the case.
>
> Now, you all have a duty during your deliberations to consult with one another and to deliberate with a view towards reaching an agreement, if it can be done without violence to your individual judgments.
>
> Each of you, of course, must decide the case for yourselves but only after an impartial consideration of the evidence with your fellow jurors.
>
> In the course of deliberations each of you should not hesitate to reexamine your own views and to change your opinion if it is erroneous. But none of you should surrender your honest, conscientious convictions either as to the weight or the affect [sic] of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict in the case.
>
> Now, I want to emphasize to you the fact that it is your duty to do whatever you can to reach a verdict in this matter. You should reason the matter over together as reasonable men and women, and try to reconcile your differences if you can without the surrender of your conscientious convictions.
>
> Now, I'm going to let you folks continue your deliberations in the matter and see if you will be able to resolve your differences and come to a unanimous verdict.

The jurors deliberated for the remainder of the afternoon. When the jury returned to the courtroom for the overnight recess, the trial judge inquired, "Has there been any change in the position of your jury that you reported to us earlier?" He was told the split was then nine to three. The judge responded:

> You're making progress. All right. We will stop at this time and let you folks go home for today. We will resume the proceedings tomorrow morning at nine thirty a.m. and let you folks continue your deliberations at that time, and hopefully be able to resolve this matter.

The jury resumed its deliberations the next day and after "some time" returned the verdicts of guilty.

[1] Defendant's sole assignment of error concerns the trial judge's instructions and remarks to the jury following a report by it that it was deadlocked. Because defendant made no objection to the additional instructions or remarks by the trial judge, the plain error standard is applicable. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). It is defendant's contention that the judge coerced a guilty verdict, thereby violating defendant's right to a fair trial and an impartial jury under both the federal and state constitutions and N.C.G.S. §§ 15A-1232 and -1235. Because defendant failed to raise the alleged constitutional issues before the trial court, he has waived these arguments, and they may not be raised for the first time in this Court. *State v. Mitchell*, 317 N.C. 661, 346 S.E. 2d 458 (1986); *Wilcox v. Highway Comm.*, 279 N.C. 185, 181 S.E. 2d 435 (1971). We turn then to the question of whether the trial judge's instructions and remarks constitute plain error under the applicable statute and decisions of this Court.

[2] Defendant's case is for all relevant intents and purposes on all fours with *State v. Fowler*, 312 N.C. 304, 322 S.E. 2d 389 (1984), which we find controls its disposition. Defendant resurrects the argument made in *Fowler* that under *Brasfield v. United States*, 272 U.S. 448, 71 L.Ed. 345 (1926), inquiry by the trial judge into the numerical division is prohibited per se because it is coercive of jury minorities. In *Fowler*, we concluded that, "[a]t most, *Brasfield* sets out a rule of federal practice and is not binding on our courts." 312 N.C. at 308, 322 S.E. 2d at 392. In *Fowler*, we also rejected the proposition that a trial judge's ques-

tions about the numerical division of a jury constituted a per se violation of article I, § 24 of the North Carolina Constitution. We held, rather, that the proper analysis was whether in considering the totality of the circumstances the inquiry had been coercive, and explained why the judge's ability to inquire into numerical divisions was to be preserved.

> We do not consider questions concerning the division of the jury to be a *per se* violation of Art. I, § 24 when the trial court makes it clear that it does not desire to know whether the majority is for conviction or acquittal. Such inquiries are not inherently coercive, and without more do not violate the right to trial by jury guaranteed by the North Carolina Constitution. *State v. Yarborough*, 64 N.C. App. 500, 502, 307 S.E. 2d 794, 795 (1983). The appropriate standard is whether in the totality of the circumstances the inquiry is coercive. *Ellis*, 596 F. 2d at 1200; *Yarborough*, 64 N.C. App. at 502, 307 S.E. 2d at 795. *See Jenkins v. United States*, 380 U.S. 445, 446 (1965).
>
> The Court of Appeals has correctly pointed out that inquiries into the division of the jury are often "useful in timing recesses, in determining whether there has been progress toward a verdict, and in deciding whether to declare a mistrial because of a deadlocked jury." *Yarborough*, 64 N.C. App. at 502, 307 S.E. 2d at 794-95. The truth of that observation is borne out in this case by the circumstances attendant to the trial court's questioning of the jury. It was late on a Friday afternoon that was the last day of the court term, and the jury had not yet reached a verdict. The trial judge needed to know whether the jury was likely to reach a verdict or was deadlocked. This was necessary so that he would know whether he should plan to resume the trial on Monday and extend the term of court to continue the jurisdiction of the Superior Court. Under the circumstances, the inquiry into the division of the jury aided the trial court in the efficient administration of justice. We conclude that such inquiries into the division of the jury do not interfere with the proper administration of justice and so decline to exercise our supervisory power to make such inquiries reversible error.

312 N.C. at 308-09, 322 S.E. 2d at 392. Nothing in this case prompts us to alter our view as to the proper standard to be applied in analyzing the propriety of a trial judge's inquiry into the numerical division. We continue to adhere to *Fowler*.

We hold that in the totality of the circumstances the challenged inquiry was not coercive of the jury's verdict. The record shows that the presiding judge made it perfectly clear from the outset that he did not wish to be told whether the majority favored guilt or innocence. He was at all times respectful of the jury, never impugning its efforts or threatening it with being held for unreasonable periods of time to accomplish a unanimous verdict. The judge was confronted with a report of deadlock after rather scant deliberation on either side of the lunch recess on the day the jury first retired. He properly exercised his discretion to hold the jurors to their duty to deliberate thoroughly together before concluding that they were indeed unable to agree. The judge's additional instructions in response to the first inquiry of the jury hew closely to the language of N.C.G.S. § 15A-1235. They are notable for the balance he achieved between recalling the jurors to their duty to deliberate fully and reminding them that their duty also required them to stand fast for their convictions after full reflection. Nor is there the slightest reference in his remarks to burdens on the administration of justice, to wasted court resources, or to the necessity of empanelling another jury in the event of a mistrial. The trial judge's instructions and remarks were well within the rules established in *State v. Fowler*, 312 N.C. 304, 322 S.E. 2d 389, and *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978).

[3] The trial judge held a second, very brief colloquy with the jury on the second day of its deliberations. Upon asking if there had been any change in its position, he was told that the division was then nine to three. The judge responded, "You're making progress." This remark, if taken out of context, might be considered of questionable propriety. In the context of the court's previous lengthy additional instructions, however, the remark could only be taken to mean that the jury was making progress towards determining whether it could conscientiously agree on a verdict. The judge's final remark to the jurors as he sent them home for their overnight recess was that he hoped that when they returned they would "be able to resolve the matter." He

thus again made it clear that what he sought was resolution after full reflection, not one outcome or another. Although we find the trial judge's remark about "making progress" does not constitute error, much less plain error, the better practice would be for trial judges to refrain from using such expressions.

No error.

POLLY ANN APPLE v. GUILFORD COUNTY AND INSURANCE COMPANY OF NORTH AMERICA

No. 217PA87

(Filed 5 November 1987)

Master and Servant § 77.2— workers' compensation—claim for additional award—time for filing

The filing of an Industrial Commission Form 18 in a workers' compensation case did not constitute a timely application for review under N.C.G.S. § 97-47 where the last compensation check was forwarded to plaintiff on 27 March 1981; she gave the check to her attorney; plaintiff's attorney wrote a letter requesting review on 20 August 1983; and plaintiff's attorney returned the check to defendant's attorneys on the date of the hearing, 24 January 1984. The filing of the Form 18 on 11 February 1981, prior to receipt of final payment, was not supererogatory compliance with the statute. A Form 18 filed prior to receipt of final payment would have to contain an express request for review based upon change of condition in order to serve as a vehicle for an application for review based on change of condition, and the Form 18 filed by plaintiff does not contain such language. Although the Supreme Court has not addressed the question, the filing of a Form 18 after receipt of final payment may satisfy the requirements of N.C.G.S. § 97-47.

ON defendants' petition for discretionary review of the decision of the Court of Appeals, 84 N.C. App. 679, 353 S.E. 2d 641 (1987), which reversed the opinion and award of the Industrial Commission, filed 12 March 1986, and remanded the case to the full Commission for further consideration. Heard in the Supreme Court 13 October 1987.

Max D. Ballinger for plaintiff-appellee.

Smith Helms Mulliss & Moore, by Caroline H. Wyatt, for defendant-appellants.

MARTIN, Justice.

This workers' compensation case comes before us solely on the question of whether plaintiff's application for additional compensation, based on change of condition, was time-barred by section 97-47 of the Workers' Compensation Act. We hold that it was and therefore reverse the Court of Appeals.

Plaintiff, Polly Ann Apple, was injured on 18 September 1980 when the van in which she was riding was involved in an accident. When the accident occurred, plaintiff was engaged in her duties as a transportation matron for the Guilford County Sheriff's Department. She sustained lacerations to her head and elbow, fractures to one finger on each hand, and a pinched nerve in the back of her neck. She was treated at Duke University Medical Center immediately after the accident and thereafter at Moses H. Cone Hospital in Greensboro.

On 2 December 1980, plaintiff and defendants entered into an Industrial Commission Form 21 compensation agreement. The Form 21 agreement recited the rate at which the employer and the insurance carrier agreed to pay compensation and the period of time for which compensation was to be paid. It also stated the date on which the employee was able to return to work.

Plaintiff subsequently filed an I.C. Form 18, notice of accident and claim of employee, dated 6 February 1981. She sent copies to her employer and to the Industrial Commission, which acknowledged receipt thereof in a letter to plaintiff's attorney dated 16 February 1981. The Form 18 recited the place, date, cause, nature, and extent of the employee's injury, as well as the occupation, hourly wage, hours per day worked, the date disability began, and other information about the claimant. The date of return to work or, alternatively, the estimated disability, was listed as "unknown."

By the terms of the compensation agreement, plaintiff was to receive, and did receive, payment for one and six-sevenths weeks at a weekly rate of $44.99. Her second and last payment was mailed to her by the carrier on 27 March 1981 along with I.C. Form 28B, Report of Compensation and Medical Paid. Form 28B recited the date of the accident, the injuries sustained, the period of time for which compensation was paid, the total amount of com-

pensation and medical paid, the date on which the last compensation check was forwarded, and the date on which the employee was able to return to work. Item 14 asked, "Does This Report Close the Case—including final compensation payment?" "[Y]es" was the response supplied on the Form 28B sent to plaintiff. Form 28B also included:

> NOTICE TO EMPLOYEE: If the answer to Item No. 14 above is "Yes," this is to notify you that upon receipt of this form your compensation stops. If you claim further benefits, you must notify the Commission in writing within two (2) years from the date of receipt of your last compensation check.

Plaintiff received the 27 March 1981 check and the Form 28B, although she cannot recall the date on which she received them. The Industrial Commission received its copy of the Form 28B on 30 March 1981. Plaintiff did not cash this second and final compensation payment. She turned it and the Form 28B over to her attorney. However, plaintiff took no further action until 20 August 1983, on which date her attorney wrote to the Commission requesting that it assign her claim for hearing. Plaintiff requested determination of both temporary total disability and permanent partial disability benefits due her as a result of the 18 September 1980 accident.

On 28 February 1985, the deputy commissioner rejected defendants' argument that plaintiff's claim was time-barred by N.C. G.S. § 97-47 and entered an award for plaintiff. The full Commission, however, reversed the decision of the deputy commissioner on the grounds that plaintiff's claim was time-barred, in an opinion and award filed on 12 March 1986. The Court of Appeals reversed the Commission on the grounds that the Form 18 which plaintiff filed was a timely application for review based on change of condition.

Accordingly, the only issue before us is whether the Form 18 filed by plaintiff on 6 February 1981 constituted a timely application for review within the meaning of N.C.G.S. § 97-47. We hold that under the facts of this case the filing by plaintiff of the Form 18 did not constitute a timely application for review. This Court has interpreted N.C.G.S. § 97-47 as a statute of limitations which requires an employee to apply for additional compensation on the

grounds of a change in condition within two years of the date on which the last compensation was paid. *Willis v. Davis Industries*, 280 N.C. 709, 186 S.E. 2d 913 (1972). The last compensation check was forwarded to plaintiff on 27 March 1981 and received by her. She gave the check to her attorney, who kept it until it was returned to defendants' attorneys on the date of the hearing, 24 January 1984. The letter requesting review, written by her attorney on 20 August 1983, clearly fails to meet the requirements of the statute. Plaintiff would have us treat the filing of the Form 18, on 11 February 1981, *prior* to receipt of final payment as supererogatory compliance with the statute, as doing more than the statute requires by filing notice of change of condition before the statutory two-year period had begun to run. But this analysis defeats the purpose of the statute, which is to give timely notice to employer and insurance carrier that a further claim is being made. The employer and the insurance carrier are entitled to treat final payment under a Form 21 agreement as closing the proceeding, absent timely notice that an employee seeks further compensation due to change of condition.

We do not say that a Form 18 could never satisfy the timely notice requirement imposed by N.C.G.S. § 97-47. In *Chisholm v. Diamond Condominium Constr. Co.*, 83 N.C. App. 14, 348 S.E. 2d 596 (1986), *disc. rev. denied*, 319 N.C. 103, 353 S.E. 2d 106 (1987), the Court of Appeals held that a Form 18 filed *after* receipt of final payment was sufficient to constitute an application for review under N.C.G.S. § 97-47. Although this Court has not addressed the question, filing of a Form 18 *after* receipt of final payment may satisfy the requirements of N.C.G.S. § 97-47 because receipt of a Form 18 by the employer and the carrier after they have made what they deem to be final payment may serve to notify them that the employee wishes to reopen the case.

A Form 18 received *prior* to final payment, however, would not, without more, produce this effect. It would be taken, rather, as mere completion of the paper work required of the employee in connection with the filing of the initial claim and would not be adequate to signal a further claim based on change of condition.[1]

1. This is demonstrated in this case by the letter from the Commission to plaintiff's attorney upon receipt of the Form 18: "The Commission has received your form 18 filed on behalf of plaintiff. We are making this claim a part of our file in this case."

In order to achieve this purpose, a Form 18 filed prior to receipt of final payment would have to contain an express request for review based upon change of condition. If a Form 18 were so drafted, it could serve as a vehicle for an application for review based on change of condition despite being filed prior to receipt of final payment. The Form 18 filed by plaintiff does not contain express language requesting a hearing based upon change of condition pursuant to N.C.G.S. § 97-47.

The decision of the Court of Appeals is reversed and the case is remanded to that court for remand to the Industrial Commission for further proceedings not inconsistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. RICHARD RHODES

No. 174A87

(Filed 5 November 1987)

1. **Rape and Allied Offenses § 5— first degree rape—intercourse with child under thirteen**

The evidence was sufficient to support defendant's conviction of first degree rape under N.C.G.S. § 14-27.2(a)(1) where the victim and her brother both testified that defendant had intercourse with the victim, and the evidence showed that the victim was ten years old and defendant was twenty-nine years old at the time.

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

The evidence was sufficient to support defendant's conviction of taking indecent liberties with a minor where it tended to show that the twenty-nine-year-old defendant engaged in sexual intercourse with the ten-year-old daughter of his girlfriend. N.C.G.S. § 14-202.1.

3. **Witnesses § 1.2— competency of children to testify**

The trial court did not err in ruling that the ten-year-old victim and her nine-year-old brother were qualified to testify in a rape and indecent liberties case where the *voir dire* testimony of the children supported the court's findings and conclusion that both children were capable of expressing themselves concerning the matters about which they were to testify and that the children understood the importance of telling the truth. N.C.G.S. § 8C-1, Rule 601(b).

4. Criminal Law § 26.5— convictions of rape and indecent liberties—no double jeopardy

Defendant was not placed in double jeopardy by being convicted and sentenced for both first degree rape and taking indecent liberties with a minor based on the same incident since each offense requires proof of a fact not required by the other offense.

APPEAL by defendant as of right from a life sentence imposed by *Watts, Judge*, at the 17 November 1986 session of Superior Court, WASHINGTON County. Defendant's motion to bypass the Court of Appeals on an appeal from a sentence of less than life was allowed. Heard in the Supreme Court 9 September 1987.

The defendant was tried for first degree rape and taking indecent liberties with a child. The State's evidence showed that on 4 January 1986 the defendant, who was 29 years of age, was living in a trailer with his girlfriend and her two children. The two children were a girl, ten years of age, and a boy, nine years of age at the time of the trial. The ten year old girl testified that while her mother was away from home the defendant took her into the bedroom where he told her to undress and lie on the bed, which she did. The defendant then undressed, got on top of her and inserted his penis into her vagina. The defendant told her he would kill her, her mother and her brother if she told anyone what happened. The nine year old boy testified that he peeped through a crack in the door of the bedroom and saw the defendant when he told the boy's sister to undress. He then saw the defendant undress, get on top of his sister and insert his penis into her vagina.

The defendant testified and denied that he had intercourse with the ten year old girl. The defendant was convicted of both charges. He was sentenced to life in prison for the rape and ten years for the taking of indecent liberties with a minor. The defendant appealed.

Lacy H. Thornburg, Attorney General, by Catherine C. McLamb, Assistant Attorney General, for the State.

Maynard A. Harrell, Jr., for defendant appellant.

WEBB, Justice.

[1] The defendant first contends there was not sufficient evidence to convict him of either first degree rape or taking indecent

liberties with a minor. We deal first with the charge of first degree rape. N.C.G.S. § 14-27.2 provides in part:

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or
>
> . . . .

A person may be guilty of first degree rape if (1) he has vaginal intercourse with a child under the age of 13 years, (2) he is at least 12 years old and (3) he is at least four years older than the victim. *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982). In this case two witnesses, the ten year old prosecuting witness and her nine year old brother, testified the defendant had intercourse with the ten year old girl. There was testimony from several witnesses that the prosecuting witness was ten years of age. The defendant testified he was born on 4 February 1956 which would make him 29 years of age on 4 January 1986. This evidence is sufficient to withstand a motion to dismiss on the charge of first degree rape.

[2] As to the charge of taking indecent liberties with a minor, N.C.G.S. § 14-202.1 provides in part:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> . . . .

In order to obtain a conviction under this statute, the State must prove (1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose

of arousing or gratifying sexual desire. *State v. Hicks*, 79 N.C. App. 599, 339 S.E. 2d 806 (1986). The first four of these elements were proved by direct evidence. The fifth element, that the action was for the purpose of arousing or gratifying sexual desire, may be inferred from the evidence of the defendant's actions. This is sufficient evidence to withstand a motion to dismiss the charge of taking indecent liberties with a child.

[3] The defendant next contends it was error for the court to allow the ten year old girl to testify. He contends she should have been disqualified under N.C.G.S. § 8C-1, Rule 601(b) which provides:

> A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

Prior to the testimony of the witness, the court conducted a voir dire hearing out of the presence of the jury to determine her competency to testify. She testified she was ten years of age and in the fourth grade at Pines Elementary School. She testified that she was living with her grandmother at the time and testified as to the other people who lived there. She also testified she could read and write and made good grades in school. She testified further she understood that she would go to jail if she did not tell the truth. The court made findings of fact consistent with this testimony and concluded as follows:

> the witness . . . has demonstrated a sufficient level of intelligence to express herself concerning the matters and things about which she will be testifying so as to be understood and that the witness . . . is fully capable of and does understand the importance of telling the truth as a witness and is not thereby disqualified as a witness pursuant to General Statute 8C-1, Rule 601(b).

The testimony of the ten year old child supported the findings of fact and the conclusion of the court that she was capable of expressing herself concerning the matters and things about which she was to testify and that she understood the importance of tell-

ing the truth. It was not error for the court not to disqualify the witness pursuant to Rule 601(b). *See State v. DeLeonardo*, 315 N.C. 762, 340 S.E. 2d 350 (1986) and *State v. Fields*, 315 N.C. 191, 337 S.E. 2d 518 (1985).

The defendant also assigns error to the court's allowing the younger brother of the prosecuting witness to testify. Prior to his testimony, the court conducted a voir dire out of the presence of the jury. The child testified to his age, where he lived, with whom he lived, where he went to school and the names of his teachers. He also testified that he saw the defendant do something to his sister. He testified further that he knew it was wrong to tell a lie, that Jesus did not want him to tell a lie, and that he would go to jail if he did not tell the truth. The court made findings of fact consistent with this evidence and concluded that the child had "demonstrated a sufficient level of intelligence to express himself concerning the matters and things about which he will be testifying so as to be understood and . . . is fully capable of and does understand the importance of telling the truth as a witness." The court refused to disqualify the nine year old boy as a witness. The testimony of the nine year old supported the findings of fact of the court. The findings of fact supported the conclusion of law by the court that the nine year old boy was not disqualified as a witness. *See DeLeonardo*, 315 N.C. 762, 340 S.E. 2d 350 and *Fields*, 315 N.C. 191, 337 S.E. 2d 518.

[4] In his last assignment of error, the defendant contends that the failure to arrest judgment of his conviction of taking indecent liberties with a minor subjected him to double jeopardy. He says this is so because the rape charge and the taking indecent liberties charge grew from the same facts and circumstances. A person is not subject to double jeopardy by being prosecuted for two separate crimes based on the same transaction provided each offense for which he is tried requires proof of a fact which the other offense does not. *Blockburger v. United States*, 284 U.S. 299, 76 L.Ed. 306 (1932). In this case, proof of rape requires proof of vaginal intercourse, while proof of taking indecent liberties with a minor requires proof that the defendant committed the act for the purpose of arousing or gratifying sexual desire. Vaginal intercourse is not an element of taking indecent liberties with a minor and committing the act for the purpose of arousing or gratifying sexual desire is not an element of rape. The defendant was not

placed in double jeopardy by being convicted of both crimes. *State v. Etheridge*, 319 N.C. 34, 352 S.E. 2d 673 (1987) and *Weaver*, 306 N.C. 629, 295 S.E. 2d 375.

No error.

STATE OF NORTH CAROLINA v. GARY MALONE RIGGINS

No. 457A86

(Filed 5 November 1987)

1. **Criminal Law § 97.1— witness recall after jury deliberating**

The trial court did not abuse its discretion in permitting a State's witness to retake the stand after the jury had begun its deliberations and to give further testimony concerning the date of a photographic identification even if the court was unaware that the date given by the witness upon recall was inconsistent with the date given in his prior testimony.

2. **Criminal Law § 99.3— permitting witness recall—failure to inform jury of inconsistent testimony—no expression of opinion**

The trial judge did not express an opinion as to whether a fact was proven when he permitted a recalled witness to present new testimony about the date of a photographic identification without informing the jury that the testimony was different from the witness's earlier sworn testimony.

DEFENDANT was convicted of first degree rape and first degree kidnapping before *DeRamus, Jr., J.*, at the 21 April 1986 Criminal Session of Superior Court, WILKES County. After jury verdict, the judge reduced the first degree kidnapping conviction to second degree kidnapping. Defendant appeals from a sentence of life imprisonment for first degree rape and thirty years imprisonment for second degree kidnapping, to run consecutively. Heard before the Supreme Court 12 October 1987.

Lacy H. Thornburg, Attorney General, by George W. Boylan, Special Deputy Attorney General, for the State.

Malcolm R. Hunter, Jr., Appellate Defender, for defendant-appellant.

FRYE, Justice.

The sole issue raised by defendant on appeal is whether the trial court committed reversible error when, at the request of the jury, it allowed a State witness to retake the stand without the court acknowledging to the jury that the witness' earlier testimony had been different. We find that the trial court did not err.

Summarily stated, the evidence introduced at defendant's trial showed that on 6 December 1985, defendant knocked on the victim's door in the middle of the night and asked if he could use her telephone because his car was inoperable. The victim did not know defendant but allowed him into the apartment to use the telephone to call his brother. Defendant left after using the telephone and the victim heard him unsuccessfully trying to start his car. He later returned to her apartment and asked if she could help him.

Together they managed to start the car. Defendant thanked the victim and she turned to reenter her apartment. At that time defendant grabbed her from behind and held a gun to her head. Defendant forced her into his car and told her he would "blow her brains out" if she ran away.

Defendant drove three miles from the apartment to a country road where he raped the victim in his car. Defendant immediately became apologetic and drove the victim back to her apartment. There he told her, "I guess you want to kill me." He then handed the victim his loaded gun. She told him she could not do it and gave the gun back. She got out of the car and entered her apartment.

The victim, at the request of her roommate, went to the hospital where the police were called. Some time after the incident, the victim identified defendant from a photographic line-up brought to her house by a police officer. She also pointed out defendant in the courtroom as the person who had abducted and raped her.

[1] The issue before this Court concerns the following testimony. During defendant's trial, the victim testified on direct examination that she had identified defendant from a photographic line-up at her apartment but *not* on the same day as the 6 December 1985 incident. During his direct examination, Detective Sergeant

Dennis Johnson testified that on 6 December 1985 at about 3:56 p.m. he and another police officer had gone to the victim's residence where she had identified the defendant from a photographic line-up. No inquiry was made as to the inconsistent dates given.

After the jury retired for deliberations, the bailiff returned to the courtroom with a question from the jury. The trial judge then requested that the jurors return to the courtroom. The jury foreman stated that the jury had a question concerning the date the photographic line-up was presented to the victim. The District Attorney then moved that the State be allowed to recall Detective Johnson so that he could repeat his testimony. Defendant's attorney stated there were no objections.

After admonishing the witness that he was still under oath, the trial judge allowed the District Attorney to proceed with his reexamination. This time, Detective Johnson testified that he presented the photographic line-up to the victim at her apartment on 10 December 1985 at 3:56 p.m., a date four days later than the date he had given in his earlier testimony.

Defendant contends the trial judge committed prejudicial error by permitting the further testimony of the State's witness and not acknowledging its inconsistency. We find this contention meritless.

Pursuant to N.C.G.S. § 15A-1226(b), the trial judge is authorized in his discretion to permit any party to introduce additional evidence at any time prior to verdict. We find that the trial judge did not abuse his discretion in the instant case. Defendant did not object to the recalling of Detective Johnson. The testimony in question concerned an incidental aspect of the case and did not involve a necessary element or feature of the State's case in chief, or that of the defendant.

Defendant further asserts that the trial judge was not aware that inconsistent testimony had been given. Thus, defendant argues that the trial judge labored under a misapprehension. In the initial testimony, the victim offered one date and the detective another. When the jury asked to rehear the testimony of the investigating officer concerning the identification, defendant argues that the detective changed his testimony on the date so that it was consistent with that already given by the victim. Because of

this misapprehension under which the trial court labored, the defendant argues that a new trial should be ordered.

Defendant cites *State v. Lang*, 301 N.C. 508, 272 S.E. 2d 123 (1980) to support his contention. In *Lang*, this Court ordered a new trial because the trial judge was under the misapprehension that he could not make the transcript available to the jury after the jury had retired. Because, the defendant argues, the trial judge in the instant case labored under a similar misapprehension that he was unaware that inconsistent evidence had been given defendant too should receive a new trial under the analysis of *Lang*. Defendant then would read *Lang* to direct that, if the trial judge labored under any misapprehension, a new trial should be ordered. Defendant reads *Lang* too broadly.

Lang concerns the misapprehension of the judge as to his discretion to make available the transcript to the jury. In *Lang*, there was error because the trial judge refused to exercise his discretion in the erroneous belief that he had no discretion as to the question presented. In the instant case, the trial judge was well aware of his discretionary authority to recall witnesses. Indeed, he exercised that discretion. The trial judge's only misapprehension, if any, was his lack of awareness of the inconsistent dates given by the State's witness upon recall. We decline defendant's invitation to extend *Lang* to such situations.

[2] Additionally, defendant assigns as error the trial judge's failure to acknowledge the inconsistent testimony once it was given. Defendant contends that the court permitted the witness to present new testimony which contradicted his earlier testimony without informing the jury that the testimony was different from earlier sworn testimony; and that by failing to acknowledge a conflict in the evidence and allowing the State's witness to change his testimony without even acknowledging the change, the court expressed an opinion as to whether a fact was proven and thus misled the jury. We disagree.

It is fundamental that it is not the duty of the trial judge to resolve inconsistencies in testimony. This is the sole province of the jury. Doubtful is it that any principle in our system of jurisprudence is more strictly defined than that which separates the functions of the judge from those of the jury.

In *State v. Fogleman*, 204 N.C. 401, 168 S.E. 536 (1933), this Court stated:

> The determination of the facts is the exclusive province of the jury; the elucidation of the law is the exclusive province of the judge; the judge cannot exercise the prerogatives of the jury. The two are separate and distinct, and neither has the right to invade the field of the other.

Id. at 404-05, 168 S.E. 2d at 538.

As the sole triers of fact, it was for the jury to compare the earlier and later testimony of Detective Johnson and it was for the jury to draw inferences from any inconsistencies or the existence of conflicts as might appear from the State's reexamination of its witness. Therefore, the judge did not err in failing to call to the attention of the jury the inconsistency in the witness' testimony.

In defendant's trial, we find

No error.

STATE OF NORTH CAROLINA v. FLOYD DIXON

No. 680A86

(Filed 5 November 1987)

1. **Homicide § 25.2— premeditation and deliberation—instructions—no plain error**

There was no plain error in the trial court's instruction on premeditation and deliberation in a first degree murder prosecution where the evidence showed that defendant deliberately shot and killed the victim while the victim was walking away from him. It may not reasonably be said that the jury's verdict depended on the fine distinctions defendant made in his complaint about the charge.

2. **Homicide § 12— first degree murder—indictment—no aggravating factors listed**

The error in a first degree murder prosecution was in defendant's favor where the prosecutor announced prior to trial that the State was not seeking the death penalty because there were no aggravating factors listed on the indictment. It is not necessary to list the aggravating factors on the bill of indictment in order to seek the death penalty.

State v. Dixon

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) by defendant from a judgment by *Lewis (John B., Jr.), Judge*, imposing a life sentence after the defendant was convicted of first degree murder at the 18 August 1986 criminal term of Superior Court, GREENE County. Heard in the Supreme Court 14 October 1987.

The defendant was tried for first degree murder. The evidence for the State showed that on 19 January 1986 Walter Speight, accompanied by his relative Reggie Speight, was in a "drinking establishment" operated by the defendant. Walter Speight was in an altercation with Calvin Aytch which ended in a handshake between the two men. Shortly after the altercation, Calvin Aytch engaged in a conversation with the defendant. Reggie Speight overheard the defendant say, "Do you want it . . . but do you want it?" Reggie Speight then told Walter Speight, "Man, they are talking about shooting; let's go."

The defendant was observed leaving the premises after talking to Calvin Aytch. The defendant returned a few minutes later with a 12 gauge shotgun and met Walter Speight who was standing in the door of the "drinking establishment." The defendant pointed the shotgun at Walter Speight and forced him into the building. Walter Speight said, "Come on, no need of that." As the defendant advanced, Walter Speight raised his arms and begged for his life. Walter Speight backed into the area of the "jukebox" and dropped his arms. He turned his back on the defendant and started to walk away from him. At this time, the defendant followed Walter Speight and shot him in the back at point blank range. Walter Speight fell to the floor. At this time, Reggie Speight started into the building. The defendant turned to Reggie Speight and said, "If you come in I will shoot you too." The defendant then left the scene, appearing to be calm. Walter Speight died as a result of the gunshot wounds.

The defendant was convicted of first degree murder. The question as to whether the death penalty would be imposed was not submitted to the jury and the court sentenced the defendant to life imprisonment.

Lacy H. Thornburg, Attorney General, by Christopher P. Brewer, Special Deputy Attorney General, for the State.

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

WEBB, Justice.

[1] The defendant's only assignment of error is to the charge to the jury. The court charged the jury in part as follows:

> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred such as the lack of provocation by the victim, conduct of the defendant before, during and after the killing, threats and declarations of the defendant, use of grossly excessive force, brutal or vicious circumstances of the killing, the manner in which or the means by which the killing was done.

The defendant contends this charge was erroneous in two respects. He says that it recites circumstances which were not in evidence and that it alleviated the requirement of the State that it prove premeditation and deliberation beyond a reasonable doubt. The defendant, relying on *Francis v. Franklin*, 471 U.S. 307, 85 L.Ed. 2d 344 (1985), contends that by charging as it did, the court told the jury the State had satisfied its burden of proof as to premeditation and deliberation when it proved any of the predicate facts upon which premeditation and deliberation could be based.

The defendant did not object to the charge when given. He has waived his right to appeal from this portion of the charge. N.C.R. App. P. 10(b)(2). If we are to review it, we must do so pursuant to the plain error rule, which was first enunciated in this state in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). In *Odom* we said,

> "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has 'resulted in a miscarriage of 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) (footnotes omitted)). In *State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986) and *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983), we said that in order to consider an assignment of error under the plain error rule, an appellate court must determine that the alleged error "tilted the scales" and caused the jury to reach its verdict convicting the defendant.

We hold that if there was error in the charge, as contended by the defendant, it was not plain error. The evidence of first degree murder against the defendant was overwhelming. It showed that he deliberately shot and killed Walter Speight when Walter Speight was walking away from him. It takes little time to premeditate and deliberate. *State v. Sanders*, 276 N.C. 598, 174 S.E. 2d 487 (1970), *reversed on other grounds*, 403 U.S. 948, 29 L.Ed. 2d 860 (1971). It would be hard not to infer that the defendant's action was the result of premeditation and deliberation. We do not believe it may reasonably be said that the jury's verdict depended on the fine distinctions defendant makes in his complaint about the charge. We hold that what the defendant contends was error in the charge did not "tilt the scales" against the defendant. There was not plain error in the charge of the court.

[2] Prior to the trial the prosecuting attorney announced "there are no aggravating circumstances on the bill of indictment and therefore, the State is not seeking the death penalty." It is not necessary to list aggravating circumstances on the bill of indictment in order to seek the death penalty. *State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981). This was error favorable to the defendant. *State v. Jones*, 299 N.C. 298, 261 S.E. 2d 860 (1980).

No error.

STATE OF NORTH CAROLINA v. RONALD EDWARD FREELAND

No. 607A86

(Filed 5 November 1987)

Criminal Law § 26.5— kidnapping, rape and sexual offense—multiple punishments problem—arrest of rape judgment

Where defendant was convicted of first degree kidnapping, first degree rape and first degree sexual offense, and it appears that the jury must have relied on the sexual offense or the rape in order to find the sexual assault element of first degree kidnapping, the trial court could avoid a multiple punishment problem by arresting judgment on the first degree rape case and was not required either to arrest judgment on both of the sexual assault convictions or to arrest judgment on the first degree kidnapping conviction and resentence defendant for second degree kidnapping.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from an order entered by *Ellis, J.*, on 7 July 1986 in Superior Court, ALAMANCE County, arresting a judgment of life imprisonment in No. 83CRS13176, wherein defendant was convicted of first degree rape, but leaving undisturbed judgments of life imprisonment in No. 83CRS13177, wherein defendant was convicted of first degree sexual offense, and thirty years' imprisonment in No. 83CRS 13178, wherein defendant was convicted of first degree kidnapping. Defendant's motion to bypass the Court of Appeals in the kidnapping case was allowed on 28 January 1987. Heard in the Supreme Court 15 October 1987.

Lacy H. Thornburg, Attorney General, by John R. Corne, Assistant Attorney General, for the state.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gayle L. Moses, Assistant Appellate Defender, for defendant appellant.

PER CURIAM.

Defendant was initially tried at the 6 February 1984 Criminal Session of Superior Court, Alamance County, before Judge Robert Hobgood and a jury. He was convicted of first degree rape, first degree sexual offense and first degree kidnapping. Judge Hobgood sentenced him to life imprisonment in both the first degree rape and first degree sexual offense cases, the sentences to run concurrently, and to thirty years' imprisonment in the first

degree kidnapping case, this sentence to begin at the expiration of the life sentences.

Upon appeal this Court concluded that the jury must have relied on the sexual offense or the rape in order to find the sexual assault element of first degree kidnapping. Further concluding that the legislature had not authorized cumulative punishments for both first degree kidnapping and a crime which formed a necessary element of the kidnapping, the Court remanded the case for a new sentencing hearing. The Court directed the trial court either to arrest judgment on the first degree kidnapping conviction and resentence defendant for second degree kidnapping or to arrest judgment on one of the sexual assault convictions. *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35 (1986).

Judge Ellis conducted the new sentencing hearing on 7 July 1986. He elected pursuant to this Court's directions to arrest judgment in defendant's first degree rape case.

Defendant now contends that under *State v. Belton*, 318 N.C. 141, 347 S.E. 2d 755 (1986), Judge Ellis was required either to arrest judgment on both of the sexual assault convictions or to arrest judgment on the first degree kidnapping conviction and resentence defendant for second degree kidnapping. We recently rejected this same argument in *State v. Young*, 319 N.C. 661, 356 S.E. 2d 347 (1987), distinguishing *Belton* from both *Freeland* and *Young*.

On the authority of our initial *Freeland* decision and *Young* the decision of Judge Ellis is

Affirmed.

ANDREE T. HOCHHEISER, ADMINISTRATOR OF THE ESTATES OF CLAUDINE HOCHHEISER AND RENEE HOCHHEISER, DECEASED v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 642PA86

(Filed 5 November 1987)

Appeal and Error § 64— evenly divided Court—decision affirmed without precedential value

Where one member of the Supreme Court did not participate in the consideration or decision of a case and the remaining six justices are equally divided, the decision of the Court of Appeals is left undisturbed and stands without precedential value.

APPEAL by the plaintiff from a decision of the Court of Appeals, 82 N.C. App. 712, 348 S.E. 2d 140 (1986) reversing an opinion and award of the North Carolina Industrial Commission. Heard in the Supreme Court 14 October 1987.

Beskind and Rudolf, P.A., by Donald H. Beskind and Heidi G. Chapman, for the plaintiff appellant.

Lacy H. Thornburg, Attorney General; Monroe, Wyne, Atkins & Lennon, P.A., by George W. Lennon, for defendant appellee.

Herman E. Gaskins, Jr., for North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

Justice Webb took no part in the consideration or decision of this case. The remaining members of this Court were equally divided with three members voting to affirm the decision of the Court of Appeals and three members voting to reverse. Therefore, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See State v. Johnson*, 286 N.C. 331, 210 S.E. 2d 260 (1974).

Affirmed.

JOHN M. PETERSON v. LINDA LOUISE BONE ALDRIDGE

No. 226A87

(Filed 5 November 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, 85 N.C. App. 171, 354 S.E. 2d 776 (1987), which affirmed the dismissal of plaintiff's complaint by *Payne, J.*, at the 9 May 1986 session of District Court, WAKE County. Heard in the Supreme Court 12 October 1987.

DeBank, McDaniel, Heidgerd, Holbrook & Anderson, by C. D. Heidgerd, for plaintiff-appellant.

Malcolm B. Grandy for defendant-appellee.

PER CURIAM.

For reasons stated in the dissenting opinion of Becton, J., the decision of the Court of Appeals is reversed. The case is remanded to that court for remand to the District Court, Wake County, for further proceedings not inconsistent with this opinion.

Reversed and remanded.

LINDA H. (HALL) KNOTTS v. BENNY T. HALL; JAMES O. BUCHANAN, TRUSTEE; AND THE UNITED STATES OF AMERICA, ACTING THROUGH FARMERS HOME ADMINISTRATION, U.S. DEPARTMENT OF AGRICULTURE

No. 300A87

(Filed 5 November 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, 85 N.C. App. 463, 355 S.E. 2d 237 (1987), which affirmed an order entered by *Cornelius, J.*, at the 5 May 1986 Civil Session of Superior Court, STANLY County. Heard in the Supreme Court 12 October 1987.

David A. Chambers for petitioner-appellant.

Michael W. Taylor for respondent-appellee.

PER CURIAM.

Affirmed.

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

COLLINS v. N.C. FARM BUREAU MUTUAL INS. CO.

No. 442P87.

Case below: 86 N.C. App. 376.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 November 1987.

DALY GROUP v. MANNING CORPORATION

No. 395P87.

Case below: 86 N.C. App. 231.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 November 1987.

DRISCKELL v. BYNUM

No. 414P87.

Case below: 86 N.C. App. 231.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 5 November 1987.

MERRITT v. MERRITT

No. 435P87.

Case below: 86 N.C. App. 376.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 November 1987.

NICHOLS v. WALKER

No. 484P87.

Case below: 86 N.C. App. 639.

Petition by defendant (Charles Walker) for discretionary review pursuant to G.S. 7A-31 denied 5 November 1987.

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

PATTERSON v. BURLINGTON INDUSTRIES

No. 518P87.

Case below: 87 N.C. App. 176.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 November 1987.

PHELPS v. DUKE POWER CO.

No. 464PA87.

Case below: 86 N.C. App. 455.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 November 1987.

RILEY v. RILEY

No. 493P87.

Case below: 86 N.C. App. 636.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 November 1987.

SAMPSON-BLADEN OIL CO. v. WALTERS

No. 440P87.

Case below: 86 N.C. App. 173.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 November 1987.

STACK v. MECKLENBURG COUNTY

No. 485P87.

Case below: 86 N.C. App. 550.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 November 1987.

STATE v. DANIELS

No. 539P87.

Case below: 87 N.C. App. 287.

Petition by defendant for temporary stay of the mandate of the Court of Appeals denied 19 October 1987.

STATE v. HATFIELD

No. 502P87.

Case below: 86 N.C. App. 640.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 November 1987.

STATE v. KERLEY

No. 543P87.

Case below: 87 N.C. App. 240.

Petition by Attorney General for temporary stay allowed 23 October 1987.

STATE v. MAYES

No. 514A87.

Case below: 86 N.C. App. 569.

Motion by the State to dismiss appeal filed pursuant to G.S. 7A-30 for lack of substantial constitutional question allowed 5 November 1987. Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 5 November 1987.

STATE v. MIXON

No. 463P87.

Case below: 86 N.C. App. 484.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 November 1987.

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

STATE v. OLIVER

No. 503P87.

Case below: 82 N.C. App. 135.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 November 1987.

STATE v. SALTER

No. 391P87.

Case below: 85 N.C. App. 172.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 November 1987.

STATE v. SULLIVAN

No. 441P87.

Case below: 86 N.C. App. 316.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 November 1987.

STATE v. WHITE

No. 535P87.

Case below: 84 N.C. App. 299.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 November 1987.

STATE v. WOXMAN

No. 554P87.

Case below: 87 N.C. App. 295.

Petition by defendant for temporary stay allowed 28 October 1987.

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

WALKER v. GUILFORD COUNTY

No. 424P87.

Case below: 86 N.C. App. 377.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 November 1987.

WILLIAMS v. JONES

No. 538A87.

Case below: 87 N.C. App. 178.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 November 1987.

STATE OF NORTH CAROLINA v. RUSSELL HOLDEN, JR.

No. 650A85

(Filed 2 December 1987)

1. **Criminal Law § 135.3; Jury § 7.11— death qualification of jury**

Death qualification of the jury in a first degree murder case did not deny defendant his right to a jury made up of a cross-section of the community or result in a conviction-prone jury in violation of the U.S. and N.C. Constitutions.

2. **Criminal Law § 135.3; Jury § 7.11— first degree murder—separate guilt and sentencing juries not required**

The trial court properly denied defendant's motion in a first degree murder case for two separate jury trials to decide the issues of guilt or innocence and punishment.

3. **Jury § 6— denial of motion to sequester prospective jurors**

The trial court did not abuse its discretion in denying defendant's motion to sequester the prospective jurors during the voir dire proceedings of a first degree murder case on the ground that questioning prospective jurors in a group setting prevents them from expressing their true feelings. N.C.G.S. § 15A-1214(j).

4. **Jury § 6.3— voir dire—ability to return guilty verdict—statements by prosecutor**

The prosecutor's statements to prospective jurors concerning the unanimity of the verdict, including a statement that "if there is one person on the jury who could not return a verdict of guilty then the State . . . could not receive a fair trial," were proper for the purpose of eliciting information relevant to provisions of N.C.G.S. § 15A-122(8) permitting a challenge for cause to a juror who, as a matter of conscience, would be unable to render a verdict in accordance with the law of North Carolina.

5. **Jury § 7.14— peremptory challenge of black jurors—no unlawful discrimination**

The trial court did not err in allowing the prosecution to challenge black potential jurors peremptorily where the State peremptorily challenged only four of twenty black potential jurors; defendant does not contend and the record does not show that the State based its peremptory challenges on racially discriminatory criteria; and defendant was tried by a jury of seven whites and five blacks, with one white alternate and one black alternate.

6. **Homicide § 12.1; Indictment and Warrant § 13— premeditation and deliberation or felony murder—election not required**

The trial court did not err in denying defendant's pretrial motion to require the State to elect whether it intended to base its first degree murder case on premeditation and deliberation or the felony murder rule.

7. Criminal Law § 98.2— refusal to sequester witnesses

The trial court did not err in the denial of defendant's motion to sequester the State's witnesses on the ground that the presence of an extensive number of witnesses has an unduly persuasive effect on the jurors and causes the witnesses to substitute the recollection of the mass for their individual recollections. N.C.G.S. § 15A-1225.

8. Constitutional Law § 30; Bills of Discovery § 6— list of State's witnesses not discoverable

The trial court properly denied defendant's pretrial discovery motion to compel the State to give him a list of the witnesses the State intended to call.

9. Constitutional Law § 31— refusal to provide defendant with ballistics expert and investigator

The trial court in a murder and attempted rape case did not err in the denial of defendant's motion that the State provide him with a ballistics expert and funds to hire a private investigator where defendant offered the court only a mere hope or suspicion that favorable evidence was available. N.C.G.S. §§ 7A-450(b) and 454.

10. Criminal Law § 75.4— voluntariness of confession

The trial court properly denied defendant's motion to suppress a statement he made to an SBI agent where the trial court conducted a voir dire hearing and found upon supporting evidence that defendant knowingly, voluntarily and understandingly waived his right to remain silent and to have an attorney present before making the statement.

11. Searches and Seizures § 14— issuance of warrant—consent to search

The trial court did not err in denying defendant's motion to suppress evidence seized from defendant's home and car after the issuance of a search warrant where the trial court found upon supporting evidence that defendant voluntarily consented to a search of his home and car and signed consent to search forms before the warrant was issued.

12. Homicide § 20.1— photographs of victim's body

The trial court did not err in denying defendant's motion to limit the number of photographs of a murder victim the State could introduce where the seven photographs presented by the State showing the body and the crime scene were not inflammatory or repetitive.

13. Criminal Law § 73.2— information received by officer not inadmissible hearsay

An officer's testimony that he received information that the victim had been shot was not inadmissible hearsay where the statement was not offered to prove the truth of the matter asserted but to explain why the officer procured a warrant to search defendant's home for a gun.

14. Criminal Law § 73.2— corroborative evidence not inadmissible hearsay

An SBI agent's testimony that a friend of defendant's wife told him that he observed defendant's wife come out of the house with something that appeared to be a gun was not inadmissible hearsay where the statement was offered to corroborate the previous testimony of the friend of defendant's wife.

15. Criminal Law § 80— firearms form—business records exception to hearsay rule

A federal firearms form which was filled out by defendant and a salesman at the time defendant bought the murder weapon was admissible under the business records exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(6).

16. Criminal Law § 87— testimony not improper assumptions

Witnesses in a homicide case did not improperly testify to assumptions when one witness explained a slang term, a second witness described what he remembered seeing at the crime scene and explained why he and other people present thought the victim died from a cut on her throat, and a forensic serologist and an SBI fingerprint examiner explained some of the mechanics of their fields of expertise.

17. Homicide § 21.6; Rape and Allied Offenses § 5— first degree murder—attempted first degree rape—sufficiency of evidence

The evidence was sufficient to support jury verdicts finding defendant guilty of first degree murder and attempted first degree rape.

18. Criminal Law § 102.6— jury argument—defendant's directions to wife—reasonable inference

The prosecutor's jury argument in a murder and attempted rape case that "his wife came over to see him in jail and don't you know what he told her is to get that gun and hide that gun" was a reasonable inference from evidence that defendant's gun was present at his home when it was searched on 16 March but was no longer there when officers returned on 18 March, defendant's wife visited him in jail on 17 March, and a witness observed defendant's wife come out of the house with something that appeared to be a gun.

19. Criminal Law § 102.6— jury argument—guilty people walking streets

Statements by the prosecutor in his jury argument to the effect that there are guilty people walking the streets of this country every day because the government cannot collect enough evidence to try them for crimes and for the jury to find them guilty were not improper when considered in context.

20. Criminal Law § 135.4— death penalty statute—constitutionality

The statute authorizing the death penalty, N.C.G.S. § 15A-2000, is not unconstitutional because the jury has discretion whether to impose it.

21. Jury § 7.11; Criminal Law § 135.3— capital punishment beliefs—excusal of juror after guilt phase

The trial court did not err in excusing a juror for cause and substituting an alternate juror after the completion of the guilt phase of a first degree murder case and prior to the sentencing phase where the juror stated during the *voir dire* prior to trial that she could vote for the death penalty but the trial court learned after the guilt phase was completed that she had changed her mind and could not vote for the death penalty under any circumstances. N.C.G.S. § 15A-2000(a)(2).

22. Homicide § 12; Indictment and Warrant § 13.1— first degree murder—death penalty—aggravating factors relied on—bill of particulars not required

The trial court did not err in the denial of defendant's motion to require the State to file a bill of particulars reciting the aggravating factors it intended to rely on at the punishment phase.

23. Criminal Law § 135.6— capital case—sentencing phase—evidence of prior conviction

Evidence of defendant's prior conviction was not improperly admitted during the sentencing phase of a first degree murder case to show defendant's bad character in violation of N.C.G.S. § 8C-1, Rule 404(a) but was properly admitted to prove the aggravating circumstance that defendant had previously been convicted of a felony involving the use or threat of violence to the person.

24. Criminal Law § 135.6— capital case—sentencing phase—evidence of prior criminal activity

Testimony by five witnesses concerning prior criminal activity by defendant (two rapes and three assaults) was not improperly admitted in a sentencing hearing for first degree murder to show a common scheme or plan in violation of N.C.G.S. § 8C-1, Rule 404(b) but was properly admitted to rebut evidence offered by defendant to prove the mitigating factor that he had no significant history of prior criminal activity. N.C.G.S. § 15A-2000(f)(1).

25. Criminal Law § 135.4— capital case—sentencing phase—jury argument—aggravating rather than mitigating factor—absence of prejudice

Defendant was not prejudiced by the prosecutor's jury argument in a murder and attempted rape case that evidence that defendant gave CPR to a victim while working with a rescue squad was really an aggravating rather than a mitigating factor because defendant used his position as a member of the rescue squad to commit a rape where any possible confusion about aggravating factors was eliminated by the trial judge's instructions.

26. Criminal Law § 102.12— jury argument for death penalty

The prosecutor's jury argument that "he should not be out there on the street and given the opportunity to commit this crime again" and that "the only way you can be sure . . . is if you give him the death penalty" was not improper.

27. Criminal Law § 102.6— statements that defendant will rape again

The prosecutor's jury arguments in a murder and rape case that "if he gets out there he's going to do it again" and "How many more women are we going to see this man rape before we say enough is enough?" were not so grossly improper as to require the trial judge to correct the arguments *ex mero motu*.

28. Criminal Law § 102.6— jury argument—statements about victim

The prosecutor's jury arguments in a murder and rape case that "The victim didn't have an opportunity to have [defendant's attorneys] represent her" on the date of the crimes and that "she cries out from the grave for justice" were not improper.

29. Criminal Law § 102.6— jury argument—religion gained by defendants

The prosecutor's jury argument that "I wish I had a quarter for every defendant that we've ever gotten up here that says after he got in jail he

found the Lord and now he's got religion," if marginally improper, was not so grossly improper as to require correction *ex mero motu.*

30. Criminal Law § 135.9— capital case—mitigating factors—no right to peremptory instructions

The trial court did not err in refusing to give peremptory instructions on the fifteen mitigating factors placed before the jury where evidence was presented from which the jury could find that three statutory factors were not true; the jury could find that defendant's age at the time of the crime, thirty, was not a mitigating factor; evidence was presented from which the jury could find that six nonstatutory factors were either not true or were of no mitigating value; and the jury found the remaining five nonstatutory factors.

31. Criminal Law § 135.7— capital case—life sentence if jury can't agree on punishment—refusal to instruct

The trial court in a first degree murder case properly refused to instruct the jury that the court would impose a life sentence if the jury could not unanimously agree on a recommendation of punishment within a reasonable time.

32. Criminal Law § 135.9— capital case—mitigating circumstances—burden of proof

Defendant has the burden of proving the existence of any mitigating circumstance by a preponderance of the evidence, and the trial court properly refused to instruct the jury that the burden was on the State to prove beyond a reasonable doubt that a mitigating circumstance does not exist.

33. Criminal Law § 135.9— mitigating circumstances—unanimity of jury

A jury must unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing, and the trial court properly refused to instruct the jury that "no single juror is precluded from considering anything in mitigation in the ultimate balancing process, even if that mitigating factor was not considered or agreed upon by all 12 of you unanimously."

34. Criminal Law § 135.9— capital case—low mental development—mitigating circumstance entitled to great weight—refusal of court to instruct

The trial court properly refused to give defendant's requested instruction that "Evidence that the defendant's mental or emotional development was significantly below that of persons of his chronological age is a mitigating circumstance entitled to great weight" since (1) although a defendant's mental or emotional development is a relevant part of the analysis of the mitigating factor of age, the relationship between defendant's mental and emotional development and that of persons of his chronological age is not the determinative factor, and the trial court properly instructed that "age" is not restricted to chronological age but includes defendant's mental and physical development, his experience, and his criminal tendencies, and (2) the jury has the duty to decide how much weight to give to each aggravating and mitigating circumstance.

35. Criminal Law § 135.7— capital case—unanimously find beyond reasonable doubt that death penalty appropriate—refusal to instruct

The trial court properly refused to give defendant's requested instruction that "even if you find that the aggravating circumstance is sufficiently substantial to call for the death penalty in light of the mitigating circumstances, you must unanimously and beyond a reasonable doubt find that death is the appropriate punishment in this case for this defendant" since this instruction incorrectly implies that the jury could find that the aggravating circumstances found are sufficiently substantial to call for the imposition of the death penalty, find that the mitigating circumstances do not outweigh the aggravating circumstances, and then decide not to impose the death penalty. N.C.G.S. § 15A-2000(c).

36. Criminal Law § 135.7— capital case—life imprisonment for typical and normal murders—refusal to instruct

The trial court properly refused to give defendant's requested instruction to the effect that the appropriate sentence for the "typical" and "normal" cases of premeditated and deliberated murder is life imprisonment.

37. Criminal Law § 135.8— capital case—aggravating circumstance—previous conviction—plea of no contest followed by sentence

A plea of no contest followed by a final judgment imposing a sentence is a conviction within the meaning of the previous conviction of a felony involving the use or threat of violence to the person aggravating circumstance set forth in N.C.G.S. § 15A-2000(e).

38. Criminal Law § 135.8— capital case—aggravating circumstance—preventing lawful arrest

Statements made by defendant were sufficient evidence for the jury to infer that one of the purposes motivating a murder was defendant's desire to avoid subsequent detection and apprehension for his rape of the victim so that the trial court properly submitted the aggravating circumstance as to whether the murder was committed for the purpose of avoiding or preventing a lawful arrest.

39. Criminal Law § 102.12— capital case—jury argument—execution procedure

The trial court in a capital case properly sustained the State's objection to defense counsel's jury argument describing the execution procedure defendant could encounter if he were sentenced to death since such argument was not based on the evidence presented.

40. Criminal Law § 102.12— capital case—jury argument—asking individual jurors to spare defendant's life

The trial court in a capital case properly sustained the State's objection to defense counsel's jury argument asking each juror individually to spare defendant's life.

41. Criminal Law § 135.10— killing after sexual assault—death penalty not disproportionate

A sentence of death imposed on a defendant who killed his victim after sexually assaulting her was not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant.

Chief Justice EXUM concurring.

Justice FRYE dissenting as to sentence.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of death entered by *Stevens, Judge*, at the 26 August 1986 Session of Superior Court, DUPLIN County, where defendant was convicted of one count of first-degree murder and one count of attempted first-degree rape. Defendant's motion to bypass the Court of Appeals as to the rape conviction was allowed. Heard in the Supreme Court 8 June 1987.

Defendant was tried for first-degree murder and first-degree rape. The State's evidence tended to show the following: At about 3:00 a.m. on 16 March 1985, defendant, the victim and a number of other people were leaving a certain nightclub. Mr. Levon Hicks, Mr. Johnny Barden, and the victim left with the defendant in his automobile. Defendant took Mr. Barden to his house. Soon thereafter, defendant stopped the car, and tied the victim's feet with a pair of suspenders that were in the car. At this time, the victim was very drunk, but conscious. Defendant then drove down a dirt road. He told Mr. Hicks he "was going to get some." Defendant parked the car again, got in the back seat with the victim, and began to feel her breasts. He unzipped her pants, then zipped them back up. He said he "would get him some, but somebody might hear her holler," so he got back in the front seat and drove off. He told Mr. Hicks, "[I]f you want some you better get it." Mr. Hicks replied that he "didn't want to mess with her." Defendant then took Mr. Hicks to his house on Rural Road 1106. When Mr. Hicks got out of the car, defendant said that "he was going to get some meat, but if he got it, he'[d] probably have to kill her so she wouldn't tell nobody." Mr. Hicks never saw the victim alive again.

The victim's body was found at 1:00 p.m. that day, off a dirt path running from Rural Road 1106. Her throat had a six-inch cut on it. She was partially undressed. Her right shoe was off, lying near her, and a red suspender was found beneath it.

When Mr. Hicks learned that the victim was dead, he went to the police and told them that defendant was the last person he had seen her with. The police searched defendant's home. They found a .25 caliber pistol. They wrote down the serial number, but

did not seize it because the search warrant did not authorize them to seize guns.

Two days later an autopsy revealed that the victim had been shot in the neck as well as cut, and that the gunshot wound was the cause of her death. The pistol was recovered from defendant's father on 29 March. An owner of a pawnshop produced a record indicating that defendant had bought the pistol.

A stained pair of pants had also been found at defendant's house on 16 March, in the washing machine. A forensic serologist testified that the stains were "probably" bloodstains. An SBI fiber expert testified that the suspender found under the victim's shoe and a suspender found in defendant's car were in all respects the same. He also testified that fibers found on the victim's clothing were in all respects the same as the fiber of the carpet in defendant's car. On 19 March, police returned to where the body was found and discovered a fired cartridge case. An SBI firearms expert testified that the cartridge case was fired in defendant's pistol.

The jury found defendant guilty of first-degree murder and attempted first-degree rape, and recommended that he be sentenced to death. The court sentenced defendant to death for the first-degree murder and twenty years imprisonment for the attempted first-degree rape.

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

Reginald Kenan, for defendant appellant.

WEBB, Justice.

[1] Defendant brings forth three assignments of error relating to the "death qualification" of the jury. He assigns error to the trial court's denial of his motion to prohibit the district attorney from challenging for cause jurors opposed to the death sentence, and the trial court's denial of his motion to seat jurors without regard to their opposition to the death penalty. Defendant further assigns error to the trial court's allowing the district attorney to ask jurors if they would be unable to vote for a sentence of death.

Defendant argues that the trial court, by "death qualifying" the jury in this manner, excluded a certain segment of society,

and thus denied defendant his right to be tried by a jury made up of a cross-section of the community. Defendant also argues that "death qualification" may have caused the jurors to be biased in favor of the prosecution's presentation.

In *Lockhart v. McCree*, 476 U.S. ---, 90 L.Ed. 2d 137 (1986), the United States Supreme Court held that the federal Constitution does not prohibit "death qualification," or removal for cause, prior to the guilt-innocence determination phase of a capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would substantially impair the performance of their duties as jurors at the sentencing phase of the trial. In its opinion, the United States Supreme Court rejected both defendant's argument that "death qualification" denies a defendant his right to a jury made up of a cross-section of the community, and also defendant's argument that "death qualification" results in a conviction-prone jury. Defendant's arguments were also rejected by this Court in *State v. King*, 316 N.C. 78, 340 S.E. 2d 71 (1986). In *State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986), we specifically held that "death qualification" does not violate the North Carolina Constitution. Defendant has given us no reason to disregard or overrule our decisions in *King* and *Barts*.

[2] Defendant next assigns error to the trial court's denial of his motion for two separate jury trials, one to decide the issue of guilt or innocence and another to decide the issue of punishment. Under N.C.G.S. § 15A-2000, it is intended that the same jury should hear both phases of the trial unless the original jury is unable to reconvene. N.C.G.S. § 15A-2000(a)(2); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398 (1983). We are bound by *Taylor* to overrule this assignment of error.

[3] Defendant next assigns error to the trial court's denial of his motion to sequester the prospective jurors during the voir dire proceedings. Defendant argues that questioning the prospective jurors in a group setting prevented them from expressing their true feelings.

N.C.G.S. § 15A-1214(j) provides: "In capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after se-

lection." Whether to sequester the prospective jurors during the voir dire rests within the sound discretion of the trial judge, and his ruling will not be disturbed absent an abuse of discretion. *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985). In the present case, defendant has made no showing that the trial judge abused his discretion. His argument that a group setting inhibits candor has been rejected before by this Court as mere speculation. *See State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979).

[4] Defendant next contends the trial court erred by allowing the district attorney to misstate the law several times during the voir dire of the jury. Defendant argues that four specific statements made by the district attorney implied that the State would not receive a fair trial, and the judge could not accept the jury's verdict, unless all twelve jurors agreed that defendant was guilty.

We disagree. When read in context, the four statements were not at all improper. Each one of the four statements was made to a separate group of prospective jurors, and all four were substantially the same. Here is one of the statements, quoted in context:

> His Honor at the appropriate time will instruct you that any verdict that the jury returns has to be unanimous and that is all 12 of you either have to vote guilty or not guilty as to each charge before His Honor can accept your verdict. No verdict can be by majority vote, it has to be unanimous. From time to time we see people who come to be on the jury who have either religious or moral beliefs that would prevent them from serving on the jury and returning a verdict of guilty. That is some people believe that it's wrong to serve on a jury and determine the innocence or guilt of another person. Obviously, if there is one person on the jury who could not return a verdict of guilty then the State . . . could not receive a fair trial since the verdict of the jury could never reach a verdict of guilty since one person could not ever return a verdict of guilty. So, does any of the six of you have . . . such a religious or moral belief in deciding the innocence or guilt of another person, please raise your hand.

N.C.G.S. § 15A-1212 provides, in pertinent part, "a challenge for cause to an individual juror may be made by any party on the ground that the juror . . . (8) As a matter of conscience, regard-

less 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." The district attorney's statements, when read in context, were clearly calculated to elicit information relevant to this provision, and were not at all improper.

[5] Defendant next contends the trial court erred in allowing the prosecution to challenge potential black jurors peremptorily, thereby denying defendant the right to be tried by his black peers.

Neither federal nor North Carolina law gives defendant the right to be tried by a jury composed in whole or in part of persons of his own race. *Batson v. Kentucky*, 476 U.S. ---, 90 L.Ed. 2d 69 (1986); *State v. Elkerson*, 304 N.C. 658, 285 S.E. 2d 784 (1982). A defendant has only the right to be tried by a jury the composition of which was not decided according to racially discriminatory criteria; the State may not challenge a potential juror solely on account of race. *Batson*, 476 U.S. ---, 90 L.Ed. 2d 69.

Defendant in the present case does not contend, nor does the record reveal, that the State based its peremptory challenges on racially discriminatory criteria. Defendant was tried by a jury of seven whites and five blacks, with one white alternate and one black alternate. Of the twenty black potential jurors and alternates, ten were excused for cause. The State peremptorily challenged only four of the remaining ten. Defendant's assignment of error is without merit.

[6] Defendant next contends the trial court erred in denying his pretrial motion to require the State to make an election whether it intended to base its first-degree murder case on premeditation and deliberation or the felony murder rule.

The State is not required to elect between legal theories in a murder prosecution prior to trial. Where the factual basis for the prosecution is sufficiently pleaded, a defendant must be prepared to defend against any and all legal theories which these facts may support. *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981). This assignment of error is overruled.

[7] Defendant next assigns error to the trial court's denial of his motion to sequester the State's witnesses. Defendant argues that the presence of an extensive number of witnesses had an unduly

persuasive effect on the jurors, and also caused the witnesses to substitute the "recollection of the mass" for their "individual recollection." A motion to sequester witnesses is addressed to the discretion of the trial judge, and is not reviewable on appeal absent a showing of abuse of discretion. N.C.G.S. § 15A-1225; *State v. Stanley*, 310 N.C. 353, 312 S.E. 2d 482 (1984). Defendant has not shown, nor does the record reveal, any abuse of discretion in the trial judge's ruling.

[8] Defendant next assigns error to the trial court's denial of his pretrial discovery motion to compel the State to give him a list of the witnesses the State intended to call. We are bound by *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983) to overrule this assignment of error.

[9] Defendant next assigns error to the trial court's denial of his motion that the State provide him with an expert to examine and testify regarding the weapon. Defendant also assigns error to the trial court's denial of his request for funds to hire an investigator to help in the preparation of defendant's case.

N.C.G.S. §§ 7A-450(b) and 454 require that expert assistance or private investigators be provided to an indigent defendant only upon a showing by the defendant that there is a reasonable likelihood that it will materially assist him in the preparation of his defense or that without such help it is probable that the defendant will not receive a fair trial. Neither the State nor the federal constitution requires more. *State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981). Mere hope or suspicion that favorable evidence is available is not enough to require that such help be provided. *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976). The decision whether to provide a defendant with either an expert witness or an investigator is addressed to the discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. *State v. Stokes*, 308 N.C. 634, 304 S.E. 2d 184 (1983); *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981).

In the present case, when defense counsel made the motion for a ballistics expert, he argued only that "experts have different opinions." When he made the motion for funds to hire an investigator, he argued only that an investigator would "get out there and beat the bushes and give [defendant] the pertinent kind of defense the defendant deserves." In these arguments, defend-

ant offered the court only "mere hope or suspicion that favorable evidence was available." Thus, we cannot find that the trial judge abused his discretion in denying defendant's motions.

[10] Defendant next assigns error to the trial court's denial of his motion to suppress a statement he gave to SBI agent John Payne on 16 March 1985. Defendant argues that the statement was obtained in violation of his constitutional rights in that it was not knowingly, intelligently and voluntarily given, and defendant did not knowingly, intelligently and voluntarily waive his right to a lawyer.

The trial court held a voir dire hearing on defendant's motion to suppress. John Payne, an agent with the State Bureau of Investigation, testified that he fully advised the defendant of his constitutional right to an attorney and his right to remain silent. Mr. Payne testified further that the defendant did not appear to be under the influence of any intoxicating beverage or drug and appeared to be able to understand what Mr. Payne was saying to him. Mr. Payne said the defendant told him he would make a statement and signed a waiver of rights form. The defendant did not offer any evidence to contradict the testimony of Mr. Payne. The court made findings of fact consistent with the testimony of Mr. Payne and held that the defendant "freely, knowingly, voluntarily, and understandingly" waived his right to remain silent and to have an attorney before making a statement. The court overruled the motion to suppress.

Findings of fact made by a trial judge following a voir dire hearing on the voluntariness of a confession are conclusive on appeal if the findings are supported by competent evidence in the record. *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983). The trial judge's findings of fact in the present case are amply supported by evidence in the record. These findings of fact in turn support the trial judge's conclusion of law that defendant's statement was not obtained in violation of his constitutional rights, and his order that defendant's motion to suppress be denied. There was no error here.

[11] Defendant next contends the trial court erred in denying his motion to suppress evidence seized pursuant to a search warrant. Defendant argues that the search warrant was "based upon hearsay information from a person who had never been used before

nor did the deputy have any knowledge or facts that the person was credible or reliable."

At the same voir dire hearing the court considered defendant's motion to suppress his statement, it also considered this motion to suppress evidence. Evidence at the hearing tended to show: a warrant was issued on 16 March 1985, the day of the murder. It authorized the police to search defendant's home and his car. They searched his home and seized a knife, some scissors, and some wet bloodstained clothing. They saw, but did not seize, a handgun. They searched his car and seized a red suspender. They took the car to the police station and two days later seized some carpet fibers. A second warrant was issued on 18 March, after it was discovered that the victim had been shot. This warrant authorized the police to search defendant's home for the handgun. However, they did not find it, and did not seize anything used as evidence at trial.

At the voir dire hearing SBI Agent John Payne testified as follows:

Q. All right. Now, in the course of this interview of the defendant, did you ask him for permission to search his vehicle?

A. Yes, sir.

Q. And did you ask him for permission to search his house where he lived?

A. Yes, sir.

Q. Okay, and did he give you permission?

A. Yes, sir, he did.

Q. Did he sign a written consent to search?

A. Yes, sir.

Q. Both his vehicle and his home?

A. Yes, sir.

Q. Do you have those with you?

A. Yes, sir, I have them.

. . . .

A. Yes, sir, I do. Exhibit 2 is a consent to search a 1973 Buick, four door, North Carolina license tag EPY 670. And State's Exhibit 3 is a consent to search the residence of 101 Lizi Street.

Q. And were those documents signed by the defendant in your presence?

A. Yes, sir, they were.

. . . .

Q. . . . Mr. Payne, did you threaten the defendant in any way to get him to sign those consents?

A. No, sir.

Q. Promise him anything to get him to sign them?

A. No, sir.

. . . .

Q. Now, after he had signed those consent forms, Mr. Payne, did you appear before the magistrate to get a search warrant to search his home and his vehicle?

A. Yes, sir, I did.

This testimony was corroborated by that of Chief Deputy Glenn Jernigan, who testified that he was present at the time defendant signed the forms.

After the hearing, the trial judge found as a fact, in addition to his findings that defendant was sober, coherent, and understanding, and was read his constitutional rights, that: "the defendant consented to the search of his home and vehicle and that he also signed a waiver permitting the officer to do this, consenting to the search." Findings of fact that are supported by competent evidence are binding on appeal. *State v. Williams*, 314 N.C. 337, 333 S.E. 2d 708 (1985). The trial judge's findings in the present case are amply supported by the testimony of Agent Payne and Chief Deputy Jernigan. "When a person voluntarily consents to a search, he cannot complain that his constitutional rights were violated . . . . Consent to search freely and intelligently given

renders competent the evidence thus obtained." *State v. Jolly*, 297 N.C. 121, 125, 254 S.E. 2d 1, 4 (1979). Therefore, the trial court properly denied defendant's motion to suppress this evidence.

[12] Defendant next contends the trial court erred in denying his motion to limit the number of photographs of the victim the State could introduce. Defendant further assigns error to the trial court's overruling of his objections to those photographs. Defendant argues that the pictures presented by the State had no probative value, were repetitive, and were presented only to inflame the minds of the jurors. We disagree.

> Properly authenticated photographs of the body of a homicide victim may be introduced into evidence under instructions limiting their use to the purpose of illustrating the witness' testimony. Photographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words. The fact that the photograph may be gory, gruesome, revolting or horrible, does not prevent its use by a witness to illustrate his testimony.

State v. Watson, 310 N.C. 384, 397, 312 S.E. 2d 448, 457 (1984) (citations omitted).

In the present case, the trial judge reserved his ruling on defendant's pretrial motion limiting the number of photographs until the time the issue arose at trial. At trial, the State offered into evidence seven photographs. Defendant objected to their admission and the trial judge held a voir dire hearing to determine their admissibility. At the hearing, the district attorney explained,

> Each one of these photographs show separate things. With respect to State's Exhibit 5, it is an area photograph taken from the greatest height of any of the photographs that I have which the purpose of that showing a greater portion of the general area where this body was found. In other words, it shows nothing about the body, simply shows the general area, shows 1105 and 1106 and all of this dirt path between 1105 and 1106 that has been discussed. State's Exhibit 6, your Honor, is a second area photograph, once again it shows nothing about the body. All it shows is it[']s a photograph

from a lower height and shows in a little more detail the specific area where the body was found. With respect to State's Exhibit 7, your Honor, that shows, it is taken from the ground, it shows, is taken from the area of the woods looking back towards the body, shows the dirt path that has been referred to in the testimony. State's Exhibit 8 is taken from a different direction showing, that is from the direction looking at the body from and looking in the direction towards the wooded area, more from the photograph standing in the area of where the path is looking at the body and back towards the wooded area showing the relationship between where the body was and where the woods started. Each of those two photographs that I have just mentioned show absolutely none of the wounds on the body from just looking at it, you could no more tell but what the body, just like somebody there asleep. The purpose of those is simply to show the location of where the body was with respect to the dirt path and the woods. State's Exhibit 9, your Honor, is a close up photograph of one side of the body, close up photograph from the back of the body, showing how her trousers are down and generally from the back of the body. State's Exhibit 10 is taken from the, looking at the body from the side, from the direction toward which she was turned and on which face her, facing the front portion of her trousers unfastened and showing, of course, showing some a little bit of the area where her head is lying there and the conditions there around that. Your Honor, we must of had 50 photographs.

. . .

I just found one more that is a photograph just shows the area where they recovered some cartridges fired and unfired cartridges, shows nothing about the body, that's just a field photograph, those two of the cartridges.

The trial judge made these findings: "[N]one of these photographs are gross or gore [sic] in any respect . . . two of them don't even show the body. The others don't show any gross manner [sic]. It seems to me that it . . . would probably assist the witness in . . . illustrating or explaining his testimony . . . they represent different shots for each purpose." The photographs were properly authenticated and the proper foundation was laid

for their admission. The trial judge instructed the jury that they were admitted "for the purpose of illustrating and explaining the testimony of the witness who uses the photograph. . . ."

We have examined the photographs at issue and they do not appear to be inflammatory or repetitive. We find no error in their admission.

[13] Defendant next assigns error to the trial court's admission of six statements, by six different witnesses. Defendant claims that each of these statements is inadmissible hearsay. The first statement excepted to was made by Deputy Glenn Jernigan at a pretrial hearing to determine the admissibility of evidence procured as a result of a search of defendant's home. Deputy Jernigan was explaining how he learned that the victim had been shot. He testified:

A: We received information from Steve Zawiskowski—

MR. KENAN: Objection.

COURT: Overruled.

A: That the victim had been shot and we knew that the pistol was there on Saturday, so we went back with a search warrant to seize it.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. N.C.G.S. § 8C-1, Rule 801(c). This statement was not offered to prove the truth of the matter asserted, that the victim was shot, but to explain why Deputy Jernigan procured a search warrant. This is not hearsay.

[14] The second statement defendant contends is hearsay was made by SBI Agent John Payne, who testified that Mr. Thelonus Burton, a friend of defendant's wife, told him that "he observed defendant's wife come out of the house with something that appeared to be a gun." This statement was not offered to prove the truth of the matter asserted, but to corroborate the previous testimony of Mr. Burton that defendant's wife had come out of the house with "something that appeared to be a gun." The trial judge instructed the jury that "this evidence is to the conversation of a previous witness, it is received into evidence for the purpose of corroborating the previous witness if you find that it does

so corroborate, it is not to be received by you for any other purpose."

Prior consistent statements made by a witness are admissible for purposes of corroborating the testimony of that witness, if it does in fact corroborate his testimony. *State v. Riddle*, 316 N.C. 152, 340 S.E. 2d 75 (1986). Admission of Agent Payne's testimony was not error.

The next statement defendant excepts to was made by Chief of Police R. P. Wood, who was testifying about the pistol. He testified, "I . . . called Chief Deputy Jernigan and told him I had a pistol there at the office that I thought he'd want to see, he told me he would be over." This statement was not offered to prove the truth of the matter asserted, that Chief Deputy Jernigan "would be over," but to explain Chief Wood's course of conduct. This is not hearsay.

[15] The next piece of evidence defendant excepts to is State's exhibit 25, a federal firearms form which was filled out by defendant and the salesman who sold defendant the murder weapon. It was filled out at the time defendant bought the gun. Mr. Wayne Bailey, the owner of the shop where the gun was purchased, testified that the form was a record kept in the course of the regular conduct of his business activity, and that it is the regular practice of his business activity to make such a record. He further testified that federal law required that he keep this form, and that the form had been kept in the place he normally keeps his business records. This form is clearly admissible under N.C.G.S. § 8C-1, Rule 803(6) which provides an exception to the rule against hearsay for records of regularly conducted business activity, if it is the regular practice of that business activity to make such a record.

The statements defendant next claims to be hearsay are various pieces of testimony by Mr. W. C. Elliot, a character witness for defendant. Although Mr. Elliot was asked on cross-examination a number of questions about whether he had heard about various occurrences, Mr. Elliot responded in the negative each time. He made no statements that can be classified as hearsay.

The statement defendant next excepts to was made by Ms. Sylvia Faison. She testified as to what her daughter had told her about a certain encounter with defendant. This statement was not offered to prove the truth of the matter asserted, but to corroborate the testimony of Ms. Faison's daughter, who had testified about the encounter immediately before Ms. Faison took the stand. Again, the trial judge gave the jury the proper limiting instruction. This assignment of error has no merit.

[16] Defendant next assigns error to the admission of six statements by four different witnesses. Defendant argues that these witnesses were "testify[ing] to assumptions." Ordinarily a witness may only testify concerning matters within his own personal knowledge. *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1983).

The first exception under this assignment of error is to the following testimony by Mr. Levon Hicks:

Q. So, where did you go then?

A. We went down some road and went out 24, went out some road and come out by the block plant and getting ready to take me home, he said, if you want some you better get it, I said, no I didn't want to mess with her.

Q. You wanted to get some, what was he talking about?

A. Some meat, I reckon. Get some meat.

Q. Was he talking about having sex?

A. Yes, sir.

Mr. Hick's testimony was not to an assumption, but was an explanation of a slang term which may not have been familiar to some jurors, but was familiar to Mr. Hicks. Although he did use the words "I reckon," this does not exclude the evidence, but goes to its weight for the jury to consider. *See Aarhus v. Wake Forest University*, 57 N.C. App. 405, 291 S.E. 2d 837 (1982).

The second and third exceptions deal with the following testimony of Mr. Joseph Steven Zawiskowski, an SBI specialist who was called to the scene of the crime:

Q. All right, and with respect to anything there around her feet, I believe you said, did you say one of her shoes was off?

A. Yes, sir, the right shoe, . . . I guess underneath the toe of the shoe was a red piece of material, we later determined it was part of a suspender.

MR. KENAN: Objection, at this time.

COURT: Objection is overruled.

. . .

Q. All right, State's Exhibit 7.

A. This is taken from this side of the body, I was taking the picture that way and just shows, that's what we're calling the road here, basically it[']s like any other farm area, they just have places where they drive the tractors and things.

MR. KENAN: Objection to all that.

COURT: Well, objection is overruled.

In these pieces of testimony, Mr. Zawiskowski was not testifying to assumptions, but simply describing what he remembered seeing.

The fourth exception deals with the following testimony by Mr. Zawiskowski:

A. Oh, yes. Yes, I did and I determined there was a lot of dried blood in the area and from what we saw at the time we just determined that she had died because of that cut on her throat.

MR. KENAN: Objection, your Honor, at this time.

. . .

COURT: Ladies and gentlemen, I want to refresh myself of what the witness testified, as I recall it, that having looked at this wound that described that they had assumed that that is what she had died from at the time. I'm going to admit that statement of the witness. The objection of the defendant is overruled, you may consider that.

Here, Mr. Zawiskowski was not making any assumption, but explaining why he and the other people present had made an assumption about the cause of the victim's death at the time they found the victim's body.

The fifth and sixth exceptions deal with the following testimony of Ms. Brenda Dew, an SBI forensic serologist:

> Q. And what is it if an object or an article of clothing has blood on it and it is washed what is the affect that that has on—
>
> MR. KENAN: Your Honor, we object to that form of question.
>
> COURT: Do you want to be heard?
>
> MR. KENAN: May we approach the bench?
>
> COURT: Approach the bench. Objection is overruled. All right, Mr. Solicitor.
>
> . . .
>
> Q. If an article of clothing has blood on it and is washed sufficiently, could that completely eliminate any evidence of blood on that article?
>
> MR. KENAN: Objection.
>
> COURT: Overruled, if she knows.
>
> A. I need to clarify one thing. Washing may not entirely remove the stain, however based upon the different tests that we performed in the laboratory, it makes it very difficult to determine that the stain actually is or actually to confirm the fact that the stain is blood. It becomes very diluted and as I stated the test that I performed [w]as just one of a series of tests, but because this had been exposed to washing type conditions, it became more and more diluted and as this happens it lessens the number of tests that can be performed on such a stain.

The final exception deals with the following testimony of Mr. Kenneth Raper, an SBI fingerprint examiner:

Q. Now, when, Mr. Raper, when an individual touches an object, do they always leave a latent fingerprint that you can examine and compare?

MR. PHILLIPS: Objection.

COURT: Overruled, if he knows.

A. No, an individual does not always leave latent fingerprints on an object when it[']s touched. It depends on the environment, object being touched and also the secretion of body fluids from the person against the object.

These expert witnesses were not testifying to assumptions but were explaining some of the mechanics of their fields of expertise. This assignment of error is without merit.

[17] Defendant next contends the trial court erred in denying defendant's motion to dismiss all charges at the close of the State's case, and his motion to dismiss all charges at the conclusion of all the evidence. He further contends the trial court erred in submitting the charges to the jury. Defendant argues in support of these contentions that there was insufficient evidence to convict defendant of the crimes charged.

When a defendant moves for dismissal, a trial court must determine, for each charge, whether there is substantial evidence of each essential element of the offense charged, and of defendant's being the one who committed the crime. If that evidence is present, the motion to dismiss should be denied. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* In ruling on a motion to dismiss, the court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. *Id.* Contradictions and discrepancies must be resolved in favor of the State. *Id.*

Defendant in the present case was convicted of first-degree murder and attempted first-degree rape. First-degree murder is defined in N.C.G.S. § 14-17 as follows:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing,

> or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree. . . .

First-degree rape is defined in N.C.G.S. § 14-27.2 in pertinent part, as follows:

> A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> . . .
>
> (2) With another person by force and against the will of the other person, and:
>
> a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
>
> b. Inflicts serious personal injury upon the victim or another person; or
>
> . . .

We find that the evidence, as set forth in the beginning of this opinion, is substantial evidence of each essential element of both first-degree murder and attempted first-degree rape, and is substantial evidence that defendant committed these crimes. Defendant's motions to dismiss were properly denied, and these charges were properly submitted to the jury.

Defendant next contends the trial court erred in denying his motion to set aside the jury's verdict, as being against the greater weight of the evidence. The decision whether to grant or deny such a motion is within the sound discretion of the trial judge, and is not reviewable absent a showing of an abuse of discretion. *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985). Since we have held that the evidence in the present case is sufficient to support the jury's verdict, we can find no abuse of discretion in the trial court's denial of defendant's motion to set aside the verdict.

Defendant next contends the trial court erred in permitting the district attorney to argue "improper matters," specifically

three statements. Defendant did not object to any of these statements; he contends the trial judge should have corrected them *ex mero motu*. In hotly contested cases counsel will be given wide latitude in arguments to the jury and are permitted to argue the facts which have been presented as well as all reasonable inferences which can be drawn from them. *State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (1984). The State's argument in capital cases is subject to limited appellate review for the existence of gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982).

[18, 19] One of the statements excepted to is as follows: "They put him in jail, on Sunday as you heard Mr. Burton testify, his wife came over to see him in jail and don't you know what he told her is get that gun and hide that gun." This statement referred to the evidence that defendant's gun was present at his home when it was searched on 16 March, but was no longer there when the officers returned on 18 March. Mr. Thelonus Burton had testified that defendant's wife visited defendant in jail on 17 March. The district attorney's statement was a reasonable inference drawn from these pieces of evidence.

The other two statements excepted to are as follows:

> [A]nd we all know that there are guilty people walking the streets of this country every day because the government cannot collect enough evidence to try them for crimes and for jury to find them guilty.
>
> However, I submit to you that it's better that there are guilty people who go free than an innocent person to be wrongfully convicted.

These statements were made in the context of explaining the burden of proof to the jury:

> We accept the burden of proof, we told you on Monday when we were selecting the jury, that the burden of proof was on us. I guess that's another thing Mr. Phillips and we all agree on in this case, is that the burden should be on the government, it should be on the State, that's the way it is in this country. We accept that and we all know that there are

> guilty people walking the streets of this country everyday because the government cannot collect enough evidence to try them for crimes and for jury to find them guilty. We realize that that's a penalty or price that we have to pay to live in a free society. Unlike countries as Iran and the Soviet Union and China and some of these countries where a person is brought to Court and he has to prove his innocence, we don't operate that way. However, I submit to you that it's better that there are guilty people who go free than an innocent person to be wrongfully convicted. We all would agree to that, I believe. However, members of the jury, I would strongly contend to you that Russell Holden, Jr. is not an innocent person . . . He's presumed to be innocent, but, folks, I believe and I would contend to you that the State has met its burden, we have proven him guilty beyond a reasonable doubt.

It is clear that these statements, when read in context, were not improper. This assignment of error has no merit.

[20] Defendant next contends the trial court erred in refusing to declare unconstitutional N.C.G.S. § 15A-2000, the statute which authorizes the imposition of the death penalty. Defendant argues that the death penalty constitutes cruel and unusual punishment when a jury has discretion whether or not to impose it. This argument has been rejected consistently by this Court. *See, e.g., State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985); *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197, *cert. denied*, 469 U.S. 963, 83 L.Ed. 2d 299 (1984); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). Defendant has given us no reasons to disregard or overrule our prior decisions.

[21] Defendant next contends the trial court erred in excusing a juror, Mrs. Eva Brinson, after the completion of the guilt phase and prior to the sentencing phase. Defendant argues that it is probable that had Mrs. Brinson remained on the jury, defendant would not have received the death penalty.

During the voir dire of the jury prior to trial, Mrs. Brinson testified that she could vote for the death penalty:

> Q. . . . Mrs. Benson [sic], do you believe in the death penalty in certain types of cases?

A. Well, yes, in certain types of cases I do.

Q. Then your answer, you're saying that under certain circumstances that you could . . . return a verdict and impose the death penalty; is that correct?

A. Yes.

However, after the guilt phase was complete, the trial court learned that she had changed her mind, and decided to excuse her:

COURT: . . . Now, I understand that this morning that you told someone that you could not kill him or could not sentence this man to death; is that what you said?

A. Well, yes, I thought I could, it was an experience I never experienced before and I thought I could fully abide by the rules and the regulations, but I can't.

COURT: And now, you're saying that you can not. Are you saying then that because of this now that your view of the death penalty will prevent you from your sworn duty as a juror under oath and instructions, that you cannot follow your oath as you previously said; is that what you're telling me?

A. Well, I have listened to everything. I have prayed over it and I did make that statement and I don't think I can. I'm just being real honest.

COURT: Mr. Solicitor, do you desire to examine the juror? Mr. Defense, do you desire to examine the juror?

MR. KENAN: A few questions, your Honor. Mrs. Brinson, I understand about your personal feelings, but would you set your personal feelings aside and listen to the Judge's instructions and from that particular point follow the Judge's instructions of law; could you not dot [sic] hat [sic] or would you not do that, Mrs. Brinson?

A. I would do it if I could, but I can't.

COURT: Well, then you mean you've already formed an opinion without hearing any evidence. Well, ma'am, if that is so then I have no alternative but to dismiss you and I

will therefore in my discretion based upon your statement that you have already predetermined at this time without hearing the charge of the Court or the lawyers speak this morning, without really hearing the evidence, that you would not impose the death sentence under any circumstances that the Court will now excuse you for that reason and will seat the alternate in your place. The Court feeling that it[']s necessary in the interest of justice to do so, there will be no alternative. Therefore, juror number three, Mrs. Brinson, is withdrawn for the reasons stated and that the alternate juror is seated in this chair.

MR. KENAN: I know you made your ruling, but I'd like to ask one question. Mrs. Brinson, you have formed an opinion before you've heard the arguments of counsel and the evidence in this particular case about whether or not he should live or die?

A. Well, for the last two days I haven't slept, it was just upsetting me and I just thought I could abide by the rules and regulations when I made a sworn statement, but it was really bothering me every since I brought the verdict out of life and death, then I just haven't been able to rest because I knew that the second verdict was life or death and I have prayed over it and I just can't. I'm just sorry. I thought I could, but I can't.

COURT: So, you're being fair and honest and I appreciate that and so, ma'am, you may stand aside, I will let you go.

MR. KENAN: We object, your Honor.

N.C.G.S. § 15A-2000(a)(2) provides, in pertinent part:

If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel.

In *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979), this Court held:

The trial judge has broad discretion in supervising the selection of the jury to the end that both the state and de-

> fendant may receive a fair trial. . . . This discretionary power to regulate the composition of the jury continues beyond empanelment. . . . These kinds of decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error.
>
> . . .
>
> A defendant is not entitled to a jury of his choice and has no vested right to any particular juror. So long as the jurors who are actually empaneled are competent and qualified to serve, defendant may not complain.

Id. at 593, 260 S.E. 2d at 644. Citations omitted.

In *Barts*, 316 N.C. 666, 343 S.E. 2d 828, this Court held: "The decision of whether to reopen examination of a juror previously accepted by both parties is a matter within the discretion of the trial court. . . . Once the trial court has exercised its discretion to reopen the examination of any juror, the trial court may excuse the juror for cause. . . ." *Id.* at 680-681, 343 S.E. 2d at 838 (citations omitted). In that case, the court reopened the examination of a juror who "emphatically stated that there were no circumstances under which she would be able to vote for the imposition of the death penalty." This Court held that she was therefore properly excused for cause.

Our decision in the present case is controlled by our decisions in *Nelson* and *Barts*. We hold that the trial judge did not abuse his discretion in reopening the examination of Mrs. Brinson, and then excusing her for cause. The alternate substituted in her place had been accepted by both parties, and had been empaneled with the other jurors and had heard all the evidence. This assignment of error is without merit.

[22] Defendant next assigns error to the trial court's denial of his motion to require the State to file a bill of particulars reciting the aggravating factors it intended to rely on at the punishment phase. A trial court may not require that the State declare which aggravating factors it intends to rely on at the punishment phase. *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982); *Taylor*, 304 N.C. 249, 283 S.E. 2d 761. N.C.G.S. § 15A-2000(e) sets forth the only aggravating fac-

tors the State may rely upon in seeking the death penalty. The notice provided by this statute is sufficient to satisfy the constitutional requirements of due process. *Young*, 312 N.C. 669, 325 S.E. 2d 181.

[23] Defendant next contends the trial court erred in admitting evidence of defendant's prior conviction during the prosecution's case in chief at the sentencing phase of the trial. Defendant argues that the court thereby allowed the prosecution to introduce evidence of defendant's bad character before defendant had put his character in issue. We assume defendant means to argue that this is a violation of Rule 404(a) of the North Carolina Rules of Evidence. We disagree.

Rule 404(a) states: "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. . . ." In the present case, the evidence concerning defendant's prior conviction was not admitted for this purpose, but as evidence of the aggravating circumstance set out in N.C.G.S. § 15A-2000(e)(3): "The defendant had been previously convicted of a felony involving the use or threat of violence to the person." The State is entitled to introduce, at the sentencing phase of the trial, any competent evidence which supports any of the aggravating factors set out in N.C.G.S. § 15A-2000(e). Defendant's assignment of error is overruled.

[24] In a similar vein, defendant contends the trial court erred in allowing the State's witnesses to testify, at the sentencing phase of the trial, "as to specific acts of misconduct by the defendant which were not similar or part of a common scheme." We assume defendant means to argue that this is a violation of Rule 404(b) of the North Carolina Rules of Evidence, which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

The evidence defendant has excepted to here was the testimony of five witnesses for the State, all of whom testified during

the State's rebuttal. Defendant had introduced evidence tending to show a lack of prior criminal activity, to support the statutory mitigating factor set out in N.C.G.S. § 15A-2000(f)(1): "The defendant has no significant history of prior criminal activity." In rebuttal, the State called these five witnesses, each of whom testified to some prior criminal activity by defendant, namely two rapes and three assaults. The trial court properly admitted this testimony. *Maynard*, 311 N.C. 1, 316 S.E. 2d 197.

Defendant next contends the trial court erred in permitting the district attorney to argue "improper matters" in his argument at the penalty phase. Again, defendant did not object to these statements; he contends the trial judge should have corrected them *ex mero motu*.

Again, the State's argument in capital cases is subject to limited appellate review for the existence of gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*. *Pinch*, 306 N.C. 1, 292 S.E. 2d 203.

[25] The first statement defendant complains about is:

> Based on the evidence that you've heard, ladies and gentlemen, I would contend to you that the next factor you should also answer no to is really an aggravating factor rather than a mitigating factor and that is their contention that it's mitigating that the defendant was an active member of the Warsaw Rescue Squad, gave CPR to a victim while working with a rescue squad.

When this remark is read in context, it is clear that the district attorney was only arguing that the jury should not find this to be a mitigating factor. The district attorney continued: "We would contend to you, ladies and gentlemen, that because he had used his position as a member of the rescue squad to commit one of these rapes that he committed that you should not find that as a mitigating factor." A statement similar to the one complained of was held not to be improper in *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983). As in *Kirkley*, any possible confusion was eliminated by the judge's instructions.

[26] Defendant also complains about these and other similar statements: "[H]e should not be out there on the street and given

the opportunity to commit this crime again." "[T]he only way you can be sure, ladies and gentlemen, that there will be no more is if you give him the death penalty." We held in *Johnson*, 298 N.C. 355, 259 S.E. 2d 752, that statements very similar to these were not improper.

[27] Defendant also complains about these and other similar statements: "You know and I know and anybody with good sense would know that if he gets out there he's going to do it again." "How many more women are we going to have to see this man rape before we say enough is enough?" These statements may be marginally improper. Considering, however, their speculative tone, we cannot say they are so grossly improper as to require the trial judge to correct them *ex mero motu.*

[28] Defendant also complains about these and other similar statements: "The victim didn't have an opportunity to have Mr. Kenan and Mr. Phillips represent her on March the 16th 1985." "Think of the victim." "I submit that she cries out from the grave for justice." It is not improper for the State to refer in its argument to the victim's suffering. *State v. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984); *Oliver*, 309 N.C. 326, 307 S.E. 2d 304.

[29] Defendant also complains about this statement: "I wish I had a quarter for every defendant that we've ever gotten up here that says after he got in jail he found the Lord and now he's got religion." This statement tends to imply that a large number of criminal defendants claim to have "gotten religion," a fact not in evidence. For that reason, it may be marginally improper. Considering, however, the speculative and rather flippant tone of the statement, and the insignificance of the fact implied, we cannot say that the statement is so grossly improper as to require correction *ex mero motu.*

We hold that none of the remarks defendant complains about constitutes reversible error.

Defendant next assigns error to the trial court's denial of his oral request for a special jury instruction about the testimony of rebuttal witnesses at the sentencing phase. All the record contains relating to this assignment of error is the following statement by the court:

> COURT: Let the record show that counsel for the defendant, Mr. Reginald Kenan, requested a pre-emptory instruction as to the state's rebuttal witness that this went to the character rather than to the matter in fact, as regarding aggravation and the Court denied the motion, being unable to separate it and if it was the Court believing that if it was admissible in aggravation it was inadmissible for all other purposes. Motion denied. . . .

Requests for special instructions must be in writing. N.C.G.S. § 15A-1231(a); *State v. Harris*, 47 N.C. App. 121, 266 S.E. 2d 735 (1980), *cert. denied*, 305 N.C. 762, 292 S.E. 2d 577 (1982); Superior and District Court Rule 21. Defendant in the present case did not comply with these provisions.

Rule of Appellate Procedure 10(b)(2) provides, in pertinent part, "An exception to the failure to give particular instructions to the jury . . . shall identify the omitted instruction . . . by setting out its substance immediately following the instructions given. . . ." Defendant in the present case has not complied with this rule.

Since defendant has not complied with these rules, we have only a vague idea of what instruction defendant actually requested, and thus we can only guess whether or not it was proper. Avoidance of this predicament was surely one of the reasons these rules were adopted. This assignment of error is overruled.

[30] Defendant next assigns error to the trial court's denial of his request for peremptory instructions on all 15 of the mitigating circumstances placed before the jury. Where all of the evidence in the case, if believed, tends to show that a particular mitigating factor exists, defendant is entitled to a peremptory instruction on that factor if he requests it. *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). However, a peremptory instruction is inappropriate when the evidence surrounding that issue is conflicting. *Id.*

The first three mitigating factors presented were statutory, based on N.C.G.S. § 15A-2000(f)(1), (2), and (6). In each of these cases, evidence was presented from which the jury could find that the proposition stated was not true. In the case of the fourth mitigating factor, based on N.C.G.S. § 15A-2000(f)(7), "the age of

the defendant at the time of the crime," the jury could find that defendant's age, 30, was not a mitigating factor.

The remaining eleven mitigating factors presented were not statutory. The jury found five of them; defendant can claim no prejudice in the trial court's failure to give peremptory instructions on these five.

The jury failed to find the other six non-statutory factors presented. In the case of each of these six, there was evidence from which the jury could find either that the proposition stated was not true, or that even if true it was of no mitigating value. Thus, peremptory instructions would have been inappropriate. This assignment of error is overruled.

[31] Defendant next contends the trial court erred in refusing to submit defendant's fifteen requested instructions to the jury. Defendant's requested instruction number one contains this statement: "If all 12 of you cannot unanimously agree within a reasonable time to a verdict sentencing the defendant to death, the law requires that I then impose a life sentence. . . ." Defendant's proposed instructions numbers fourteen and fifteen contained similar statements. We have repeatedly held that such an instruction is improper "because it would be of no assistance to the jury and would invite the jury to escape its responsibility to recommend the sentence to be imposed by the expedient of failing to reach a unanimous verdict." *Young*, 312 N.C. 669, 685, 325 S.E. 2d 181, 191 (citations omitted). The court correctly refused to give this instruction.

Defendant's requested instruction number five would have required the jury to mark its answer as to each mitigating factor in the space following that mitigating factor. The record reveals that the judge instructed the jury to do this, and the jury followed his instruction.

[32] Defendant's requested instruction number six was to the effect that for each mitigating circumstance, "The burden is on the State to prove beyond a reasonable doubt that this mitigating circumstance does not exist." This is an incorrect statement of the law. The burden of proof on the existence of any mitigating circumstance is on the defendant, and the standard of proof is by a preponderance of the evidence. *State v. Johnson*, 298 N.C. 47, 257

S.E. 2d 597 (1979). The court correctly refused to give this instruction.

[33] Defendant's requested instruction number seven is as follows:

> With respect to each of the mitigating circumstances, only those mitigating circumstances unanimously found by you to exist should be marked "yes" by you on the verdict sheet. However, no single juror is precluded from considering anything in mitigation in the ultimate balancing process, even if that mitigating factor was not considered or agreed upon by all 12 of you unanimously.

This is also an incorrect statement of the law. A jury must unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing. *Kirkley*, 308 N.C. 196, 302 S.E. 2d 144. The court correctly refused to give this instruction.

[34] Defendant's requested instruction number eleven contains this statement: "Evidence that the defendant's mental or emotional development was significantly below that of persons of his chronological age is a mitigating circumstance which is entitled to great weight." This is also an incorrect statement of the law, for two reasons. First, while a defendant's mental or emotional development is a relevant part of the analysis of the mitigating factor of age, the relationship between his mental and emotional development and that of persons of his chronological age is not the determinative factor. The court in the present case correctly instructed the jury, "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, emotional and physical development, his experience, and criminal tendencies. . . ." *See Oliver*, 309 N.C. 326, 307 S.E. 2d 304. Second, a judge may not instruct a jury that a particular circumstance is "entitled to great weight." The jury has the duty of deciding how much weight to give to each aggravating and mitigating circumstance. *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 court correctly refused to give this instruction.

[35] Defendant's requested instruction number twelve contains this statement:

> I instruct you that even if you find that the aggravating circumstance is sufficiently substantial to call for the imposition of the death penalty in light of the mitigating circumstances, you must unanimously and beyond a reasonable doubt find that death is the appropriate punishment in this case for this defendant.

This is an incorrect statement of the law in that it implies that the jury may find that the aggravating circumstances found are sufficiently substantial to call for the imposition of the death penalty, and find that the mitigating circumstances do not outweigh the aggravating circumstances, and then decide not to impose the death penalty. This the jury may not do. As we stated in *Pinch*, 306 N.C. 1, 292 S.E. 2d 203, the jury must recommend the death penalty if it makes the three findings necessary to support such a sentence under N.C.G.S. § 15A-2000(c):

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and,

(2) That the aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

The court correctly refused to give defendant's instruction.

[36] Defendant's requested instruction number thirteen contains these statements:

> For the typical case of premeditated and deliberated murder, the appropriate penalty is imprisonment of the defendant for the balance of his natural life.
>
> [I]t is important that you keep in mind that the proper sentence for the normal cases of premeditated and deliberated murder is imprisonment for life.

These are also incorrect statements of the law. N.C.G.S. § 15A-2000 establishes the method by which a jury decides which penal-

ty is appropriate. These references to "typical" and "normal" cases of premeditated and deliberated murder are not consistent with the statutory scheme. The court correctly refused to give this instruction.

Defendant's remaining requested instructions numbers two, three, four, eight and nine (there is no number ten), may not be legally incorrect. Defendant has not shown, however, how he was prejudiced by the trial court's failure to give those instructions verbatim. In several instances, we find defendant's requested instructions to be wordy, repetitive, and potentially confusing. We have examined the instructions given in this case and find them to be legally correct, clear and complete. This assignment of error is overruled.

[37] The defendant next contends the trial court erred in submitting three aggravating circumstances to the jury. He argues that the aggravating circumstance, "Had Russell Holden, Jr. been previously convicted of a felony involving the use of violence to the person?" was erroneously submitted because it was based on a record of his plea of no contest in 1984 to a charge of attempted rape. A sentence was imposed on this plea. The question posed by this argument is whether a plea of no contest followed by a final judgment imposing a sentence is a conviction under N.C.G.S. § 15A-2000(e) which provides in part:

> Aggravating circumstances which may be considered shall be limited to the following:
>
> . . .
>
> (3) the defendant had been previously convicted of a felony involving the use or threat of violence to the person.

The use of a plea of no contest in a case other than the one in which it is entered has been at issue in several cases. *See State Bar v. Hall*, 293 N.C. 539, 238 S.E. 2d 521 (1977); *Fox v. Scheidt, Comr. of Motor Vehicles*, 241 N.C. 31, 84 S.E. 2d 259 (1954); *Mintz v. Scheidt*, 241 N.C. 268, 84 S.E. 2d 882 (1954) and *Winesett v. Scheidt, Comr. of Motor Vehicles*, 239 N.C. 190, 79 S.E. 2d 501 (1954). *See also* Reticker, *Nolo Contendere in North Carolina*, 34 N.C.L.R. 280 (1955). A no contest plea is not an admission of guilt. It is a statement by the defendant that he will not resist the imposition of a sentence in the case in which the plea is entered. In

that case the defendant is treated as if he had pled guilty. A court may not accept a plea of no contest without first determining there is a factual basis for the plea. N.C.G.S. § 15A-1022. A no contest plea may not be used in another case to prove that the defendant committed the crime to which he pled no contest because he has not admitted he committed the offense. That is not what was done in this case. It is important that the statute does not require proof that the defendant actually committed the offense. It only requires proof that he was convicted of the offense. The question presented in this case is not whether the no contest plea may be used to prove the aggravating circumstance but whether proof of the no contest plea and final judgment entered thereon constitute a conviction within the meaning of the statute. We hold it is a conviction within the statute's meaning and was properly found as an aggravating circumstance.

[38] The second aggravating factor submitted was: "Was the murder committed for the purpose of avoiding or preventing a lawful arrest?" At trial, Mr. Levon Hicks testified that defendant, on the night of the murder, referring to the victim said, "he was going to get some meat, but if he got it, he'[d] probably have to kill her so she wouldn't tell nobody." Mr. Jessie Sutton testified that he had asked defendant if defendant had gone to jail for raping another girl, and defendant had replied that, "if he had known he was going to go to jail, he would have killed the girl." Mr. Johnny Williams testified that defendant told him "the next girl he raped that he was going to kill her." ". . . because if I kill her I don't have to worry about her talking." These statements are sufficient evidence for the jury to infer that at least one of the purposes motivating the killing was defendant's desire to avoid subsequent detection and apprehension for his crime of rape. Therefore this aggravating factor was not erroneously submitted. *See Williams*, 304 N.C. 394, 284 S.E. 2d 437.

The third aggravating factor submitted was: "Was this murder committed while Russell Holden, Jr., was attempting to commit rape?" As we have previously stated, sufficient evidence was presented in this case for the jury to find that defendant attempted to commit rape. This aggravating factor was not erroneously submitted. Defendant's assignment of error has no merit.

[39] Defendant next contends the trial court erred in sustaining the State's objection to a portion of defense counsel's argument, where defense counsel began to describe the execution procedure. Defendant argues that he had the right to inform the jury of the things he would encounter if he were sentenced to death. We disagree.

In arguments to the jury, counsel may only argue the evidence which has been presented, and all reasonable inferences which can be drawn from the evidence. *Hamlet*, 312 N.C. 162, 321 S.E. 2d 837. Any discussion of the execution procedure would not have been drawn from the evidence presented. In fact, any evidence on that subject would have been inadmissible as irrelevant. *Johnson*, 298 N.C. 355, 259 S.E. 2d 752. We stated in *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), that the portion of defense counsel's argument in that case describing the execution procedure was "irrelevant, and highly improper." *Id.* at 425, 319 S.E. 2d at 201. In the present case, the court correctly sustained the State's objection.

[40] Defendant further assigns error to the trial court's sustaining of the State's objection to a portion of defense counsel's jury argument where defense counsel began to ask each juror individually to spare defendant's life.

Again, in arguments to the jury, counsel may only argue the evidence which has been presented, and all reasonable inferences which can be drawn from the evidence. *Hamlet*, 312 N.C. 162, 321 S.E. 2d 837.

This portion of defendant's argument was improper in that it asked each individual juror to decide defendant's fate on an emotional basis, in disregard of the statutorily prescribed procedure of N.C.G.S. § 15A-2000, and in disregard of the jurors' duty to deliberate with the entire jury toward the end of reaching a unanimous verdict. The trial court properly sustained the State's objection.

Defendant next contends the trial court erred in refusing to set aside the jury's recommendation of the death sentence. We disagree. A trial court is obligated to enter a judgment consistent with a jury's unanimous recommendation that a defendant be sen-

tenced to death, and has no authority to set aside such a recommendation. *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982). This assignment of error has no merit.

[41] As a final matter in every capital case, we are directed by N.C.G.S. § 15A-2000(d)(2) to review the record and determine (1) whether the record supports the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

We find, for reasons already stated, that the record contains ample support for the jury's finding the three aggravating circumstances. We also find that the record does not contain anything which suggests the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

To determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant, we refer to the pool of cases established in *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335 *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177 (1983):

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

Id. at 79, 301 S.E. 2d at 355 (emphasis in original). The pool includes only those cases in which this Court has found no error in both the guilt and penalty phases. *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983).

The purpose of our review is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant

jury. *State v. Rogers*, 316 N.C. 203, 341 S.E. 2d 713 (1986). To achieve this purpose, we

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

State v. Lawson, 310 N.C. 632, 648, 314 S.E. 2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L.Ed. 2d 267 (1985).

In looking at cases from the pool which are most similar to the present case, we have found several cases in which the defendant killed his victim either after or in the process of sexually assaulting her.

In *McDougall*, 308 N.C. 1, 301 S.E. 2d 308, the defendant voluntarily injected cocaine, gained entry into the victim's home by guile, cut and stabbed the victim with a butcher knife. There was strong evidence that he killed her while attempting to rape her. The jury found three aggravating factors: a previous conviction of a violent felony, the murder was especially heinous, atrocious and cruel, and it was part of a course of conduct including a crime of violence by the defendant against another person. The jury found two mitigating factors: defendant was under the influence of mental or emotional disturbance, and his capacity to appreciate the criminality of his conduct or to conform to the requirements of law was impaired. The jury recommended the death sentence, and this Court upheld the jury's recommendation.

In *State v. Vereen*, 312 N.C. 499, 324 S.E. 2d 250, *cert. denied*, 471 U.S. 1094, 85 L.Ed. 2d 526 (1985), the defendant entered the seventy-two-year-old victim's home, strangled her, stabbed her and sexually assaulted her. The jury found three ag-

gravating factors: a previous conviction of a violent felony, the murder was committed while defendant was engaged in first-degree burglary or attempted first-degree rape, and it was part of a course of conduct including a crime of violence by defendant against another person. The jury found, without specifying, the existence of one or more mitigating factors. The jury recommended the death sentence, and this Court upheld the jury's recommendation.

In *Smith*, 305 N.C. 691, 292 S.E. 2d 264, defendant kidnapped, raped and tortured his victim. He finally beat her to death and threw her in a pond. The jury found as aggravating factors that the murder was committed while defendant was engaged in the commission of or attempted commission of rape, robbery, and kidnapping of the deceased, and that the murder was especially heinous, atrocious, or cruel. The jury found one mitigating factor: the murder was committed while the defendant was under the influence of mental or emotional disturbance. The jury recommended the death sentence, and this Court upheld that recommendation.

In *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732, *cert. denied*, 455 U.S. 1038, 72 L.Ed. 2d 155 (1981), the defendant beat his victim, cut her, raped her, and ran over her body with his car. The jury found three aggravating factors: the murder was committed while the defendant was engaged in the rape and kidnapping of the victim, and it was especially heinous, atrocious or cruel. The jury found one or more mitigating circumstances but did not specify which ones. Again, this Court upheld the jury's recommendation of the death sentence.

In *Williams*, 308 N.C. 47, 301 S.E. 2d 335, the defendant struck the 100-year-old victim and battered her with clock weights, sexually assaulted her with a mop handle, ransacked her house and left her to die. The jury found four aggravating factors: the murder was committed while defendant was engaged in first-degree burglary, and while he was engaged in a sexual act, the murder was committed for pecuniary gain and was heinous, atrocious and cruel. The jury found no mitigating circumstances. This Court upheld the jury's recommendation of the death sentence.

In *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1979), the defendant strangled, stabbed and raped his victim. The jury

found three aggravating factors: the defendant had a previous conviction of a violent felony, the murder was committed while the defendant was engaged in rape, and was especially heinous, atrocious and cruel. The jury did not reach the mitigating factors. In this case, the jury recommended a life sentence.

Clearly, juries have tended to return death sentences in murder cases where the defendant also sexually assaulted his victim. We also note that this Court has never found a death sentence disproportionate in such a case. It is true that defendant in the present case did not inflict on his victim as much torture as some of these defendants inflicted on their victims. However, none of these defendants seemed to be as cold and calculating about the crimes they were about to commit as was defendant in the present case.

We have, in our examination, come across several cases which are similar to the present case in that the defendant murdered the victim to eliminate a witness to a crime by the defendant.

In *Lawson*, 310 N.C. 632, 314 S.E. 2d 493, the defendant shot and killed the owner of a home after the owner caught the defendant burglarizing the home. The jury found two aggravating factors: the murder was committed for the purpose of avoiding a lawful arrest, and was part of a course of conduct including a crime of violence against another person. The jury found one or more mitigating factors, but did not specify which ones. The jury recommended the death sentence, and this Court upheld that recommendation.

In *Maynard*, 311 N.C. 1, 316 S.E. 2d 197, the defendant beat his victim in the head and shot him, and threw his body in a river. His sole reason for doing so was that the victim had agreed to testify against the defendant in another matter, pursuant to a plea arrangement. The jury found two aggravating factors: the murder was committed to hinder the enforcement of laws, and was especially heinous, atrocious, and cruel. The jury found two non-statutory mitigating factors. This Court upheld the jury's recommendation of the death sentence.

In *Oliver*, 309 N.C. 326, 307 S.E. 2d 304, defendant was robbing a convenience store. He shot and killed a customer at the

store to eliminate him as a witness to the robbery. The jury found two aggravating factors: the murder was committed to avoid arrest, and was committed for pecuniary gain. No mitigating factors were found. This Court upheld the jury's recommendation of the death sentence.

In *State v. Fields*, 315 N.C. 191, 337 S.E. 2d 518 (1985), the defendant, after consuming quantities of beer and Quaaludes, was robbing a house. A neighbor came over to investigate, and defendant shot and killed him. The jury found as an aggravating factor that the murder was committed to avoid arrest. The jury found three non-statutory mitigating factors. The jury recommended life imprisonment.

In *State v. Fox*, 305 N.C. 280, 287 S.E. 2d 887 (1982), the defendant robbed a convenience store, made the cashier leave with him, took her down a dirt road, stabbed her with a knife, and left her to die. The jury found as aggravating factors that the murder was committed to avoid arrest, and was committed while defendant was engaged in the robbery of the victim. In its recommendation the jury did not reach the mitigating factors, but recommended life imprisonment.

Our study reveals that juries have often recommended the death sentence in witness-elimination cases. We also note that this Court has never found a death sentence disproportionate in such a case. In holding that the death sentence was not disproportionate in *Oliver*, 309 N.C. 326, 307 S.E. 2d 304, we noted that "[m]urder can be motivated by emotions such as greed, jealousy, hate, revenge, or passion. The motive of witness elimination lacks even the excuse of emotion." *Id.* at 375, 307 S.E. 2d at 335. The murder in the present case was as cold and calculated as a murder can be, as demonstrated by defendant's statement that "he was going to get some meat, but if he got it, he'[d] probably have to kill her so she wouldn't tell nobody." Rarely have we ever seen such a callous disregard for another's life.

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." *Rook*, 304 N.C. 201, 247, 283 S.E. 2d 732, 759 (Exum, J., now C.J., dissenting in part). Even under such a standard, the present case warrants the death penalty.

In comparing this case to similar cases, and in considering both the crime and the defendant, we do not find that the death sentence was excessive or disproportionate. We therefore decline to set it aside.

No error.

Chief Justice EXUM concurring.

Were we deciding the issue for the first time, I would agree with defendant's contention that the trial court erred in failing to give defendant's requested instruction number seven, which is:

> With respect to each of the mitigating circumstances, only those mitigating circumstances unanimously found by you to exist should be marked "yes" by you on the verdict sheet. However, no single juror is precluded from considering anything in mitigation in the ultimate balancing process, even if that mitigating factor was not considered or agreed upon by all 12 of you unanimously.

This is precisely the instruction suggested by the state in *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983) (Exum, J., dissenting). As the state's brief then put it, such an instruction should be given in order that "no juror . . . be precluded from considering anything in mitigation in the ultimate balancing process even if that mitigating factor was not agreed upon unanimously. To do otherwise, the State believes, could run afoul of *Lockett v. Ohio*, [438 U.S. 586 (1978)]." *Id.* at 228, 302 S.E. 2d at 163.

I continue to think, as I wrote in dissent in *Kirkley*, that in the final balancing process the rationale of *Lockett* would suggest that each juror must be permitted to consider any circumstance he or she concludes exists and has mitigating value whether or not all other jurors agree.

The Court held to the contrary in *Kirkley*; and *Kirkley*, being the law on this point, controls the issue here contrary to defendant's contention.

Justice FRYE dissenting as to sentence.

I believe that defendant is entitled to a new sentencing hearing. The majority holds that proof of a no contest plea and final

judgment entered thereon constitutes a conviction within the meaning of the capital punishment statute. I do not agree.

Our capital punishment statute, N.C.G.S. § 15A-2000, carefully limits the aggravating circumstances that may be considered by the jury in recommending a sentence of death. As the majority recognizes, a plea of no contest does not establish the fact of guilt for any other purpose than in the case in which the plea is entered. *State Bar v. Hall,* 293 N.C. 539, 238 S.E. 2d 521 (1977). Therefore, when the General Assembly intends that a no contest plea be treated as a conviction, it says so clearly. An example is found under the Fair Sentencing Act, which provides: "[a] person has received a prior conviction when he . . . has entered a plea of guilty or no contest to a criminal charge." N.C.G.S. § 15A-1340.2 (4) (1983). However there is no similar provision in the capital punishment statute. Under the North Carolina Rules of Evidence, a plea of no contest is not the same as a plea of guilty. N.C.G.S. § 8C, Rule 410 (1986). We have held that a disciplinary action may not be taken against an attorney based on his plea of no contest to a criminal offense. *See State Bar v. Hall,* 293 N.C. 539, 238 S.E. 2d 521. Perhaps the plea of no contest should be abolished. However, as it remains a plea that is viable, its viability should apply to the capital punishment statute unless changed by the General Assembly. In the absence of clear legislative direction, I do not believe that we should allow a plea of no contest to be the deciding factor as to whether a person receives life imprisonment or death. Accordingly, I dissent from so much of the majority opinion as upholds the death penalty in this case.

STATE OF NORTH CAROLINA v. EARL JACKSON BARTS

No. 370A84

(Filed 2 December 1987)

1. Criminal Law § 23.3— guilty plea to first degree murder—knowing and voluntary

In a prosecution arising from a robbery and murder in which defendant pled guilty, the trial court adequately explained the two theories of first degree murder under which defendant was pleading guilty, and defendant's responses indicated that he understood the nature of the plea and the possible consequences. N.C.G.S. § 15A-1022(a) and (b).

2. Criminal Law § 23.3— plea of guilty to first degree murder—evidence sufficient

In a case arising from a robbery and murder in which defendant pled guilty, there was sufficient evidence to support a plea of guilty to premeditated and deliberate murder where the prosecutor's summary of the evidence, to which defendant stipulated, showed that defendant and an accomplice formed a plan to rob the victim, broke into the victim's house, accosted and robbed the victim, the victim died of blunt trauma consisting of multiple blows to the skull, and defendant made a statement to police admitting his involvement.

3. Criminal Law § 73— common law rules of evidence—statements of accomplice—excludable as hearsay

In a sentencing hearing for first degree murder held before the effective date for the Rules of Evidence, statements of an accomplice were properly excludable as hearsay where defendant made no effort to show that the declarant was unavailable to testify even though the declarant was incarcerated in the state prison system at the time of defendant's hearing, nor did defendant avail himself of the opportunity to subpoena the declarant as a witness.

4. Constitutional Law § 28; Criminal Law § 73— first degree murder sentencing hearing—hearsay excluded—violation of due process

The trial court erred in a sentencing hearing for first degree murder by excluding portions of a written statement and testimony which recounted an accomplice's oral confession to his role in the murder. Given the relevance of the statement, the assurances of its trustworthiness, and the greater latitude accorded in sentencing proceedings, hearsay rules must yield to due process considerations under the facts of this case.

5. Criminal Law § 138.40— failure to find mitigating factor of voluntary acknowledgment of wrongdoing—no abuse of discretion

The trial court did not abuse its discretion when sentencing defendant for burglary and armed robbery by failing to find the mitigating factor that defendant voluntarily acknowledged wrongdoing in connection with the offenses to a law enforcement officer at an early stage of the criminal process where defendant did not admit his participation until after he was arrested and confronted with an accomplice's statement; a detective testified that defendant volunteered the information because he got mad that an accomplice had made a statement; and, when asked on videotape if he had ever considered going to the police about the crime himself, defendant responded that sooner or later he might have admitted responsibility had he not been arrested. N.C.G.S. § 15A-1340.4(a)(2)1.

6. Criminal Law § 138.34— failure to find alcoholism or drug addiction as mitigating factor—no abuse of discretion

The trial judge did not abuse his discretion when sentencing defendant for burglary and robbery by failing to find that defendant's alcoholism or drug abuse lessens his culpability for the offenses where the evidence tended to show that two accomplices had explained their plan for robbing the victim; defendant had understood this plan and agreed to participate although he real-

ized that he could go back to prison; defendant attempted to disguise his identity during the crime by wearing a mask and using a false name; and defendant attempted to conceal the crime by disposing of the baseball bat and wallet and burying the stolen pistol. The trial judge could properly have concluded from this evidence that defendant's alcoholism and prolonged drug abuse did not affect his presence of mind, his ability to appreciate the nature of his own actions, or his understanding that his conduct was wrong. N.C.G.S. § 15A-1340.4(a)(2)d.

Justice MEYER dissenting.

APPEAL by defendant from judgments sentencing defendant to death on his plea of guilty of murder in the first degree and to consecutive terms of forty years, thirty years, and three years, respectively, on his pleas of guilty of robbery with a dangerous weapon, burglary in the second degree, and felonious larceny, said judgments imposed by *Hobgood (Robert H.), J.*, at the 28 May 1984 session of Superior Court, ALAMANCE County. Heard in the Supreme Court 14 October 1987.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the state.

Lee W. Settle and Robert E. Collins for defendant.

MARTIN, Justice.

On 20 November 1983 the body of Richard Braxton, aged seventy-four, was discovered on the porch of his Alamance County farmhouse. His face and head were battered and covered with blood and both eyes were blackened. An autopsy performed by Dr. Robert Anthony, assistant chief medical examiner for the state, revealed that the victim had suffered at least seven forceful blows to the head which had crushed his skull and caused bone fragments to be driven into his brain. Among numerous bruises and lacerations were defensive wounds on one hand.

Based on information obtained from other suspects in the crime, the Alamance County Sheriff's Department arrested defendant on 5 December at North Carolina Memorial Hospital, where he was receiving treatment for alcohol abuse. Defendant was advised by police that his cousin Keith Barts had implicated him in the victim's death. Defendant then made an oral statement which was reduced to writing and signed. A similar statement was videotaped on 8 December.

These statements tended to show that defendant was recruited by Keith Barts and John David "Fireball" Holmes to participate in the robbery of Richard Braxton. The elderly Braxton lived alone on his Snow Camp farm and was rumored to carry large amounts of cash. On 19 November 1983, Holmes dropped defendant and Keith off near the Braxton farmhouse. The cousins had armed themselves with a small crowbar and a rubber hubcap hammer and were wearing masks and gloves. No one was at home, so Keith pried open a door. Inside they discovered a .22-caliber pistol and a sling blade, both of which they appropriated. Defendant thought he might use the sling blade to hit the victim on the arm to "get his attention" so he could push him down and let Keith take his money. After unsuccessfully searching the house for money, they went outside to look in the shed. Keith abandoned the crowbar there and defendant exchanged the sling blade for a baseball bat. They then returned to the house where they remained until they spotted headlights coming up the driveway.

Braxton drove up and noticed that the shed door had been left open. As he stepped inside to investigate, defendant ran toward him, swinging the baseball bat. Braxton picked up the discarded crowbar and hit defendant on the arm and in the face, causing him to drop the bat. Defendant, calling for Keith's aid, pushed Braxton onto the shed steps. Braxton grabbed defendant and the two were struggling when Keith arrived and began to hit Braxton with the rubber hammer and the baseball bat. When Braxton lay still, defendant unzipped the pocket of his bib overalls and took his wallet, containing about $3,200. Keith hit Braxton once more with the bat. The cousins then drove the victim's pickup truck to a bridge where they had previously arranged to meet Holmes. They abandoned the truck, disposed of the bat and wallet, and returned home to divide the cash.

Defendant pled guilty to murder in the first degree, burglary in the second degree, felonious larceny, and robbery with a dangerous weapon. After entry of his guilty pleas, a jury was empaneled pursuant to N.C.G.S. § 15A-2000(a) for purposes of determining defendant's punishment for murder in the first degree. At the sentencing proceeding, the state presented expert medical testimony and introduced defendant's statements into evidence. The state also presented expert testimony as to blood

spatter evidence which tended to contradict defendant's claim that he himself did not strike the victim.

Defendant testified on his own behalf, consistent with his prior statements. He blamed Keith for the beating and denied that he had ever intended that the victim be killed. He also presented evidence that his mother died when he was three years old, that he quit school during the eighth grade to help his father on the family farm, and that he began to abuse alcohol as early as the age of twelve. Although his heavy drinking and drug abuse kept him from holding a steady job, he did the cooking and housekeeping for his wife and two sons and did carpentry, leatherwork, and odd jobs for his neighbors. He had been hospitalized repeatedly for his drinking problem.

The jury found the following circumstances in aggravation: the defendant had previously been convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000 (e)(3); the murder was committed while defendant was engaged in the commission of armed robbery, N.C.G.S. § 15A-2000(e)(5); the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

The jury rejected each of twenty-one mitigating circumstances submitted. Upon unanimously finding beyond a reasonable doubt that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, the jury recommended that defendant be sentenced to death. Judgment of execution was entered on 7 June 1984. The judge then sentenced defendant to consecutive sentences of forty years' imprisonment for robbery with a dangerous weapon, thirty years' imprisonment for burglary in the second degree, and three years' imprisonment for felonious larceny. Defendant appealed the sentence of death to this Court as a matter of right, and his motion to bypass the Court of Appeals as to the other sentences was allowed on 13 July 1984.

[1] By his first assignment of error, defendant argues that the trial court erred in accepting his plea of guilty to murder in the first degree. A plea of guilty involves the waiver of various fundamental rights such as the privilege against self-incrimination, the right of confrontation, and the right to trial by jury. Consequently, through N.C.G.S. § 15A-1022(a) and (b), our legislature

has sought to ensure that such pleas are voluntary and the product of informed choice. *State v. Sinclair*, 301 N.C. 193, 270 S.E. 2d 418 (1980). Defendant contends (1) that he did not knowingly and voluntarily enter the plea as to both the felony murder and the premeditation and deliberation theories of murder in the first degree and (2) that there was no factual basis to support the plea as to the premeditation and deliberation theory. We disagree.

The record of defendant's plea proceeding contains the following colloquy:

> THE COURT: Now, in connection with the charge of First Degree Murder, you understand that you're pleading guilty to First Degree Murder on two theories: First, on the basis of malice, premeditation, and deliberation?
>
> THE DEFENDANT: I didn't understand it, Your Honor.
>
> THE COURT: All right. I'll go through this for you.

The trial judge then proceeded to define the elements of premeditated and deliberate murder. He also discussed the principles of acting in concert. The colloquy continued:

> THE COURT: Now, what I am saying is that the State in its proof—if it proves that you were acting in concert with Keith Barts, and if Keith Barts committed all of the acts necessary to constitute First Degree Murder with malice, premeditation, and deliberation pursuant to a common plan or purpose to commit First Degree Murder, then you equally would be guilty of First Degree Murder under that theory.
>
> If you were present at the scene.
>
> Now, there is another theory of First Degree Murder, and that is called Felony Murder. And I'll explain that to you at this time.
>
> In order for the State to prove you guilty of First Degree Felony Murder, the State must prove: first, that you committed robbery of Richard Braxton; second, that while committing the robbery of Richard Braxton, that you or someone acting in concert with you beat Richard Braxton on the head; third, that this beating on the head was a proximate cause of Richard Braxton's death.
>
> . . . .

Now, do you understand that you're pleading guilty to First Degree Murder under both theories?

THE DEFENDANT: Yes, sir.

The trial judge next informed defendant that a sentencing hearing would be held and that the jury could recommend either a life term or the death penalty. Finally the judge inquired:

THE COURT: Do you now personally plead guilty to First Degree Murder under the theory of malice, premeditation, and deliberation and felony murder rule, Second Degree Burglary, Armed Robbery and Felonious Larceny?

THE DEFENDANT: Yes, sir.

THE COURT: Are you, in fact, guilty of these charges?

THE DEFENDANT: Can I say something?

THE COURT: Yes, sir.

THE DEFENDANT: I was there. Yes, I am.

We find that the trial judge adequately explained the two theories of murder in the first degree. Defendant's responses indicate that he understood the nature of the plea and the possible consequences. The record simply does not support defendant's claim that his plea was not an informed choice as to both theories.

[2] We turn now to the second part of defendant's argument on this issue. He maintains that the plea proceeding record is devoid of any evidence to support a plea of premeditated and deliberate murder and at most supports only a plea of guilt to felony murder. N.C.G.S. § 15A-1022 provides:

(c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

(1) A statement of the facts by the prosecutor.
(2) A written statement of the defendant.
(3) An examination of the presentence report.
(4) Sworn testimony, which may include reliable hearsay.
(5) A statement of facts by the defense counsel.

This section does not require the trial judge to elicit evidence from each, any, or all of the enumerated sources. The trial judge may consider any information properly brought to his attention, but that which he does consider must appear in the record. *State v. Sinclair*, 301 N.C. 193, 270 S.E. 2d 418; *State v. Dickens*, 299 N.C. 76, 261 S.E. 2d 183 (1980).

Here the trial judge relied on the prosecution's summary of the evidence, to which defendant stipulated. We have examined this summary in the record and find that it provides a sufficient factual showing to support defendant's plea of guilty to premeditated murder. The summary showed that defendant and Keith Barts formed a plan to rob the victim, that they broke into the victim's house, that they both accosted and robbed the victim in the shed, that the victim died of blunt trauma consisting of multiple blows to the skull, and that defendant made a statement to police admitting his involvement.

Although the summary does not specifically allege that defendant was responsible for the actual beating, under the principles of acting in concert one who enters into a common design for a criminal purpose is deemed a party to every criminal act done by others in furtherance of such design. *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *modified on other grounds*, 408 U.S. 939, 33 L.Ed. 2d 761 (1972). Thus, any acts alleged in the summary which Keith performed in furtherance of the robbery and which tended to show premeditation and deliberation could properly be imputed to defendant.

It is well settled that premeditation and deliberation can be inferred from circumstances such as the brutality of the killing, the nature and number of the victim's wounds, and the dealing of lethal blows after the victim has already been felled. *State v. Rasor*, 319 N.C. 577, 356 S.E. 2d 328 (1987). The medical findings contained in the prosecution's summary tended to show that multiple injuries had been inflicted upon the victim in a particularly brutal and vicious beating. This provided sufficient evidence from which premeditation and deliberation could be inferred for the purposes of establishing a factual basis for defendant's plea. We therefore perceive no error in the judge's acceptance of defendant's plea of guilty to murder in the first degree.

[3] Defendant next contends that the trial court improperly excluded evidence offered to explain the circumstances of his participation in the victim's death. Specifically defendant challenges the trial court's exclusion on hearsay grounds of those portions of defense witness Richard Lockemy's testimony and written statement which recounted Keith Barts' oral confession to his role in the murder. Lockemy had been involved with Keith and several others in the month-long planning stages of the Braxton robbery. His statement, handwritten and signed on 4 December 1983, details the planning of the crime and the reactions of key participants in its immediate aftermath.

On direct examination, defense counsel asked Lockemy to recount his conversation with Keith after the murder and to identify and read his written statement. Upon objections by the state, the trial judge excluded evidence of Keith's declarations.

As the state points out, defendant neglected to place in the record Lockemy's answers to the questions propounded to him on the witness stand. An exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness's testimony would have been had he been permitted to testify. *State v. Simpson*, 314 N.C. 359, 334 S.E. 2d 53 (1985). Nor did defendant place Lockemy's written statement into the record. However this Court, in its discretion pursuant to North Carolina Rule of Appellate Procedure 9(b)(5), allowed defendant's motion to amend the record on appeal so as to include the written statement. We will limit our remarks to the question of the written statement's exclusion.

The part of the statement pertinent to this appeal reads as follows:

> I didn't see Keith Barts or Fireball until Sunday, November 20, 1983 the day the old man was found dead. That Sunday around lunch time Keith Barts came into the trailer. Keith said, "I did that last night." I said, "What are you talking about?" Keith said, "I went to the old man's house and I think I killed him." I said, "God no you didn't kill him did you?" Keith Barts said that he wasn't sure but the old man was strong. Keith said that he kept beating the old man until the old man quit moving. Keith said the old man kept saying,

"Oh God you are going to kill me." Keith said he beat the old man with something rubber and a crow bar.

Because defendant's sentencing hearing concluded on 7 June 1984, and the North Carolina Rules of Evidence as they are now codified did not come into effect until 1 July 1984, we must apply the evidentiary principles developed at common law. Declarations against penal interest were traditionally inadmissible in North Carolina, *see State v. English*, 201 N.C. 295, 159 S.E. 318 (1931), until the landmark case of *State v. Haywood*, 295 N.C. 709, 249 S.E. 2d 429 (1978). In *Haywood*, this Court determined that such declarations could be admitted as hearsay exceptions under certain conditions. The first of these conditions is unavailability:

> (1) The declarant must be dead; beyond the jurisdiction of the court and the reach of its process; suffering from infirmities of body or mind which preclude his appearance as a witness either by personal presence or by deposition; or exempt by ruling of the court from testifying on the ground of self-incrimination. As a further condition of admissibility, in an appropriate case, the party offering the declaration must show that he has made a good-faith effort to secure the attendance of the declarant.

Id. at 730, 249 S.E. 2d at 442.

In ruling that the hearsay portions of the statement were inadmissible, the trial judge noted that "the defendant, through his attorney, has the right to subpoena any of these [declarants] to testify at this hearing. And the Court will give the defendant clerical assistance and time and opportunity to obtain any of those [declarants] to testify at this sentencing hearing." Defendant made no effort to demonstrate that declarant Keith Barts, who was incarcerated in the state prison system at the time of defendant's hearing, was unavailable to testify, nor did he avail himself of the opportunity to subpoena Keith as a witness. Under state evidentiary rules, then, the hearsay statements were properly excluded.

[4] However, our analysis does not end here. Defendant, while conceding that the challenged portions of Lockemy's statement were inadmissible under hearsay rules, raises a federal constitutional issue under the due process clause of the fourteenth amend-

ment. Evidentiary rules which would normally apply at the guilt phase of a trial do not necessarily apply with equal force at a sentencing hearing. Evidentiary flexibility is encouraged in the serious and individualized process of life or death sentencing. *State v. Pinch*, 306 N.C. 1, 19 n.9, 292 S.E. 2d 203, 219 n.9, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983). The extent to which the rules of evidence may be relaxed within the dictates of due process is best resolved on a case-by-case basis. *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978). An examination of key federal precedents leads us to the conclusion that under the facts of this case defendant's right to a fair trial under the due process clause was violated by exclusion of the challenged evidence.

The Supreme Court of the United States has addressed the tension between a defendant's due process rights and the strict application of a state's evidentiary rules in *Chambers v. Mississippi*, 410 U.S. 284, 35 L.Ed. 2d 297 (1973). Defendant Chambers, on trial for the murder of a police officer, proffered the testimony of three different witnesses to whom another man, Gable McDonald, had confessed to the crime. The trial judge excluded this testimony because it constituted hearsay in violation of the state evidence code. In reversing Chambers' conviction on the grounds that exclusion of the evidence had deprived him of a trial in accord with fundamental standards of due process, the Supreme Court noted that McDonald's confessions bore persuasive assurances of trustworthiness because they were made spontaneously to close acquaintances shortly after the murder and were corroborated by some other evidence presented at trial. Under such circumstances, the Court held, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302, 35 L.Ed. 2d at 313.

The Supreme Court later applied the *Chambers* rationale to a sentencing hearing in a case very similar to the one now before us. In *Green v. Georgia*, 442 U.S. 95, 60 L.Ed. 2d 738 (1979) (per curiam), defendant Green and codefendant Moore were tried separately for the murder of Teresa Allen, and both were convicted and sentenced to death. Evidence during the guilt phase of Green's trial tended to show that he had acted either separately or in concert with Moore in the abduction, rape, and shooting death of the victim. At his sentencing hearing, Green attempted

to introduce the testimony of Thomas Pasby, an acquaintance of Moore's, who would have testified that Moore had admitted that he alone fired the fatal shots, contrary to the state's theory that both men had participated in the shooting. The trial judge excluded the testimony because it constituted inadmissible hearsay under the state evidence code.

The Supreme Court, citing *Chambers*, held that the hearsay evidence was relevant to an important sentencing issue and that its exclusion violated due process and denied Green a fair hearing. In reaching this result, the Court relied on certain circumstances which indicated the statement's reliability:

> Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it.

442 U.S. at 97, 60 L.Ed. 2d at 741.

We find *Green* to be dispositive of this case. Under the criteria listed therein, Keith Barts' declarations bore suitable indicia of reliability under a due process standard. The declarations were decidedly against penal interest and were made spontaneously to his friend Lockemy shortly after the crime had occurred. Significantly, the state relied upon Lockemy's testimony as to the declarations at Keith's capital trial to support its theory that Keith alone had beaten the victim. *See State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986). Here, moreover, Lockemy was on the witness stand and subject to cross-examination by the state.

As in *Green*, the excluded evidence was highly relevant to the issue of punishment. Defendant, while admitting some level of participation in the crime, sought to establish that he had not personally administered the fatal beating and therefore was not deserving of the death penalty for his part in the victim's demise. The state, on the other hand, presented some physical evidence tending to contradict defendant's version of events and argued in closing that defendant had been the sole perpetrator of the mur-

derous deeds. Keith's description of how he beat the victim, lacking any mention of defendant's participation, would have tended to corroborate defendant's story. The evidence might have been sufficient to tip the scales in favor of life imprisonment in the jury's assessment of the appropriate punishment.

Given the relevance of Lockemy's statement, the assurances of its trustworthiness, and the greater latitude to be afforded in sentencing proceedings, we hold that exclusion of the Lockemy statement deprived defendant of a fair sentencing hearing. Under the facts of this case our hearsay rules must yield to due process considerations. Defendant is entitled to a new sentencing hearing on the murder conviction. Because we award defendant a new hearing, we need not address his remaining assignments of error as to the death sentence.

We turn now to defendant's assignments of error with respect to noncapital sentencing. The trial judge found two factors in aggravation and no factors in mitigation on the burglary and armed robbery charges. He consequently imposed sentences exceeding the presumptive terms for both of these offenses.[1] Defendant maintains that the judge abused his discretion by failing to find certain mitigating factors which defendant claims were supported by the evidence.

[5] Specifically, defendant argues that the evidence was uncontroverted as to the statutory mitigating factor that he voluntarily acknowledged wrongdoing in connection with the offenses to a law enforcement officer at an early stage of the criminal process, N.C.G.S. § 15A-1340.4(a)(2)(l). A defendant is entitled to a finding of this statutory mitigating factor if his confession is made prior to the issuance of a warrant or information, the return of a true bill of indictment or presentment, or prior to arrest, whichever comes first. *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 471 (1985).

The record shows that defendant did not admit to his participation in the crimes until 5 December 1983, *after* he was arrested and confronted with Keith Barts' statement to police implicating him in the beating of the victim. We have declined to establish a per se rule as to the length of time which may elapse

1. Defendant was sentenced to the presumptive term of three years on the charge of felonious larceny. He does not challenge this sentence.

between arrest and confession and still allow an accused the benefit of the mitigating factor. *Id.* The existence of the mitigating factor was to be determined in the discretion of the trial judge. A matter committed to the discretion of a trial court is not subject to review except upon a showing of an abuse of discretion, *Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22 (1967), and a trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision, *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985).

One purpose of the mitigating factor is to allow a sentencing judge to give some credit to a defendant who by early confession spares law enforcement officers expense and trouble which might otherwise be required to resolve the crime. Another purpose is to allow a sentencing judge to recognize that the earlier one admits responsibility, the better one's chance of rehabilitation. *State v. Brown*, 314 N.C. 588, 336 S.E. 2d 388 (1985). Here the trial judge heard evidence as to the circumstances of defendant's confession which could reasonably have led him to the conclusion that the mitigating factor should not be found in this case. According to the testimony of Detective Alan Cates, defendant volunteered the information because "he got mad when we advised him that Keith had made a statement. And at that time, he seemed, appeared to be mad at Keith Barts and made a statement to us then." In the videotape of defendant's statement he was asked if he had ever considered going to the police about the crime himself. He responded that "sooner or later" he might have contacted the authorities. From this evidence it may reasonably be inferred that defendant would not have admitted responsibility had he not been arrested and confronted with the statement of another participant in the crime. Under the circumstances, we cannot say that the trial judge abused his discretion in failing to find the mitigating factor.

[6] Defendant also argues, and the state concedes, that the evidence was uncontroverted as to his prolonged abuse of drugs and alcohol. Alcoholism or drug addiction, while not itself a statutorily enumerated mitigating factor, may properly be found to mitigate an offense under the rubric of the statutory factor contained in N.C.G.S. § 15A-1340.4(a)(2)(d): "The defendant was suffering from a mental or physical condition that was insufficient

to constitute a defense but significantly reduced his culpability for the offense." *State v. Ragland*, 80 N.C. App. 496, 342 S.E. 2d 532 (1986); *State v. Bynum*, 65 N.C. App. 813, 310 S.E. 2d 388, *disc. rev. denied*, 311 N.C. 404, 319 S.E. 2d 275 (1984). The burden of proving that the condition reduced his culpability is upon defendant. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983); *State v. Barranco*, 73 N.C. App. 502, 326 S.E. 2d 903, *cert. denied & appeal dismissed*, 314 N.C. 118, 332 S.E. 2d 484 (1985).

Here the evidence tended to show that Keith Barts and Fireball Holmes had explained their plan for robbing the victim, that defendant understood this plan and agreed to participate although he realized he could go back to prison, that defendant attempted to disguise his identity during the crime by wearing a mask and using a false name, and that defendant attempted to conceal the crime by disposing of the baseball bat and wallet and by burying the stolen pistol. From this evidence the trial judge could properly conclude that defendant's alcoholism and prolonged drug abuse did not affect his presence of mind, his ability to appreciate the nature of his own actions, or his understanding that his conduct was wrong. Under the circumstances we cannot say that the trial judge abused his discretion in failing to find that defendant's alcoholism or drug abuse lessened his culpability for the offenses. Defendant has failed to show error in the sentencing hearing on the robbery and burglary charges.

The result is:

83CRS16651—murder—death sentence vacated, remanded to Superior Court, Alamance County, for new sentencing hearing.

83CRS16652—burglary in the second degree—no error.

83CRS16653—larceny—no error.

83CRS16654—armed robbery—no error.

Justice MEYER dissenting.

The defendant did not preserve for the record what the witness Lockemy's proffered verbal testimony as to Keith Barts' statements to him would have been had he been allowed to testify

concerning those statements. For this reason, the majority correctly concludes that we cannot sustain an exception to the exclusion of the proffered verbal hearsay testimony of Lockemy. *State v. Haywood*, 295 N.C. 709, 249 S.E. 2d 429 (1978).

I believe the majority errs, however, in concluding that the defendant's due process rights were violated by the exclusion of the written statement of what Lockemy had said that Keith Barts had said to him. The majority's reliance on *Chambers v. Mississippi*, 410 U.S. 284, 35 L.Ed. 2d 297 (1973), is misplaced. In *Chambers*, the defendant, in the guilt phase, proffered the live testimony of three witnesses to whom another man had confessed to the crime with which the defendant was charged. The trial judge excluded the live testimony as hearsay in violation of the state's evidentiary code which prohibited a party from impeaching his own witness. The United States Supreme Court properly reversed the conviction because the state's evidentiary rule impinged upon the defendant's right to a fair trial. Had the live testimony of the three witnesses in *Chambers* been admitted, those witnesses would have been subject to cross-examination to test the veracity of their statements concerning the confession made to them by the third party.

Likewise, in *Green v. Georgia*, 242 U.S. 95, 60 L.Ed. 2d 738 (1979) (a per curiam opinion), upon which the majority also relies and, indeed, finds dispositive of this case, the proffered evidence was also live testimony as opposed to a written statement. In *Green*, as in *Chambers*, the live witnesses would have been subject to cross-examination to test their veracity.

In the case at bar, defense counsel attempted to have Lockemy testify as to the written statement in question, but the trial judge sustained the State's objection on the grounds that the written statement (like the proffered oral statements of Lockemy) was hearsay. The trial judge so severely sanitized the statement that defense counsel apparently felt that its introduction would have accomplished nothing. Because Lockemy was on the stand, I would have no difficulty with the result reached in this particular case if the majority opinion required the trial judge to allow the State to cross-examine him concerning the written hearsay statement. The majority does not so restrict its holding. On retrial, this same statement might be offered through Lockemy without

the trial judge permitting Lockemy to be cross-examined concerning the statement. Likewise, under the majority opinion, Lockemy's written statement might be admitted through the auspices of the officer obtaining it without Lockemy being cross-examined or without Lockemy even being present though otherwise available to testify.

So long as the witness who gives the written statement containing the hearsay is subject to cross-examination, the interests of justice are properly served. Upon cross-examination, the witness who gives (or gave) the statement containing the hearsay may very well repudiate the proffered statement as untrue or even deny having made it. If the witness gives the hearsay statement or testifies precisely to the contents of a prior written hearsay statement, his demeanor may convince a sentencing judge (or the jury in a capital case) that the statement and the live testimony are untrue.

Because the majority opinion gives no assurance that Lockemy's written statement containing the hearsay can be introduced by way of Lockemy's testimony only if Lockemy is subject to cross-examination, or otherwise condition its introduction upon the availability of Lockemy for cross-examination concerning the statement, I cannot join the majority opinion.

STATE OF NORTH CAROLINA v. JOHN FORREST

No. 705A86

(Filed 2 December 1987)

1. Homicide § 24.1— shooting terminally ill parent—instructions on malice

In a murder prosecution where defendant had shot and killed his incurably and terminally ill father, the trial court did not err by instructing the jury that it could infer from the use of a deadly weapon that the killing was unlawful and committed with malice, and did not instruct the jury that malice should be presumed.

2. Homicide § 27.1— shooting of terminally ill parent—instructions—heat of passion doctrine

In a murder prosecution arising from defendant's shooting of his terminally ill father, the trial court's instruction on malice was not incomplete in that it failed to define "just cause, excuse, or justification." The "heat of passion" doc-

trine is meant to reduce murder to manslaughter where defendant kills without premeditation and deliberation and without malice, but under the heat of passion suddenly aroused which makes the mind temporarily incapable of reflection. This defendant, though clearly upset by his father's condition, indicated by his actions and his statements that his crime was premeditated and deliberate.

3. Homicide § 23.1— instructions—definition of malice

The trial judge did not err in its instruction on malice in a first degree murder prosecution by failing to explicitly and specifically qualify the particular definition of malice as "that condition of mind that prompts a person to take the life of another intentionally" with the phrase "without just cause, excuse or justification." The instruction given was consistent with the N.C. Pattern Jury Instructions, has been approved by the Supreme Court on numerous occasions, and is in essence the same as that which defendant argues.

4. Homicide § 18.1— killing of terminally ill parent—evidence of premeditation and deliberation—sufficient

There was sufficient evidence of premeditation and deliberation to submit a first degree murder charge to the jury where it was clear that the seriously ill deceased did nothing to provoke defendant's action; the deceased was lying helpless in a hospital bed when defendant shot him four separate times; defendant's revolver was a five-shot single-action gun which had to be cocked each time before it could be fired; although defendant testified that he always carried the gun in his job as a truck driver, he was not working on the day in question; and defendant stated after the incident that he had thought about putting his father out of his misery because he knew he was suffering, that he had promised his father that he would not let him suffer, and that he could not stand to see his father suffer any more.

5. Criminal Law § 122.2— divided jury—inquiry into division—additional instructions—no error

The trial court did not err in a murder prosecution by inquiring into the numerical division of the jury or in its instructions to the jury about deliberating toward a verdict where the inquiry and instructions were not coercive when viewed in the totality of the circumstances.

Chief Justice EXUM dissenting.

BEFORE *Cornelius, J.*, and a jury at the 30 June 1986 Special Criminal Session of Superior Court, MOORE County, defendant was convicted of first-degree murder. From that conviction and the subsequent imposition of a sentence of life imprisonment entered by *Judge Cornelius*, defendant appeals as of right pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court 13 October 1987.

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

Van Camp, Gill, Bryan & Webb, P.A., by James R. Van Camp, for defendant-appellant.

MEYER, Justice.

Defendant was convicted of the first-degree murder of his father, Clyde Forrest. The State having stipulated before trial to the absence of any statutory aggravating factors under N.C.G.S. § 15A-2000, the case was tried as a noncapital case, and defendant was sentenced accordingly to life imprisonment. In his appeal to this Court, defendant brings forward three assignments of error relative to the guilt-innocence phase of his trial. Having considered the entire record and each of these assignments in turn, we find no error in defendant's trial. We therefore leave undisturbed defendant's conviction and life sentence.

The facts of this case are essentially uncontested, and the evidence presented at trial tended to show the following series of events. On 22 December 1985, defendant John Forrest admitted his critically ill father, Clyde Forrest, Sr., to Moore Memorial Hospital. Defendant's father, who had previously been hospitalized, was suffering from numerous serious ailments, including severe heart disease, hypertension, a thoracic aneurysm, numerous pulmonary emboli, and a peptic ulcer. By the morning of 23 December 1985, his medical condition was determined to be untreatable and terminal. Accordingly, he was classified as "No Code," meaning that no extraordinary measures would be used to save his life, and he was moved to a more comfortable room.

On 24 December 1985, defendant went to the hospital to visit his ailing father. No other family members were present in his father's room when he arrived. While one of the nurse's assistants was tending to his father, defendant told her, "There is no need in doing that. He's dying." She responded, "Well, I think he's better." The nurse's assistant noticed that defendant was sniffing as though crying and that he kept his hand in his pocket during their conversation. She subsequently went to get the nurse.

When the nurse's assistant returned with the nurse, defendant once again stated his belief that his father was dying. The

nurse tried to comfort defendant, telling him, "I don't think your father is as sick as you think he is." Defendant, very upset, responded, "Go to hell. I've been taking care of him for years. I'll take care of him." Defendant was then left alone in the room with his father.

Alone at his father's bedside, defendant began to cry and to tell his father how much he loved him. His father began to cough, emitting a gurgling and rattling noise. Extremely upset, defendant pulled a small pistol from his pants pocket, put it to his father's temple, and fired. He subsequently fired three more times and walked out into the hospital corridor, dropping the gun to the floor just outside his father's room.

Following the shooting, defendant, who was crying and upset, neither ran nor threatened anyone. Moreover, he never denied shooting his father and talked openly with law enforcement officials. Specifically, defendant made the following oral statements: "You can't do anything to him now. He's out of his suffering." "I killed my daddy." "He won't have to suffer anymore." "I know they can burn me for it, but my dad will not have to suffer anymore." "I know the doctors couldn't do it, but I could." "I promised my dad I wouldn't let him suffer."

Defendant's father was found in his hospital bed, with several raised spots and blood on the right side of his head. Blood and brain tissue were found on the bed, the floor, and the wall. Though defendant's father had been near death as a result of his medical condition, the exact cause of the deceased's death was determined to be the four point-blank bullet wounds to his head. Defendant's pistol was a single-action .22-calibre five-shot revolver. The weapon, which had to be cocked each time it was fired, contained four empty shells and one live round.

At the close of the evidence, defendant's case was submitted to the jury for one of four possible verdicts: first-degree murder, second-degree murder, voluntary manslaughter, or not guilty. After a lengthy deliberation, the jury found defendant guilty of first-degree murder. Judge Cornelius accordingly sentenced defendant to the mandatory life term.

Defendant assigns three specific errors relative to his conviction at trial: first, that the trial court committed reversible error

in its instruction to the jury concerning the issue of malice; second, that the trial court committed reversible error in its submission of the first-degree murder charge to the jury because there was insufficient evidence of premeditation and deliberation; third and finally, that the trial court committed reversible error when, during jury deliberation, it inquired into the jury's numerical division and subsequently instructed the jury about deliberating toward a verdict. We deal with each assignment of error in turn.

I.

[1] In his first assignment of error, defendant asserts that the trial court committed reversible error in its instruction to the jury concerning the issue of malice. Defendant makes three specific arguments in support of his position on this assignment of error. First, states defendant, the instruction permitting an inference of malice from the use of a deadly weapon on these particular facts constituted an impermissible shift of the burden of persuasion on the issue of malice to defendant. Second, continues defendant, the trial court erred in giving incomplete instructions on the element of malice and in thereby improperly suggesting that the mitigating evidence presented at trial neither negated malice nor showed heat of passion. Third, concludes defendant, the trial court erred more generally in giving instructions on malice which were simply erroneous and misleading. We find each of defendant's arguments unpersuasive, and we therefore overrule this assignment of error.

On the issue of malice, the trial court consistently instructed the jury as follows:

> Malice means not only hatred, ill-will or spite, as it is ordinarily understood; to be sure that's malice. But it also means that condition of the mind that prompts a person to take the life of another intentionally, or to intentionally inflict serious bodily harm which proximately results in his death without just cause, excuse or justification.
>
> If the State proves beyond a reasonable doubt that the defendant killed the victim with a deadly weapon, or intentionally inflicted a wound upon the victim with a deadly weapon that proximatley [sic] caused the victim's death you may infer, first, that the killing was unlawful. Second, that it

was done with malice. But you are not compelled to do so. You may consider this, along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice.

I charge that it is not a legal defense to the offense of murder if the defendant, John Forrest, at the time of the shooting believed his father, Clyde Forrest, to be terminally ill or in danger of immediate death. But you may consider such belief in determining whether the killing was done with malice.

It is this instruction to which defendant now assigns error.

Defendant first argues that, on the particular facts of this case, the trial court's instruction permitting an inference of malice from the use of a deadly weapon improperly shifted the burden of persuasion on the issue of malice to defendant. Here, claims defendant, where the facts presented tended to show a distraught son who wanted merely to end his father's suffering, the evidence in fact negated the element of malice. According to defendant, there was no rational connection here between the fact proved (intentional use of a dangerous weapon) and the fact inferred (malice). Therefore, concludes defendant, use of an inference under these circumstances was tantamount to shifting the burden of persuasion to defendant, because first, the jury was encouraged to draw the inference regardless of any other evidence presented, and second, it was told, in effect, that the inference could not be overcome—that the direct evidence was not a "legal defense." We cannot agree.

The instruction employed by the trial court is in accord with the North Carolina Pattern Jury Instructions and with extensive North Carolina case law. *See State v. Reynolds*, 307 N.C. 184, 297 S.E. 2d 532 (1983); *State v. Patterson*, 297 N.C. 247, 254 S.E. 2d 604 (1979). Significantly, the trial court did not instruct the jury that malice should be *presumed*. On the contrary, the trial court instructed the jury that it *"may infer"* that the killing was unlawful and committed with malice, but that it was not compelled to do so. The trial court properly instructed the jury that it should consider this permissive inference along with all the other facts and circumstances, including defendant's belief that his father was terminally ill or in danger of immediate death, in

deciding whether the State had proven malice beyond a reasonable doubt. Defendant's first argument therefore lacks merit.

[2] Defendant argues second that the trial court erred in giving incomplete instructions on the issue of malice, thereby improperly suggesting that any mitigating evidence presented did not negate malice or show heat of passion. While conceding that the instruction here was technically correct, defendant claims that it was nevertheless inadequate and misleading in that it failed to define what was meant by the phrase "just cause, excuse or justification." According to defendant, there is abundant evidence in the record that, upon seeing his father at the hospital, he was overwhelmed by the futile, horrible suffering before him and that, in a highly emotional state, he killed to bring relief to the man he deeply loved. The jury instruction employed by the trial court, concludes defendant, because it did not instruct on heat of passion, for all intents and purposes precluded the jury from considering these critical facts in mitigation of the offense. We do not agree with defendant, and we hold that a heat of passion jury instruction on facts such as those of the case at bar is improper.

In essence, defendant asks this Court to hold that his extreme distress over his father's suffering was adequate provocation, as in the "heat of passion" doctrine, to negate the malice element required for a murder conviction. Our Court has held on numerous occasions that, under certain circumstances, one who kills another human being in the "heat of passion," produced by adequate provocation sufficient to negate malice, is guilty of manslaughter rather than murder. *State v. Robbins*, 309 N.C. 771, 309 S.E. 2d 188 (1983); *State v. Jones*, 299 N.C. 103, 261 S.E. 2d 1 (1979). A killing in the "heat of passion" on sudden and adequate provocation means a killing without premeditation under the influence of a sudden passion which renders the mind incapable of cool reflection. *State v. Jones*, 299 N.C. 103, 261 S.E. 2d 1; *State v. Jennings*, 276 N.C. 157, 171 S.E. 2d 447 (1970).

Significantly, our Court has narrowly construed the requirement under the "heat of passion" doctrine that provocation be adequate and reasonable. We have held, for example, that mere words or insulting language, no matter how abusive, can never be adequate provocation and can never reduce murder to manslaughter under the "heat of passion" doctrine. *State v. McCray*, 312

N.C. 519, 324 S.E. 2d 606 (1985); *State v. Montague*, 298 N.C. 752, 259 S.E. 2d 899 (1979). We have held as adequate provocation an assault or threatened assault, *State v. Montague*, 298 N.C. 752, 259 S.E. 2d 899; *State v. Williams*, 296 N.C. 693, 252 S.E. 2d 739 (1979), and the discovery of the deceased spouse and a paramour in the act of intercourse, *State v. Ward*, 286 N.C. 304, 210 S.E. 2d 407, *vacated in part* 428 U.S. 903, 49 L.Ed. 2d 1207 (1974).

We are unwilling to hold that, as in the case at bar, where defendant kills a loved one in order to end the deceased's suffering, adequate provocation to negate malice is necessarily present. The "heat of passion" doctrine is meant to reduce murder to manslaughter when defendant kills without premeditation and deliberation and without malice, but rather under the influence of the heat of passion suddenly aroused which renders the mind temporarily incapable of cool reflection. *State v. Jones*, 299 N.C. 103, 261 S.E. 2d 1. Here, irrefutable proof of premeditation and deliberation is clearly present. This defendant, though clearly upset by his father's condition, indicated by his actions and his statements that his crime was premeditated and deliberate.

The instruction employed by the trial court was correct, and we reject this second of defendant's arguments that the jury instructions constitute reversible error.

[3] Defendant argues third that the trial court committed reversible error in giving instructions on the issue of malice which were erroneous and generally misleading. Defendant's objection here is essentially a grammatical one and is directed at that portion of the jury instruction which reads as follows:

> [Malice] also means that condition of the mind that prompts a person to take the life of another intentionally, . . . without just cause, excuse or justification.

The trial court, argues defendant, failed to explicitly and specifically qualify the particular definition of malice as "that condition of the mind that prompts a person to take the life of another intentionally" with the important phrase "without just cause, excuse or justification." This, claims defendant, almost certainly led the jury to conclude that the intentional shooting alone required them to find malice, despite any evidence to the contrary. The

trial court, adds defendant, should have defined malice in its instruction as follows:

> That condition of the mind which prompts a person, without just cause, excuse or justification to take the life of another intentionally
>
> or
>
> to intentionally inflict serious bodily harm which proximately results in his death.

We do not agree, and we therefore decline defendant's invitation to adopt a new jury instruction concerning the issue of malice. The instruction employed by the trial court is consistent with the North Carolina Pattern Jury Instructions and is the very instruction we have previously expressly approved on numerous occasions. *State v. Reynolds*, 307 N.C. 184, 297 S.E. 2d 532; *State v. Patterson*, 297 N.C. 247, 254 S.E. 2d 604. Moreover, the instruction used at trial is, on its face, in essence the same as that for which defendant argues. Defendant's third argument in support of this assignment of error is without merit, and the assignment as a whole is hereby overruled.

II.

[4] In his second assignment of error, defendant asserts that the trial court committed reversible error in denying his motion for directed verdict as to the first-degree murder charge. Specifically, defendant argues that the trial court's submission of the first-degree murder charge was improper because there was insufficient evidence of premeditation and deliberation presented at trial. We do not agree, and we therefore overrule defendant's assignment of error.

We recently addressed this very issue in the case of *State v. Jackson*, 317 N.C. 1, 343 S.E. 2d 814 (1986). Our analysis of the relevant law in that case is instructive in the case at bar:

> Before the issue of a defendant's guilt may be submitted to the jury, the trial court must be satisfied that substantial evidence has been introduced tending to prove each essential element of the offense charged and that the defendant was the perpetrator. *State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (1984); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

Substantial evidence must be existing and real, but need not exclude every reasonable hypothesis of innocence. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983). In considering a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and inference to be drawn therefrom. *State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837; *State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980). Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808 (1985); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114.

First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979); N.C.G.S. § 14-17 (1981 and Cum. Supp. 1985). Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808; *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980). Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. *State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837; *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982). The phrase "cool state of blood" means that the defendant's anger or emotion must not have been such as to overcome his reason. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768.

Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence. *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975). Among other circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the

> defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808; *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 117, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704. We have also held that the nature and number of the victim's wounds is a circumstance from which premeditation and deliberation can be inferred. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982).

Jackson, 317 N.C. at 22-23, 343 S.E. 2d at 827.

As in *Jackson*, we hold in the present case that there was substantial evidence that the killing was premeditated and deliberate and that the trial court did not err in submitting to the jury the question of defendant's guilt of first-degree murder based upon premeditation and deliberation. Here, many of the circumstances that we have held to establish a factual basis for a finding of premeditation and deliberation are present. It is clear, for example, that the seriously ill deceased did nothing to provoke defendant's action. Moreover, the deceased was lying helpless in a hospital bed when defendant shot him four separate times. In addition, defendant's revolver was a five-shot single-action gun which had to be cocked each time before it could be fired. Interestingly, although defendant testified that he always carried the gun in his job as a truck driver, he was not working on the day in question but carried the gun to the hospital nonetheless.

Most persuasive of all on the issue of premeditation and deliberation, however, are defendant's own statements following the incident. Among other things, defendant stated that he had thought about putting his father out of his misery because he knew he was suffering. He stated further that he had promised his father that he would not let him suffer and that, though he did not think he could do it, he just could not stand to see his father suffer any more. These statements, together with the other circumstances mentioned above, make it clear that the trial court did not err in submitting to the jury the issue of first-

degree murder based upon premeditation and deliberation. Accordingly, defendant's second assignment of error is overruled.

III.

[5] In his third assignment of error, defendant asserts that the trial court committed reversible error when it inquired into the numerical division of the deliberating jury and when it subsequently instructed the jury about deliberating toward a verdict. Defendant claims that the trial court's actions taken in context were sufficiently coercive of the jury as to deny him a fair trial. We have recently addressed this very issue in a similar case, and we simply do not agree.

During its deliberation at trial, the jury returned to the courtroom on several occasions with a specific question. On one such occasion, the exchange between the trial court and the jury proceeded as follows:

> [COURT]: Mrs. Kelly, as Foreperson of the jury, you have submitted a question to the Court. You have indicated that you are unable at this time to come to a unanimous decision. You would like the Court to advise you. Is that your question?
>
> FOREPERSON: Yes, sir.
>
> COURT: Listen very carefully to what I ask you. I'm going to ask you the numerical division. I don't want you to tell me which way; just tell me the division numberwise the way the jury is now constituted.
>
> FOREPERSON: You mean in numbers?
>
> COURT: Yes, ma'm [sic].
>
> FOREPERSON: Eleven to one.
>
> COURT: And has that number remained the same throughout the proceedings, or has it shifted from time to time?
>
> FOREPERSON: No, sir. It has been constant.
>
> COURT: Members of the jury, your Foreperson has indicated that you've been unable to reach a verdict at this particular point. The Court wants to emphasize the fact that it is your duty to do whatever you can to reach a verdict

> in this matter. You should reason the matter over together as reasonable men and women and to reconcile your differences if you can without the surrendering of your conscientious convictions. But no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of a fellow juror, or for the mere purpose of returning a verdict. The Court will now let you return to the jury room to continue with your deliberations, and when you've reached a unanimous verdict—please see if you can reach a unanimous verdict. If you can please knock on the door.

It was this inquiry and instruction by the trial court to which defendant now assigns error.

The disposition of defendant's assignment of error is controlled by our recent decision in the very similar case of *State v. Bussey*, 321 N.C. 92, 361 S.E. 2d 564 (1987). There, as here, defendant challenged the trial court's inquiry into the numerical division of the deliberating jury and its instruction concerning deliberating further toward a verdict. In *Bussey*, we reaffirmed our holding in *State v. Fowler*, 312 N.C. 304, 322 S.E. 2d 389 (1984), that such cases are to be decided by employing a totality of the circumstances test. *Bussey*, 321 N.C. 92, 361 S.E. 2d 564. Therefore, the proper analysis here is whether, upon consideration of the totality of the circumstances, the inquiry and instruction of the trial court were unduly coercive.

As in *Bussey*, we hold here that, when viewed in the totality of the circumstances, the challenged inquiry and instruction were not coercive of the jury's verdict. Our exact analysis in *Bussey* is appropriate in the case at bar as well:

> The record shows that the presiding judge made it perfectly clear from the outset that he did not wish to be told whether the majority favored guilt or innocence. He was at all times respectful of the jury, never impugning its efforts or threatening it with being held for unreasonable periods of time to accomplish a unanimous verdict. The judge was confronted with a report of deadlock . . . . He properly exercised his discretion to hold the jurors to their duty to deliberate thoroughly together before concluding that they were indeed unable to agree. The judge's additional instructions in re-

> sponse to the first inquiry of the jury hew closely to the language of N.C.G.S. § 15A-1235. They are notable for the balance he achieved between recalling the jurors to their duty to deliberate fully and reminding them that their duty also required them to stand fast for their convictions after full reflection. Nor is there the slightest reference in his remarks to burdens on the administration of justice, to wasted court resources, or to the necessity of empanelling another jury in the event of a mistrial. The trial judge's instructions and remarks were well within the rules established in *State v. Fowler*, 312 N.C. 304, 322 S.E. 2d 389, and *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978).

Id. at 97, 361 S.E. 2d at 567.

In oral argument, defendant placed particular emphasis upon the final two sentences of the trial court's instruction to the jury, claiming that this amounted to pleading by the court that the jury reach a verdict. Specifically, the court concluded its instruction to the jury as follows:

> The Court will now let you return to the jury room to continue with your deliberations, and when you've reached a unanimous verdict—please see if you can reach a unanimous verdict. If you can please knock on the door.

Assuming, *arguendo*, as defendant argues, that these two sentences, if taken out of context, might be considered of questionable propriety, we find that, in the context of the court's total instruction and, in particular, of its admonishment to the jury that no juror should surrender any conscientious convictions, this passage is not coercive and does not constitute error in the court's instructions.

In conclusion, having reviewed the record and each of defendant's assignments of error, we find that defendant had a fair trial, free of prejudicial error. Accordingly, we leave undisturbed defendant's conviction of the first-degree murder of Clyde Forrest and his sentence of life imprisonment.

No error.

Chief Justice EXUM dissenting.

Almost all would agree that someone who kills because of a desire to end a loved one's physical suffering caused by an illness which is both terminal and incurable should not be deemed in law as culpable and deserving of the same punishment as one who kills because of unmitigated spite, hatred or ill will. Yet the Court's decision in this case essentially says there is no legal distinction between the two kinds of killing. Our law of homicide should not be so roughly hewn as to be incapable of recognizing the difference. I believe there are legal principles which, when properly applied, draw the desirable distinction and that both the trial court and this Court have failed to recognize and apply them.

The difference, legally, between the two kinds of killings hinges on the element of malice, the former being without, and the latter with, malice. The absence of malice, however, does not mean the killing is justified or excused so as not to be unlawful; it means simply that the killing is mitigated so as not to be murder but manslaughter. Our cases have traditionally recognized the distinction between mitigation and excuse in the law of homicide. *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), and cases therein cited and discussed.

The error in the trial court's instructions stems from the failure to recognize this difference between mitigation and excuse. The trial court instructed that malice was "that condition of mind that prompts a person to take the life of another intentionally . . . without just cause, excuse or justification." This instruction, correct insofar as it goes, is incomplete. The trial court should have added "and without mitigation."

Failure to include circumstances in mitigation as capable of rebutting malice, in effect, precluded the jury from considering at all defendant's reasons for killing his father on the issue of whether he acted with malice. The instructions were that only matters which excused the killing altogether were sufficient to rebut the element of malice. The trial court then told the jury that defendant's reasons for killing his father would not excuse the killing, saying,

> I charge that it is not a legal defense to the offense of murder if the defendant, John Forrest, at the time of the shooting believed his father, Clyde Forrest, to be terminally ill or in danger of immediate death.

Although the trial court followed this immediately with, "But you may consider such belief in determining whether the killing was done with malice," he gave the jury no theory by which the circumstances might in law rebut the inference of malice which arose from the intentional killing with a deadly weapon. In essence this instruction was superfluous because the jury had already been told that only legal defenses, as opposed to circumstances in mitigation, could be considered on the issue of malice. At best the instructions were conflicting on the crucial element in the case. Ordinarily this kind of error calls for a new trial. *State v. Parrish*, 275 N.C. 69, 165 S.E. 2d 230 (1969).

The jury's confusion concerning the malice instructions is revealed by their three requests that the trial court repeat them and the trial court's finally submitting them to the jury in writing.

For this error in the trial court's instructions, I vote to give defendant a new trial.

STATE OF NORTH CAROLINA v. BRUCE BAGLEY

No. 637PA86

(Filed 2 December 1987)

1. Criminal Law § 34.8— sexual offense—evidence of subsequent offense—relevancy

In a first degree sexual offense case, testimony by a witness that defendant had attempted to commit a sexual offense against her some ten weeks after the offense for which defendant was on trial was relevant and admissible as tending to prove the defendant's *modus operandi*, motive, intent, preparation and plan where a strikingly similar licking *modus operandi* was attributed to defendant by both women. Furthermore, for the limited purposes for which such testimony was admitted, the incident with the witness was not so remote that evidence of it should have been excluded under the Rule 403 balancing test. N.C.G.S. § 8C-1, Rule 404(b).

2. Criminal Law § 89.3— corroboration—prior consistent statements

A detective's testimony that a witness had made statements to him similar to those she made in her testimony at trial was admissible to corroborate the witness's trial testimony.

3. Criminal Law § 85.5— subsequent crime—cross-examination of defendant

Cross-examination of defendant regarding a sexual offense which occurred ten weeks after the offense for which defendant was on trial was not improper under Rule of Evidence 608(b) where evidence of defendant's commission of the other offense was admissible to show his intent, plan, and *modus operandi*.

4. Rape and Allied Offenses § 6.1— first degree sexual offense—assault on female not lesser-included crime

The trial court in a first degree sexual offense case did not err in failing to instruct the jury concerning a possible verdict of guilty of assault on a female since the crime of assault on a female has at least three elements not included in the crime of first degree sexual offense and cannot be a lesser included offense of first degree sexual offense.

5. Rape and Allied Offenses § 6.1— first degree sexual offense—instructions on attempted sexual offenses not required

The trial court in a first degree sexual offense case was not required to instruct on attempted first or second degree sexual offense where the State's evidence tended to show a completed sexual offense against the will of the victim and defendant's evidence was that any sexual act he committed or attempted with the victim was entirely consensual.

6. Rape and Allied Offenses § 6.1— first degree sexual offense—failure to instruct on assault—no plain error

Failure of the trial court in a first degree sexual offense case to instruct the jury on the lesser offenses of assault with a deadly weapon and simple assault did not constitute plain error.

7. Rape and Allied Offenses § 6— definition of deadly weapon—instruction not plain error

Assuming arguendo that the trial court in a first degree sexual offense case erred by defining a dangerous or deadly weapon as one "capable" of causing death or great bodily harm rather than one "likely" to cause such harm, such error was not harmful to defendant and was not plain error where the trial court would have been correct on the evidence in the case in declaring the knife to be a deadly weapon as a matter of law.

8. Rape and Allied Offenses § 6— first degree sexual offense—instructions on use of superior strength—no plain error

The trial court in a first degree sexual offense case did not commit plain error by stating at one point in its instructions that the jury could consider whether defendant engaged in the sexual act charged "and that he did so by the use of force or threat of force and by use of a knife *or superior strength*" where the court's instructions, when read in their entirety, clearly informed the jury that it must find that defendant employed or displayed a dangerous

or deadly weapon in order to convict him of first degree sexual offense and did not permit a conviction upon a finding that the sexual act was committed by use of defendant's superior strength without the use of a deadly weapon.

9. Rape and Allied Offenses § 6— second degree sexual offense—instruction on use of force—no plain error

The trial court's instruction that the jury could convict defendant of second degree sexual offense if it found he had committed the sexual act by force "sufficient to overcome any resistance which she might make—he might also have accomplished it by putting her in fear, if you find that to be so—and this was sufficient to overcome any resistance which [the victim] . . . might make" did not permit the jury to convict defendant under a constructive force theory without finding that he had posed "a threat of serious bodily harm which reasonably induced fear thereof" and did not constitute plain error.

Chief Justice EXUM dissenting.

ON writ of certiorari to review a judgment of life imprisonment entered by *Bailey, J.*, at the 10 September 1984 Criminal Session of Superior Court, DURHAM County. Heard in the Supreme Court on 10 September 1987.

Lacy H. Thornburg, Attorney General, by Laura E. Crumpler, Assistant Attorney General, for the State.

Thomas F. Loflin, III, for the defendant-appellant.

MITCHELL, Justice.

The defendant contends on appeal that the trial court erred in permitting the State to introduce evidence tending to show that he committed a separate sexual offense unrelated to the first-degree sexual offense for which he was on trial and in instructing the jury with regard to such evidence. He also argues that the trial court erred in failing to permit the jury to consider verdicts for certain lesser included offenses. The defendant further argues, *inter alia*, that the trial court committed "plain error" in its instructions to the jury. We find no error.

The defendant was tried upon a proper indictment for first-degree sexual offense. The jury returned a verdict finding the defendant guilty as charged of first-degree sexual offense in violation of N.C.G.S. § 14-27.4. The trial court entered judgment sentencing the defendant to the mandatory sentence of life imprisonment. The defendant gave notice of appeal to this Court. On 12 September 1984, the trial court appointed the defendant's trial

counsel to represent him on appeal. Counsel failed to perfect the appeal, however, and on 3 October 1986, the Superior Court, Durham County removed him as attorney for purposes of perfecting this appeal. At the same time, Thomas F. Loflin, III, was appointed as attorney of record for the defendant for the purpose of seeking appellate review of the defendant's trial and conviction. He immediately filed a petition for writ of certiorari on the defendant's behalf, which was allowed by this Court on 5 November 1986.

The evidence for the State tended to show, *inter alia*, that on 26 March 1984, the victim, an adult female, met the defendant Bruce Bagley while playing a video game at a place called "Go-Speedio." The defendant requested that she give him a ride to the North Hyde Park area of Durham, and she complied. On the way, she stopped at a 7-11 store where the defendant bought seventy-three cents worth of gas which he pumped into her station wagon. When the victim and the defendant arrived at a house pointed out by the defendant as their destination, the defendant grabbed the victim around the neck and pulled a knife. The victim and the defendant scuffled, and the victim was cut on the hand. The defendant used graphic terms in telling the victim that he did not want to hurt her but only wanted to perform cunnilingus upon her. Fearing the defendant would hurt her further with the knife, the victim stopped struggling. At that point, the defendant performed cunnilingus upon her against her will.

The victim told the defendant they would have more room in the back seat of the station wagon. She testified that she did this in the hope that she could escape if they got out of the vehicle. The victim and the defendant then got in the back seat. In order to make more room, the defendant took the spare tire from the rear of the station wagon and put it in the front seat. At that point, the prosecutrix took the opportunity to unlock her door and escape, although the defendant grabbed for her and cut her on the foot.

The victim went to a house nearby and remained there for about five minutes while she told the residents what had occurred. She then went back to her vehicle accompanied by the man of the house. From there she drove to a 7-11 store and called the police.

The State also introduced evidence tending to show that the defendant had attempted to commit a similar sexual offense against Foster on 10 June 1984. The defendant chased her until she fell. He told her that he had a knife and wanted to commit cunnilingus upon her, but he fled when other men came to the scene.

The defendant offered evidence in the form of his own testimony. He testified that he and the victim left "Go-Speedio's" to "get high" at a friend's house. After making the gasoline purchase, the defendant asked the victim to have sex with him. He paid her $20.00 which she put "down in her top." They then drove to the defendant's friend's house, but the friend was not home.

The defendant testified that the victim agreed to engage in sex with him. When asked by his trial counsel if he did anything of a sexual nature to the victim, the defendant testified that "we's foreplayin', kissin', and whatnot, and when we got ready to get in the back seat, she just started actin' funny. So, that's—that's when I took my money back." The defendant testified that the victim offered no resistance until they got in the back seat. At that point she acted as though she did not want to touch him and said she had to go. The defendant put his hand in her blouse and got his money. She then got out of the car and was "raisin' hell" and called the defendant "some names."

The defendant denied that he had any weapon. He admitted kissing the victim on her legs and thigh, but denied committing cunnilingus upon her. He said that the only threat he made of any kind was to tell the victim: "Give me my money back, bitch." The defendant also denied having ever seen the witness Foster or knowing anything about the attempted sexual offense against her, which she described as occurring after the offense for which the defendant was on trial.

[1] The defendant first assigns as error the trial court's action in overruling his motion *in limine* and admitting into evidence testimony of the witness Foster that the defendant had attempted to commit a sexual offense against her some ten weeks after the offense for which the defendant was on trial. This assignment is without merit.

The defendant first argues in support of this assignment that the evidence was not admissible under N.C.G.S. § 8C-1, Rule 404(b)—North Carolina Rules of Evidence—to show identity of the defendant as the perpetrator of the offense charged. Because identity was not at issue, the defendant is correct in asserting that the challenged testimony was not admissible for that purpose. We conclude, however, that it was admissible under Rule 404(b) for other purposes, and that the trial court properly instructed the jury to limit its consideration of the testimony to those purposes.

The pertinent part of Rule 404 is as follows:

> (b) *Other crimes, wrongs, or acts*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1986).

The list of permissible purposes for which such evidence may be introduced as set forth in the statute *is not exclusive*, and "the fact that evidence cannot be brought within a [listed] category does not necessarily mean that it is inadmissible." *State v. DeLeonardo*, 315 N.C. 762, 770, 340 S.E. 2d 350, 356 (1986). "In fact, as a careful reading of Rule 404(b) clearly shows, evidence of other offenses *is admissible* so long as it is *relevant to any fact or issue* other than the character of the accused." *State v. Weaver*, 318 N.C. 400, 403, 348 S.E. 2d 791, 793 (1986) (quoting 1 *Brandis on North Carolina Evidence* § 91 (2d rev. ed. 1982)) (emphasis added). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1986). Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also "is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried."

State v. Morgan, 315 N.C. 626, 637, 340 S.E. 2d 84, 91 (1986) (emphasis in original).

More directly to the point, perhaps, "this Court has been markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in Rule 404(b)." *State v. Cotton*, 318 N.C. 663, 666, 351 S.E. 2d 277, 279 (1987) (identity). Such evidence is relevant and admissible under Rule 404(b) if the incidents are sufficiently similar and not too remote.

The question before us, then, is whether the testimony of the witness Foster was relevant to some fact or issue other than the character of the defendant. We conclude that it was, and that it was properly admitted by the trial court.

In the present case, the evidence tended to show that the defendant approached the victim in the early morning hours and asked her to give him a ride to Hyde Park. Once they arrived there, the defendant grabbed the victim, pulled a knife from his pocket and stated repeatedly, "[y]ou see this knife, you see this knife; I want you to be stayed still." The defendant took off the victim's shoes and panties and began "messing" with her legs by kissing and licking them. He told the victim he was not going to hurt her and said: "The only thing I want to do is eat your pussy." He then performed cunnilingus upon her.

Foster's testimony as to the defendant's other crime, wrong, or act tended to show that the defendant accosted her in the Hyde Park area. He had something yellow and pointed in his hand, but she could not tell whether it was a knife. She fled the defendant until she fell, at which point he caught her and held her down. She testified that: "He was lickin' me. I said wait a minute, hold it. I was tryin' to talk this fool off of me, you know, and he—kept sayin', I got—I got a knife." He then told her to pull her pants down and said "all I want to do is eat you, ..." He continued to emphasize that he had a knife. At that time, some other men arrived at the scene, and the defendant fled.

Although the evidence indicated that the incident with Foster occurred some ten weeks after the incident with the victim in this case, we conclude that the remarkably odd and strikingly similar licking *modus operandi* attributed to the defendant by both women rendered Foster's testimony relevant and admis-

sible as tending to prove the defendant's *modus operandi*, motive, intent, preparation and plan. *See generally State v. Cotton*, 318 N.C. 663, 351 S.E. 2d 277. This is particularly true where the evidence was offered only for such purposes, and not for the purpose of establishing the defendant's identity as the perpetrator of the crime charged. We conclude that, for the limited purposes for which the contested evidence was admitted here, the incident with Foster was not so remote that evidence of it should have been excluded under the Rule 403 balancing test. Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court, and it will not be reversed absent an abuse of that discretion. *State v. Cotton*, 318 N.C. at 668, 351 S.E. 2d at 280.

There was no abuse of discretion by the trial court in the present case. This is particularly apparent in light of the trial court's following instructions to the jury:

> Evidence has been received in this case tending to show that another person has charged this defendant with a similar crime; that is an attempt to engage in a sex act with her against her will. You will recall that when this evidence was admitted, I limited its effects. You may consider this evidence for two purposes only: (1) As to whether or not the defendant had the intent, which is a necessary element of the crime charged in this case; and (2) whether or not there existed in the mind of this defendant a plan, scheme, system, or design involving the crime charged in this case.

In the present case, as we stated in *State v. Gordon*, 316 N.C. 497, 505, 342 S.E. 2d 509, 513-14 (1986):

> While it is true that the evidence was prejudicial to the defendant—as is true of most of the prosecution's evidence against a defendant—it cannot be said that it was *unfairly* prejudicial. The testimony was not unduly cumulative nor grossly shocking. Also, the trial judge gave a proper limiting instruction to the jury regarding this evidence.

We conclude that the trial court did not err in the present case by admitting the testimony of Foster concerning the defendant's similar crime, wrong, or act against her. This assignment of error is overruled.

[2] The defendant next assigns as error the action of the trial court in permitting Detective Calvin Henry Smith to testify as to statements made to him by the witness Foster during his investigation of the crime for which the defendant was on trial. Detective Smith testified, in essence, that the witness had made statements to him similar to those she made in her testimony in the trial of this case. The defendant's counsel on appeal candidly recognizes in his brief that such testimony by Smith was admissible to corroborate Foster's testimony, if her testimony was properly admitted. The gist of appellate counsel's argument against the admissibility of Smith's testimony is that it compounded the trial court's error in admitting Foster's testimony concerning the defendant's attack upon her. As we have concluded that her testimony was properly admitted, we overrule this assignment of error.

[3] The defendant next assigns as error the action of the trial court in allowing the prosecutor to cross-examine the defendant regarding the incident described by Foster in her testimony. The defendant argues in support of this assignment that such cross-examination was improper under N.C.G.S. § 8C-1, Rule 608(b) which requires that a prior act of misconduct be probative of truthfulness or untruthfulness in order to be admissible for purposes of impeaching the witness. Although it is true that the cross-examination in question would not have been proper under Rule 608(b) for purposes of testing the veracity of the defendant-witness, such considerations are irrelevant to a determination of whether cross-examination concerning crimes, wrongs, or acts by the defendant is proper as tending to show his intent, plan, scheme, design, or *modus operandi*. *State v. Morgan*, 315 N.C. 626, 340 S.E. 2d 84. Where evidence of such other crimes, wrongs, or acts by the defendant is otherwise admissible, it properly may be inquired into upon cross-examination of the defendant. This assignment of error is overruled.

Appellate counsel for the defendant next assigns as error the failure of the trial court to instruct the jury as to various offenses which he contends were supported by evidence and are lesser included offenses of first-degree sexual offense. The trial court instructed the jury with regard to possible verdicts finding the defendant guilty of first- or second-degree sexual offense or not guilty. Counsel at trial only requested in this regard that the trial

court instruct the jury "on attempted act and assault on a female." The trial court did not err in failing to give instructions in accord with this request.

[4] We first address the trial court's failure to instruct the jury concerning a possible verdict of guilty of assault on a female. The determination of whether one offense is a lesser included offense of another must always be made on a definitional as opposed to a factual basis. *State v. Weaver*, 306 N.C. 629, 635, 295 S.E. 2d 375, 378 (1982). "If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense." *Id.*, 295 S.E. 2d at 379. In order for a defendant to be convicted of assault on a female, the evidence must establish, *inter alia*, that the victim is a female, that the defendant is a male, and that he is at least eighteen years of age. N.C.G.S. § 14-33(b)(2) (1986). To convict for first-degree sexual offense, however, it need not be shown that the victim is a female, that the defendant is a male, or that the defendant is at least eighteen years of age. N.C.G.S. § 14-27.4 (1986). Therefore, the crime of assault on a female has at least three elements not included in the crime of first-degree sexual offense and cannot be a lesser included offense of first-degree sexual offense. *See State v. Weaver*, 306 N.C. at 635, 295 S.E. 2d at 379; *cf. State v. Wortham*, 318 N.C. 669, 351 S.E. 2d 294 (1987) (assault on a female not a lesser included offense of attempted rape). The trial court did not err in failing to instruct the jury concerning the crime of assault on a female.

[5] For different reasons, the trial court was not required to instruct on attempted first- or second-degree sexual offense. The duty to instruct on a lesser included offense arises only where there is evidence from which the jury reasonably could find that the defendant committed the lesser offense. However, "when all the evidence tends to show that defendant committed the crime charged in the bill of indictment and there is no evidence of the lesser-included offense, the court should refuse to charge on the lesser-included offense." *State v. Summitt*, 301 N.C. 591, 596, 273 S.E. 2d 425, 427, *cert. denied*, 451 U.S. 970, 68 L.Ed. 2d 349 (1981).

Based on the evidence presented in this case, we conclude that the trial court did not err by failing to instruct on attempted first-degree sexual offense. Likewise, even if it is assumed that trial counsel requested an instruction on attempted second-degree

sexual offense, the trial court did not err in failing to give the requested instruction. The State's evidence tended to show a completed sexual offense against the will of the victim. The defendant's evidence was that any sexual act he committed or attempted with the victim was entirely consensual. Thus, even if the jury had believed the defendant's testimony, it could not properly have found an attempted sexual offense of either the first or second degree. If the State's evidence in the present case was believed by the jury, the defendant was guilty of first-degree sexual offense. If the defendant's testimony that the victim consented was believed, the defendant was not guilty of first-degree or second-degree sexual offense or of an attempt to commit either of those crimes. N.C.G.S. §§ 14-27.4 and 27.5 (1986). Further:

> 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.

State v. Lampkins, 286 N.C. 497, 504, 212 S.E. 2d 106, 110 (1975), *cert. denied*, 428 U.S. 909, 49 L.Ed. 2d 1216 (1976). The trial court did not err by failing to instruct on either attempted first-degree or attempted second-degree sexual offense.

[6] Appellate counsel additionally argues in support of this assignment of error, that the trial court erred in failing to instruct the jury with regard to possible verdicts of guilty of assault with a deadly weapon and simple assault. As counsel at trial failed to request such instructions and did not object to the instructions given, however, our review is limited to the question of whether the trial court committed "plain error" in this regard. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). We cannot say on the record before us in this case that the purported error of the trial court in failing to instruct on assault with a deadly weapon and simple assault was error so fundamental that it "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, we cannot conclude that the trial court committed plain error. *State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986); *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983). This assignment of error is overruled.

Appellate counsel for the defendant next assigns as error the trial court's instructions to the jury with regard to the incident involving the witness Foster. Appellate counsel does not argue that the substance of the instructions was incorrect; rather, he argues that no instructions concerning the testimony of Foster should have been given, because her testimony should have been excluded. For the reasons previously discussed herein, we overrule this assignment of error.

Appellate counsel for the defendant also assigns as error several isolated statements of the trial court during its instructions to the jury. Appellate counsel has been commendably diligent in meeting his obligation under *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983), to inform this Court on appeal that no objection to these portions of the instructions was made by trial counsel. Since no objection was raised at the trial level, our review of these assignments is limited to a consideration of whether "plain error" occurred. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375. We will briefly address the defendant's assignments.

[7] The defendant argues that the trial court erred by instructing the jury that, in order to be considered a deadly weapon, the knife in the present case need not have been certain to cause death or serious bodily injury, "just capable of doing it." The defendant is correct in contending that a dangerous or deadly weapon is "generally defined as any article, instrument or substance which is *likely* to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E. 2d 719, 725 (1981) (emphasis added). We conclude, however, that the trial court would have been correct on the evidence in the present case in declaring the knife, as used according to the evidence, to be a deadly weapon as a matter of law. *State v. Torain*, 316 N.C. 111, 340 S.E. 2d 465, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 77 (1986); *State v. Sturdivant*, 304 N.C. at 301, 283 S.E. 2d at 725; *State v. Wiggins*, 78 N.C. App. 405, 407, 337 S.E. 2d 198, 199 (1985). Therefore, even assuming *arguendo* that the trial court erred by defining a dangerous or deadly weapon as one "capable" of causing death or great bodily harm rather than one "likely" to cause such harm, the error was not harmful to the defendant and clearly was not "plain error."

[8] Appellate counsel for the defendant next argues that the trial court erred by stating at one point in its instructions to the jury that it should consider whether the defendant engaged in the sexual act charged "and that he did so by the use of force or threat of force and by use of a knife *or superior strength* . . . ." (emphasis added). The defendant argues that this instruction permitted the jury to convict the defendant of first-degree sexual offense if it believed the sexual act had been committed by force and against the will of the prosecuting witness by the use of the defendant's superior strength but without the use of a weapon. We conclude that the quoted portions of the instructions did not mislead the jury. The instructions, when read in their entirety, indicate that the trial court clearly and repeatedly instructed the jury that, in order to convict the defendant of first-degree sexual offense, they must find that he committed the sexual act by force and against the victim's will while he employed or displayed a dangerous or deadly weapon. Therefore, the instructions were sufficient in this regard, and no "plain error" was committed.

[9] Appellate counsel for the defendant also argues that the trial court's instructions to the jury relative to the lesser included offense of second-degree sexual offense were erroneous. He excepts to a part of the instructions to the effect that the jury could convict the defendant for second-degree sexual offense if it found he had committed the sexual act charged by force "sufficient to overcome any resistance which she might make—he might also have accomplished it by putting her in fear, if you find that to be so—and this was sufficient to overcome any resistance which [the victim] . . . might make . . . ." The defendant argues, in essence, that this instruction permitted the jury to convict him under a constructive force theory without finding that he had posed "a threat of serious bodily harm which reasonably induce[d] fear thereof." *State v. Locklear*, 304 N.C. 534, 539, 284 S.E. 2d 500, 503 (1981). We do not agree. Having carefully reviewed the briefs of counsel and the instructions of the trial court in their entirety, we detect no "plain error" so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached. *See State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80; *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375. Therefore, the assignments concerning the

instructions which were given without objection are without merit and are overruled.

We hold that the defendant's trial was free of reversible error.

No error.

Chief Justice EXUM dissenting.

Believing that evidence of the Foster incident was improperly admitted and unfairly prejudiced defendant, I respectfully dissent and vote for a new trial.

The majority concedes this evidence was not admissible to prove defendant's identity as the perpetrator of the crime because identity was not at issue. I agree and can find no other basis upon which the evidence was properly admitted.

The majority says the evidence was admissible to prove a similar *modus operandi*, motive, intent, preparation and plan. I disagree. It is, of course, proper to prove that two crimes were committed with the same or similar *modus operandi* and defendant committed one of the crimes in order to prove that defendant was the perpetrator of the other crime for which he is being tried. The justification for admitting such evidence rests on proving identity. Where identity is not in issue there is no justification for admitting the evidence on this theory.

Motive and intent are no more at issue in this case than identity. First degree sexual offense requires neither motive nor specific intent. Thus there is no justification for admitting the evidence to show these things.

It is also permissible to prove that defendant planned or prepared to commit a crime in order to prove that he committed it. Such a plan or preparation must occur, however, before the crime has been committed. The Foster incident occurred some ten weeks *after* the incident for which defendant was being tried. It could not have been evidence that defendant planned or prepared to commit the crime for which he was being tried.

CONTRACT STEEL SALES, INC. v. FREEDOM CONSTRUCTION COMPANY AND E. I. DU PONT DE NEMOURS AND COMPANY

No. 154PA87

(Filed 2 December 1987)

1. **Laborers' and Materialmen's Liens § 3— furnishing of materials defined**

Materials are furnished within the meaning of N.C.G.S. § 44A-18(1) when, pursuant to a subcontract, materials are delivered to the site of improvement, and it is not required that the materials be incorporated into the improvement or that the materials be present on the site at the time notice of lien is given.

2. **Laborers' and Materialmen's Liens § 4— notice of claim of lien—use of statutory form not required**

A materialman's lien claimant is not required to use the model "Notice of Claim of Lien" form set out in N.C.G.S. § 44A-19(b) in order to perfect its lien but may deviate from the statutory form so long as all of the information set out in the statutory form is contained in the notice.

3. **Laborers' and Materialmen's Liens § 4— notice of claim of lien—sufficiency of letter to owner**

Plaintiff first tier subcontractor complied with the requirements of N.C.G.S. § 44A-19 for giving notice of a claim of lien for materials by writing to the owner a letter which specifically stated that it was a notice of claim of lien and contained all the information set out in the statutory form, including the names and addresses of the parties to the subcontract, a description of the work encompassed by the subcontract, the amount claimed and a description of the project.

Justice MEYER dissenting.

Justice MITCHELL joins in this dissenting opinion.

APPEAL by defendant pursuant to N.C.G.S. § 7A-31 from a Court of Appeals decision, 84 N.C. App. 460, 353 S.E. 2d 418 (1987), reversing a judgment entered by *John, J.*, sitting without a jury at the 4 April 1986 Session of Superior Court in GUILFORD County, concluding that plaintiff is not entitled to a lien on funds under N.C.G.S. § 44A-18. Heard in the Supreme Court 13 October 1987.

Foster, Conner, Robson & Gumbiner, P.A., by Eric C. Rowe and Allen Holt Gwyn, for plaintiff appellee.

Smith, Helms, Mulliss & Moore, by Robert A. Wicker and Catherine C. Eagles, for defendant appellant.

Fenton T. Erwin, Jr. and L. Holmes Eleazer, Jr. for amici curiae, American Subcontractors Association of the Carolinas, Inc.; Steel Erectors Association of Virginia and Carolinas, Inc.; Carolinas Roofing and Sheet Metal Contractors Association, Inc. and North Carolina Association of Plumbing, Heating and Cooling Contractors, Inc.

EXUM, Chief Justice.

The question presented is whether plaintiff subcontractor is entitled to a materialmen's lien under Part 2 of Chapter 44A of our general statutes. The answer depends on whether plaintiff furnished materials at the site of improvement as contemplated by N.C.G.S. § 44A-18(1) and, if so, whether plaintiff complied with the notice requirements of N.C.G.S. § 44A-19. We conclude plaintiff complied with both provisions and affirm the Court of Appeals' decision that plaintiff is entitled to assert its lien.

The facts are not in dispute. On 20 July 1983, Contract Steel Sales, Inc. (Steel Sales) subcontracted with Freedom Construction Company (Freedom) to provide structural, reinforcing and fabricated miscellaneous steel in connection with Freedom's work as general contractor for E. I. Du Pont de Nemours and Company (Du Pont). The subcontract obligated Steel Sales to deliver fourteen categories of materials for a single lump-sum subcontract price.

In August 1983 Steel Sales began delivery of the materials. The first items delivered, wire mesh and reinforcing steel, were accepted by Freedom, incorporated into the improvement, and partial payment was made to Steel Sales on its subcontract.

The subcontract also called for Steel Sales to provide approximately twenty-three tons of structural and fabricated miscellaneous steel. On 28 September 1983 the entire twenty-three tons of steel were delivered to the site and were inspected by a Du Pont quality assurance inspector. Following Du Pont's inspection, Freedom refused to incorporate these materials into the improvement and informed Steel Sales that it believed defects existed in the steel itself. Thereafter, all the materials, except those already incorporated into the building, were returned to the Steel Sales plant for "reworking." Several weeks later a second Du Pont inspector traveled to the Steel Sales plant and inspected the steel.

Following the second inspection the steel was delivered by Steel Sales to the jobsite. Freedom and Du Pont again refused to allow the materials delivered by Steel Sales to be incorporated into the improvement.

On 11 November 1983 a discussion was held among representatives of Freedom, Du Pont and Steel Sales about reworking the steel a second time. As a result of this discussion all of the steel was taken to another company, Pine State Steel (Pine State), for reworking. However, the steel was not refabricated by Pine State, was not redelivered to the jobsite and was not used in the construction of the improvement. Instead, Pine State fabricated other steel which was used to erect the improvement. The twenty-three tons of steel furnished by Steel Sales were left at the Pine State plant.

On 6 December 1983, following Freedom's acceptance of the steel from Pine State, the president of Steel Sales wrote a letter to Du Pont claiming a lien on any funds owed by Du Pont to Freedom. This letter was received by Du Pont in the early part of December. Notwithstanding receipt of the letter, Du Pont did not withhold the $50,000 it owed on its contract with Freedom; and on 5 March 1984 Du Pont paid Freedom this amount in exchange for Freedom's release of all liens and claims against Du Pont.

On 18 April 1984 Steel Sales filed complaint against defendants based upon two claims for relief. The first claim for relief alleged that Freedom had breached its subcontract with Steel Sales by refusing to pay the contract amount of $50,008.91.[1] The second claim for relief was against Du Pont. Steel Sales alleged that "sums in excess of $50,008.91 are being retained by Du Pont and are owed by Du Pont to Freedom arising out of Freedom's general construction work and materials furnished to the Project." Steel Sales further alleged that a notice of claim of lien (*i.e.*, the letter dated 6 December 1983) had been received by Du Pont and that Du Pont was personally liable to Steel Sales because Du Pont had paid Freedom despite the notice of claim of lien.

1. During the pendency of the action, defendant Freedom filed for bankruptcy under Chapter 7 of the United States Bankruptcy Code. Freedom appeared in this action pursuant to an order of the Bankruptcy Court granting Steel Sales' petition for relief from the automatic stay of creditors' proceedings.

Defendants answered Steel Sales' complaint. Freedom denied that Steel Sales had performed its subcontract. Du Pont generally denied all allegations that it had received a notice of a claim of lien from Steel Sales.

On 27 March 1986 the parties agreed to stipulations of fact and agreed to "waive a jury trial as to the issues of whether the letter mailed by Steel Sales is a valid notice of claim of lien under N.C.G.S. Sec. 44A-19 and whether Steel Sales is entitled to a lien under the provisions of Part II, Article II, Chapter 44A, North Carolina General Statutes." On 4 April 1986 the trial court, sitting without a jury, concluded that plaintiff was not entitled to a lien and that the letter of 6 December 1983 did not substantially comply with the notice requirements of N.C.G.S. § 44A-19. The Court of Appeals reversed.

I

[1] We first address the issue of whether Steel Sales, pursuant to its subcontract with Freedom, "furnished . . . materials at the site of the improvement" to Du Pont's property as contemplated by N.C.G.S. § 44A-18(1). We conclude it did.

N.C.G.S. § 44A-18(1), by which Steel Sales seeks to assert its lien, provides in pertinent part as follows:

> (1) A first tier subcontractor who furnished labor or materials at the site of the improvement shall be entitled to a lien upon funds which are owed to the contractor with whom the first tier subcontractor dealt and which arise out of the improvement on which the first tier subcontractor worked or furnished materials.

In this case, it is uncontroverted that Steel Sales is the first tier subcontractor, Freedom is the contractor and Du Pont is the owner of the improvement. The subcontract obligated Steel Sales to deliver fourteen categories of materials for a single lump-sum subcontract price.

In August 1983 the first delivery of materials was accepted by Freedom and was incorporated into the improvement. These materials were accepted by defendants and plaintiff has been paid for them. The only materials at issue here are the twenty-three tons of structural and fabricated miscellaneous steel which were

delivered to the jobsite on 7 and 8 November 1983. For some reason, yet to be established in this litigation, this steel was removed from the site some time before Steel Sales sought to perfect its lien and was never incorporated into the improvement.[2]

Defendants contend that in order to meet the "furnishing" requirement under N.C.G.S. § 44A-18(1), the materials must be not only delivered to the site of the improvement but must also be incorporated into the improvement itself. At least, defendants argue, there can be no lien when, as here, the materials had been physically removed from the site at the time the lien was sought to be perfected. The Court of Appeals rejected these contentions, holding that materials are furnished within the meaning of N.C.G.S. § 44A-18(1) when, pursuant to a subcontract, materials are delivered to the site of improvement.

We agree with, and affirm, this holding. In *Queensboro Steel Corp. v. East Coast Machine & Iron Works*, 82 N.C. App. 182, 346 S.E. 2d 248, *disc. rev. denied*, 318 N.C. 508, 349 S.E. 2d 865 (1986), the Court of Appeals said:

> North Carolina's current mechanics' and materialmen's lien statutes apparently do not require actual incorporation of materials into the improvement . . . . *But see Fulp & Linville v. Kernersville Light and Power Company*, 157 N.C. 154, 72 S.E. 869 (1911) (interpreting an older statute that has since been repealed).

82 N.C. App. at 190, 346 S.E. 2d at 253. Additionally, an important commentary on our current statute states:

> If the materials are furnished at the site in accordance with the requisite contractual intent, the better rule seems to be that materials so furnished need not have become incorporated into the improvement in order for a mechanic's lien to arise.

Urban & Miles, "Mechanic's Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority," 12 Wake Forest L. Rev. 283, 355 (1976).

2. We express no opinion on whether Steel Sales is entitled to recover against either Du Pont or Freedom pursuant to the subcontract. Nor do we decide the issue of whether the steel fabricated pursuant to the subcontract was defective or properly rejected by defendants.

We conclude that, just as actual incorporation into the improvement is not a statutory prerequisite, neither does the statute require that the materials be physically present on the site at the time notice of lien is given.

There can be many reasons why materials might not be physically present at such a time and not incorporated into the improvement, none necessarily inconsistent with full performance of the subcontract. The contractor, owner or both could have decided to substitute other materials. The materials could have been lost, misused or wrongfully rejected. The subcontractor should not have to bear the burden of demonstrating that these things occurred in order to be entitled to assert a lien. The lien only serves to secure payment if, in the later action to enforce the lien, the subcontractor can prove he properly performed under the contract.

> [T]he claimant-subcontractor should not have to bear the burden of loss, non-use or misuse of the materials furnished, nor should he be forced to refrain from enforcing his contract by taking back undamaged goods. . . . His *contractual performance* should be entitled to the security of a mechanic's lien.

Id.

The subcontractor must prove performance of his contract to enforce the lien, but he need not show such performance in order to assert his entitlement to a lien. For this entitlement, he need only show that the materials were delivered to the site of the improvement. Having made such a showing here, Steel Sales is entitled to its lien if it is properly perfected, a question we shall now proceed to address.

II

In order to perfect a lien under N.C.G.S. § 44A-18, a first tier subcontractor must comply with the requirements of N.C.G.S. § 44A-19 and must send the owner a "Notice of Claim of Lien." Once the owner receives valid notice he is placed under a duty to retain funds subject to the lien. N.C.G.S. § 44A-20(a). If the owner pays the contractor after receiving a proper notice of claim of lien, the owner becomes an "obligor . . . personally liable" to the subcontractor for the amount owed. N.C.G.S. § 44A-20(b).

N.C.G.S. § 44A-18(6) provides that the "liens granted under this section are perfected upon the giving of notice in writing to the obligor as hereinafter provided and shall be effective upon the receipt thereof by such obligor." The statute which sets forth the requirements for giving notice is N.C.G.S. § 44A-19(a). It provides in pertinent part:

44A-19. Notice to Obligor.

(a) Notice of a claim of lien shall set forth:

(1) the name and address of the person claiming the lien,

(2) A general description of the real property improved,

(3) The name and address of the person with whom the lien claimant contracted to improve real property,

(4) The name and address of each person against or through whom subrogation rights are claimed,

(5) A general description of the contract and the person against whose interest the lien is claimed, and

(6) The amount claimed by the lien claimant under this contract.

(b) All notices of claims of liens by first, second or third tier subcontractors must be given using a form substantially as follows:

NOTICE OF CLAIM OF LIEN BY
FIRST, SECOND OR THIRD TIER SUBCONTRACTOR

To:

1. ....., owner of property
(Name and address) involved.

2. ....., general contractor.
(Name and address)

3. ....., first tier subcontractor
(Name and address) against or through whom subrogation is claimed, if any.

4. ....., second tier
(Name and address) subcontractor against or through whom subrogation is claimed, if any.

General description of real property where labor performed or material furnished:

. . . . . .

. . . . . .

. . . . . .

General description of undersigned lien claimant's contract including the names of the parties thereto: . . . . . .

. . . . . .

. . . . . .

The amount of lien claimed pursuant to the above described contract: $. . . . . .

The undersigned lien claimant gives this notice of claim of lien pursuant to North Carolina law and claims all rights of subrogation to which he is entitled under Part 2 of Article 2 of Chapter 44A of the General Statutes of North Carolina.

Dated . . . . . .

. . . . . , Lien Claimant

. . . . . .

(Address)

[2] The question here is whether a lien claimant is required to use the model statutory form set out above in order to perfect its lien. We think not and hold that deviation from the statutory form is permissible so long as all of the information set out in the statutory form is contained in the notice.

In construing materialmen's lien statutes, courts have recognized a distinction between the entitlement provisions on one hand and the perfection provisions on the other. *See Earp v. Vanderpool*, 160 W.Va. 113, 232 S.E. 2d 513 (1976); *Hough v. Zehirner*, 158 Ind. App. 409, 302 N.E. 2d 881 (1973); *Las Vegas Plywood and Lumber, Inc. v. D & D Enterprises*, 98 Nev. 378, 649 P. 2d 1367 (1982); *Republic Bank & Trust Co. v. Bohmar Minerals, Inc.*, 661 P. 2d 521 (Okla. 1983); *Lambert v. Newman*, 245 Ark. 125, 431 S.W. 2d 480 (1968). Most courts hold that once entitlement to a lien has been established, statutory requirements concerning

perfection must be liberally construed in favor of the lien claimant. *See generally*, 53 Am. Jur. 2d *Mechanics' Liens* §§ 23-24 at 538-43 (1970).

In addition to the foregoing rules of statutory construction, the statute itself requires that "notices of claims of liens by first, second or third tier subcontractors must be given using a form *substantially* as follows . . . ." (Emphasis added.) Under the statute a form is clearly contemplated, and a claimant places himself in peril by failing to make use of the statutory form. However in the past we have concluded that deviation from a statutory form is permissible so long as the content set out in the form is present. *Freeman v. Morrison*, 214 N.C. 240, 199 S.E. 2d 12 (1938). In *Freeman* a statutory model form of acknowledgment was prescribed. The statute required that "the form of acknowledgment shall be in substance" that of the statutory model. Although the statutory model form was not followed, we held that "[i]t is not necessary that the exact language of the statutory requirements be followed, provided the necessary facts are expressed in words of substantially equivalent import." *Id.* at 244, 199 S.E. 2d at 14.

[3] The letter by which plaintiff sought to perfect its lien states:

> Dupont Company
> P. O. Drawer Z
> Fayetteville, N.C. 28302
>
> Re: Dupont Co.
> MMF Process Building
> Fayetteville, N.C.
>
> Gentlemen:
>
> Pursuant to our agreement with Freedom Construction Co., 315 S. Moore St. Sanford, N.C. to furnish structural, fabricated miscellaneous steel and reinforcing steel for the Du Pont Co. MMF Process Building, Fayetteville, N.C. we have on November 7, 1983 actually furnished to the job site all structural steel.
>
> The amount of $50,008.91 remaing [sic] due and owing to us and Freedom Construction Co. has in our opinion, wrongfully refused payment. Please take notice that we hereby claim a

lien in any and all funds owing from you to Freedom Const. to the extent of $50,008.91 and claim and reserve all of our rights under Chapter 44A of the North Carolina General Statute.

On receipt of this notice of claim of lien please confirm to us in writing that such funds have been withheld from Freedom Const. Co.

While we deem this action unfortunate in view of our desire to maintain our working relationship with you, we are taking this action in a timely manner to protect our legal right, and hope that a prompt settlement will be made. You will find attached a copy of our letter to Freedom Const. Co.

Very truly yours,

CONTRACT STEEL SALES, INC.

Philip A. Hutson
President

Encl.

cc: Freedom Const. Co.

Although the letter is not in the format set out in N.C.G.S. § 44A-19, it does clearly state that Du Pont "take notice that we hereby claim a lien . . . and reserve all of our rights under Chapter 44A of the North Carolina General Statute"; and the exact statutory language, "notice of claim of lien," is utilized in paragraph three of the letter. The letter contains all the information set out in the statutory form including the names and addresses of the parties to the subcontract, the description of the work encompassed by the subcontract, the amount claimed and a description of the project.

We conclude, therefore, that plaintiff has complied with the notice requirements of the statute.

Accordingly, the decision of the Court of Appeals is

Affirmed.

Justice MEYER dissenting.

I dissent from part II of the majority opinion, which holds that in order to perfect his lien, a lien claimant is not required to substantially comply with the model statutory form set forth in N.C.G.S. § 44A-19(b), so long as all of the information required by the form is contained in the notice. Even liberally construing the statute, it is quite clear that the legislative intent was that a form was not merely contemplated but required in order to perfect the lien.

The majority does not contend that our legislature lacks the power or authority to specifically require the substantial compliance with a form. Generally, the composition of our legislature includes numerous astute businessmen who are well aware that employees who handle incoming mail are easily trained to recognize a "notice of lien" form and to route it to the proper official for appropriate action. Such employees may not be so adept at reading and interpreting what appears to be ordinary correspondence and determining that somewhere within the items of correspondence is contained all of the information that is required on the form specified by the legislature. The form mandated by the statute requires a bold "all caps" heading that defies misinterpretation: "NOTICE OF CLAIM OF LIEN BY FIRST, SECOND OR THIRD TIER SUBCONTRACTOR." The form also requires that the signatory be designated "Lien Claimant." No extensive reading and no interpretation are required.

The majority recognizes that "[u]nder the statute a form is clearly contemplated." The statute provides in pertinent part "notices of claims of liens . . . *must* be given using a form substantially as follows." N.C.G.S. § 44A-19(b) (1984) (emphasis added). The intent of the legislature that, as a prerequisite to the validity of the notice, a form be used is inescapable. It is the "form" that must be substantially complied with and not simply its content, as the majority suggests.

Justice MITCHELL joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. PATRICIA McGEE CHILDRESS

No. 42A87

(Filed 2 December 1987)

1. Homicide § 21.5— first degree murder—evidence sufficient

The trial court did not err in a murder prosecution by denying defendant's motion to dismiss at the close of the evidence where the deceased and defendant were the only two people in the home of the deceased; the deceased was shot in the back either from a distance of approximately two feet or point blank through some object such as a sheet; there was testimony that the deceased could not have shot himself; and, for deceased to have shot himself accidentally, he would have had to lose control of the pistol, have it move to his back and fire either two feet from him or point blank through the sheet while he was lying on the bed with the sheet over him.

2. Homicide § 11— defense of accident—motion to dismiss denied

The trial court in a first degree murder prosecution did not err by submitting the case to the jury despite defendant's evidence of accident. On a motion to dismiss, the court must consider the defendant's evidence which explains or clarifies the State's evidence, but this does not mean that the State may not rely on the more probable inferences which may be drawn from the evidence if the defendant's evidence contradicts those inferences.

3. Criminal Law § 106.2; Homicide § 21.5— inference on inference permitted

The evidence in a first degree murder prosecution was sufficient even though it required an inference on an inference. There is no logical reason why an inference which naturally arises from a fact proven by circumstantial evidence may not be made; insofar as other cases hold that in considering circumstantial evidence an inference may not be stacked on an inference, they are overruled.

4. Homicide § 15— accusations of victim's nephew—no prejudice

There was no prejudicial error in a prosecution for first degree murder where the court allowed a witness to testify that a nephew of the deceased, who had been called to the trailer immediately after the shooting by defendant, had said "The bitch killed my uncle," and allowed the nephew to testify that he had accused defendant of killing the victim. The jury knew that the nephew did not know who shot the deceased except by the same evidence which was presented to the jury.

5. Homicide § 20— items found at crime scene—relevant

The trial court did not err in a first degree murder prosecution by admitting into evidence a bloody napkin found in the bathroom of the trailer within which the shooting occurred, a photograph of a broken door latch in the bedroom of the trailer, and testimony as to a pistol found under the rug in the bedroom where the three items had some tendency to make a fact at issue in the case more probable.

6. Criminal Law § 85.3— murder—cross-examination of defendant—bad conduct—no prejudice

The trial court in a first degree murder prosecution did not commit plain error by allowing the district attorney to cross-examine defendant about the various names by which she had been known in such a way that the jury could infer that she had been married four times or to elicit testimony that defendant had spent the night with deceased on their first date.

7. Criminal Law § 114.2— instructions on evidence and contentions of State—no prejudice

The trial court in a first degree murder prosecution did not commit plain error or express an opinion in its instructions by reciting the evidence and the State's contentions.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a life sentence imposed by *Washington, Judge*, at the 9 September 1986 Criminal Session of Superior Court, YADKIN County. Heard in the Supreme Court 9 September 1987.

The defendant was tried for first degree murder. The State's evidence showed the defendant had lived a good part of the time in 1985 in a mobile home with Robert Vanhoy. On 31 December 1985 the defendant and Robert Vanhoy attended a New Year's Eve party with Randy and Sandra Burcham. Randy Burcham was Robert Vanhoy's nephew. The two couples left the party at approximately 3:00 a.m. and Randy Burcham drove the defendant and Robert Vanhoy to Robert Vanhoy's mobile home.

The Burchams went to their home and had been there a short period of time when they received a telephone call from the defendant who said, ". . . get down here. Robert has shot himself." When the Burchams arrived at the mobile home, the defendant told them that Robert Vanhoy had tried to shoot her but had shot himself. Randy Burcham went to the bedroom and saw Robert Vanhoy lying face down on the bed with a bullet hole in his back. A .25 caliber cartridge was found on the bed and a .25 caliber pistol was found under the bed. The pistol was cocked with the hammer back. A bullet was found in the body of Robert Vanhoy.

A State Bureau of Investigation agent testified as a ballistics expert that the bullet taken from the body of Robert Vanhoy was fired from the pistol found under the bed. There was a sheet on the bed with a hole in it with powder burns and human blood

around the hole. The SBI agent testified that a contact shot caused the hole in the sheet. There was testimony that the pistol would not fire unless the hammer was pulled back and that it took thirteen pounds of pressure to pull the trigger.

The defendant testified that when she and Robert Vanhoy arrived at the mobile home from the party, she changed clothes in preparation for a trip to the hospital to see her son. She testified that Robert Vanhoy called her to the bedroom, told her to lie down and forbade her from leaving the mobile home. She testified that she lay down on the bed with her back to Robert Vanhoy. She felt him put something in her back and say "he was going to shoot her before he'd let her leave." She then stated she:

> flipped over in the bed, heard a shot go off. I jumped up. He was rolling backwards and forwards in the bed. I seen a hole in his back. I went around and dialed the operator to get help. . . . I was trying to get some help. I couldn't tell them how to get there. I couldn't do nothing. I guess I was just hysterical.

Dr. Howard Nabors testified that he was a surgeon on duty in a hospital in Winston-Salem when Robert Vanhoy was brought to the hospital. He testified that the bullet entered the victim's back between the shoulder blades and traveled through the body in a downward direction until it lodged in the abdomen. He testified that in his opinion the bullet wound caused Robert Vanhoy to bleed to death. He also testified that he did not think the bullet wound could have been self-inflicted. Dr. Modesto Scharyj testified that he is a pathologist and the medical examiner for Forsyth County. He testified the death of Robert Vanhoy was caused by massive bleeding as a result of the bullet wound. He said, "I would categorically deny that this could, in my opinion, this could not be a self-inflicted wound." Dr. Scharyj testified that the absence of smoke stain in the wound showed that either the bullet was fired from a distance of more than two feet or there was something that filtered the powder granules. He testified he did not know a sheet with a bullet hole in it had been found at the scene.

The jury found the defendant guilty as charged. The case was not tried as a capital case and the defendant was sentenced to life in prison. The defendant appealed.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Theodore A. Bruce, Associate Attorney General, for the State.

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

WEBB, Justice.

[1] In her first assignment of error, the defendant contends it was error not to allow her motion to dismiss at the close of the evidence. She bases this argument on the premise that the State did not prove that Robert Vanhoy did not accidentally shoot himself. In this case the State relies on circumstantial evidence for the proof of a part of its case. In evaluating this evidence the State is entitled to every reasonable inference that may be drawn therefrom. *State v. Byrd*, 309 N.C. 132, 305 S.E. 2d 724 (1983).

In order to survive a motion to dismiss the charge of first degree murder, there must be substantial evidence that the defendant intentionally killed Robert Vanhoy with malice and with premeditation and deliberation. *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296 (1976). The question posed by this assignment of error is whether these elements may be inferred from the evidence which was introduced. The direct evidence upon which the State relies is that the deceased and the defendant were the only two persons in the home of the deceased. The deceased was shot in the back and either from a distance of approximately two feet or point blank through some object such as a sheet. There was testimony that the defendant could not have intentionally shot himself. It is difficult to conclude that Robert Vanhoy shot himself accidentally if the State's evidence is believed. He would have had to lose control of the pistol and have it move to his back and fire either two feet from him or point blank through the sheet, and this while he was lying on the bed with the sheet over him. It is much more likely that the defendant had control of the gun immediately before it was fired.

If the defendant had control of the gun immediately before it was fired, the question is whether the jury could conclude that she intentionally shot the deceased. We hold that the jury could do so. From the evidence it is difficult to conclude the shooting by the defendant was an accident. There was testimony that the pis-

tol had to be cocked before it was fired and that it took thirteen pounds of pressure to pull the trigger. It is hard to imagine the pistol accidentally coming to a position pointed towards Robert Vanhoy's back while he was lying face down under a sheet. The much more likely inference from the evidence is that the defendant intentionally pointed the pistol at Robert Vanhoy and intentionally pulled the trigger.

The jury could infer malice from an intentional shooting of Robert Vanhoy which proximately caused his death. *State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968). Premeditation means thought beforehand for some length of time, however short. Deliberation means an intention to kill, executed by the defendant in a cool state of blood. "No fixed amount of time is required for the mental processes of premeditation and deliberation constituting an element of the offense of murder in the first degree, it being sufficient if these mental processes occur prior to, and not simultaneously with, the killing." *State v. Sanders*, 276 N.C. 598, 615-616, 174 S.E. 2d 487, 499-500 (1970), *rev'd on other grounds*, 403 U.S. 948, 29 L.Ed. 2d 860 (1971). Having concluded that the defendant intentionally shot Robert Vanhoy, the jury could conclude from her action that she thought about it for some short time beforehand and that she executed her intention in a cool state of blood. The evidence introduced by the State was sufficient for the jury to find the defendant intentionally killed Robert Vanhoy with malice and with premeditation and deliberation. The charge of first degree murder was properly submitted to the jury.

[2] The defendant presented evidence of accident and she contends the case should not have been submitted to the jury because the State did not prove the killing was not accidental. Her evidence of accident was that she was lying on the bed with her back to Robert Vanhoy. Robert Vanhoy put the gun in her back and she "flipped over." The gun then accidentally went off and shot Robert Vanhoy in the back. This was evidence of accident submitted to the jury which the jury did not believe. In rebutting this evidence the State was entitled to use the inferences which it contended were more probable from its evidence than the explanation of the shooting given by the defendant.

The defendant relies on several cases which we find inapplicable. *State v. Bates*, 309 N.C. 528, 308 S.E. 2d 258 (1983), in-

volved a charge of felony murder. This Court held that felony murder should not have been submitted to the jury because the evidence did not support a verdict of the underlying felony of armed robbery. The Court said that on a motion to dismiss the court must consider the defendant's evidence which explains or clarifies the State's evidence. This does not mean that if the defendant's testimony contradicts the more probable inferences which may be drawn from the evidence, the State may not rely on these inferences.

In *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963), this Court held there was insufficient evidence of second degree murder to be submitted to the jury when the evidence showed the defendant and the deceased were in a room with no one else present and the deceased was killed by the firing of a shotgun. The defendant told the investigating officers and testified that he was holding the shotgun in his lap when his girlfriend grabbed it. He pulled the shotgun away from her and it went off. The defendant's explanation was consistent with the physical evidence and this Court held the evidence did not show an intentional killing. The defendant's testimony in this case is not consistent with the physical evidence.

State v. Hood, 77 N.C. App. 170, 334 S.E. 2d 421 (1985), is a case in which the deceased was found in his home with a .25 caliber bullet wound in his head. The defendant had been seen leaving the area of the victim's home. The Court of Appeals said there was no evidence the defendant had been in the decedent's home. This distinguishes *Hood* from this case.

In *State v. Edwards*, 224 N.C. 577, 31 S.E. 2d 762 (1944), there was no evidence of how the deceased died. This Court, in holding that judgment of nonsuit should have been entered, said the State had not proved the corpus delicti. In this case the evidence is undisputed that the decedent died of a gunshot wound. *State v. Brown*, 308 N.C. 181, 301 S.E. 2d 89 (1983), involved the proof of a corpus delicti sufficiently to make a confession admissible. It has no application to this case.

[3] The defendant also contends the evidence is not sufficient to convict her of murder because to do so requires an inference on an inference. *State v. Holland*, 318 N.C. 608, 350 S.E. 2d 56 (1986); *Byrd*, 309 N.C. 132, 305 S.E. 2d 724 and *State v. LeDuc*, 306 N.C.

62, 291 S.E. 2d 607 (1982). She argues that if the circumstances are proved which allow the jury to infer that she intentionally shot Robert Vanhoy causing his death, the law does not allow an inference from this inferred fact that the killing was with malice and premeditation and deliberation. It is true that some of our cases say that in considering circumstantial evidence we will not make an inference on an inference. This is a rule that is much criticized by legal scholars. For instance it is stated at 1A Wigmore, *Evidence* § 41 (Tillers rev. 1983):

> It was once suggested that an inference upon an inference will not be permitted, i.e., that a fact desired to be used circumstantially must itself be established by testimonial evidence, and this suggestion has been repeated by several courts and sometimes actually has been enforced. There is no such orthodox rule; nor can there be. If there were, hardly a single trial could be adequately prosecuted.

See also Louisell and Mueller, *Federal Evidence* § 94 (1977). There is no logical reason why an inference which naturally arises from a fact proven by circumstantial evidence may not be made. This is the way people often reason in everyday life. In this case the inferences on inferences dealt with proving the facts constituting the elements of the crime. We hold that the jury could properly do this. Insofar as *Holland, Byrd, LeDuc* and other cases hold that in considering circumstantial evidence an inference may not be made from an inference, they are overruled.

[4] The defendant next contends the court committed prejudicial error in its rulings on the evidence. Sandra Burcham was the first witness to testify. She testified that she and her husband Randall Burcham went to the mobile home immediately after receiving the call from defendant that Robert Vanhoy had been shot. She testified that after Randall Burcham saw Robert Vanhoy with a bullet hole in his back Randall Burcham said to her, "The bitch killed my uncle." Randall Burcham was allowed to testify that he had accused the defendant of killing Robert Vanhoy.

The defendant contends these two statements were admitted for proving the truth of the assertions and are hearsay as defined in N.C.G.S. § 8C-1, Rule 802. Assuming the challenged testimony was inadmissible hearsay, we hold the defendant was not prejudiced by its admission. In order to show reversible error, the de-

fendant must show there is 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 and *State v. Billups*, 301 N.C. 607, 272 S.E. 2d 842 (1981). The jury knew that Randall Burcham did not know who shot Robert Vanhoy except by the same evidence which was presented to the jury. It is not likely they gave his opinion much weight in reaching a decision.

[5] The defendant next contends it was error to admit into evidence three items found at the scene of the alleged crime. These items were (1) a napkin found in the bathroom with human blood on it, (2) a photograph of a broken door latch in the bedroom, and (3) testimony as to a .38 caliber pistol which was found under the rug in the bedroom where Robert Vanhoy was shot. The defendant contends this evidence is not relevant as relevancy is defined in N.C.G.S. § 8C-1, Rule 401, and should have been excluded pursuant to N.C.G.S. § 8C-1, Rule 402. We hold that these three items of evidence had some tendency to make a fact at issue in this case more probable. That makes the three items relevant and admissible. The evidence showed the defendant did not have blood on her when the Burchams arrived at the mobile home. The fact that there was a bloody napkin in the bathroom had a tendency to prove she had removed blood from her body after the shooting. The State contended that the defendant forced her way into the bedroom and shot Robert Vanhoy. A broken latch on the floor of the bedroom had some tendency to prove this contention. The evidence was that the deceased owned a .38 caliber pistol. The gun with which he was killed belonged to the defendant. Proof that the deceased had his own pistol in the room has a tendency to show that if it was the deceased who was pointing a pistol at the defendant, it is more likely he would have used his own pistol. This makes the defendant's description of the events less believable.

[6] The defendant next contends it was error for the district attorney to be allowed to cross examine her about the various names by which she had been known. The defendant contends the only purpose of this cross examination was to show she had been married four times and it violates the rule of *State v. Morgan*, 315 N.C. 626, 340 S.E. 2d 84 (1986), which prohibits cross examination as to instances of bad conduct unless the subject matter pertains to credibility. The defendant did not object to these

questions. N.C.R. App. P. 10(b)(1) provides that, with some exceptions not applicable here, an objection to a question of a witness must be made at trial in order to assign error on appeal to allowing the question. The plain error rule was adopted in *State v. Odom*, 316 N.C. 306, 341 S.E. 2d 332 (1986), to alleviate the hardship imposed by N.C.R. App. P. 10(b)(2) which requires an exception be made to a jury charge before error may be assigned to the charge on appeal. This Court extended the plain error rule to evidentiary rulings in *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983). We held in *State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986), and *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983), that in order to invoke the plain error rule this Court must determine that the alleged error "tilted the scales" and caused the jury to reach its verdict convicting the defendant. We cannot hold that allowing the defendant to be questioned in such a way that the jury could infer that she had been married four times "tipped the scales" and caused her to be convicted. We do not invoke the plain error rule for this assignment of error.

The defendant also contends it was error for the State to be allowed to elicit testimony that she spent the night with Robert Vanhoy on their first date. Assuming this was error it was harmless. There was extensive testimony that defendant and Robert Vanhoy had lived together for some time prior to the day Robert Vanhoy was killed. There is not a reasonable possibility there would have been a different result if the jury had not known the date their relationship commenced. N.C.G.S. § 15A-1443(a).

[7] Defendant's last assignment of error is to the charge of the court. She did not object to the charge at trial and relies on the plain error rule to have us review it. The defendant argues the instructions given by the court permitted an inference of premeditation and deliberation based on evidence not before the jury. *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975). She also says the court expressed an opinion on the evidence in violation of N.C.G.S. § 15A-1232. In charging on the contentions of the State the court said some of the evidence upon which the State relies is:

> the fact that there were only two persons in the trailer at the time of the shooting, the defendant walked out of the trailer and the victim was carried out of the trailer on a

> stretcher. The State contending that the lack of any eyewitnesses in this home at the time of the shooting to tell you exactly what happened. . . . the wound was inflicted by another person when considering the opinion of two medical expert witnesses that the wound was not self-inflicted. . . . And consider the conduct and the statements of the Defendant after the time of the shooting, and the statements made by her to various persons, including officers, as to whether the act was suicide or an accident, or whether the cause of the act was unknown. And, another factor that the State is contending is the passage of time after the shot before anyone, neighbors, emergency medical services personnel, or any law enforcement authorities, were notified.

We can find no error in any part of the charge which we have quoted. The defendant does not point out how the court expressed an opinion on the evidence and we do not believe it did so. The judge recited the evidence and told the jury what the State contended they should infer from this evidence. The fact that two people were in the room at the time of the shooting and only one of them walked out supports an inference that the one who walked out shot the other. When the court said there was not an eyewitness, the jury is bound to have known it meant there was not an eyewitness other than the defendant. The two doctors had testified that in their opinions Robert Vanhoy did not intentionally shoot himself. The court could tell the jury they could consider this testimony in considering whether the wound was self-inflicted. The defendant contends her conduct and all her statements after the shooting were consistent with her defense that the deceased accidentally shot himself. It is not error for the court to charge the jury that the State contended otherwise. The State's evidence showed that defendant and Robert Vanhoy arrived at the mobile home at 3:00 a.m. It was one-half hour later when defendant called for help. The State contended that the defendant shot the deceased shortly after they arrived at the mobile home and she did not call for help for several minutes. The judge was stating this contention of the State. If we invoked the plain error rule, it would not be helpful to the defendant.

No error.

RAYMOND B. ABERNATHY v. CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE; RAY MOSLEY AND RICHARD P. WHITAKER, JR.

No. 369PA87

(Filed 2 December 1987)

Master and Servant § 89.1— operating forklift without brakes—ordinary negligence—Workers' Compensation Act sole remedy

Plaintiff dock worker's evidence showed only ordinary negligence by his co-employees where it showed that plaintiff was struck by a forklift operated by the co-employees on a loading dock, that the co-employees knew the forklift had no brakes, and that the co-employees thought the forklift could be stopped without brakes by using the foot pedal to disengage the transmission and changing gears to the opposite direction. Therefore, plaintiff was limited to recovery under the Workers' Compensation Act, and the trial court had no jurisdiction over plaintiff's action against his co-employees and his employer. N.C.G.S. §§ 97-10, 97-10.1.

Justice MEYER concurring in result.

Justice MARTIN dissenting.

ON discretionary review prior to determination by the Court of Appeals, pursuant to N.C.G.S. § 7A-31, of a judgment entered by *Downs, J.*, at the 8 December 1986 Civil Session of Superior Court, GASTON County. Heard in the Supreme Court on 15 October 1987.

Whitesides, Robinson, Blue & Wilson, by Henry M. Whitesides; Stott, Hollowell, Palmer & Windham, by Douglas P. Arthurs, for the plaintiff-appellant.

Caudle & Spears, P.A., by Lloyd C. Caudle and Harry P. Brody, for the defendant-appellants.

MITCHELL, Justice.

The plaintiff brought this action alleging, *inter alia*, that he was injured by the willful, wanton and reckless conduct of his co-employees, Ray Mosley and Richard Whitaker. The plaintiff seeks recovery based on his allegations that the defendant Mosley's operation of a brakeless tow motor, which caused the injury, and the defendant Whitaker's instruction to Mosley to use the brakeless tow motor amounted to conduct so reckless as to rise to the level of "quasi-intent" or "constructive intent" to injure the plain-

tiff. The plaintiff contends that his injury should be treated as an intentional injury for purposes of our Workers' Compensation Act, and that he should be allowed to recover from Mosley and Whitaker, individually and from Consolidated Freightways under the tort theory of respondeat superior.

Since we conclude that the evidence presented at trial supports only a finding of ordinary negligence, the pivotal question in this case is whether the North Carolina Workers' Compensation Act provides the exclusive remedy when an employee is injured in the course of his employment by the ordinary negligence of co-employees. We conclude that it does.

The evidence offered at trial, taken in the light most favorable to the plaintiff, tends to show that on 8 November 1984, the plaintiff, while employed as a dock worker by the defendant Consolidated Freightways, sustained a compound fracture to his right leg. This injury was caused when a brakeless tow motor* driven by Mosley struck a float which came against the plaintiff's leg and pinned his leg between the float and an iron pole embedded in the floor. Mosley was working on the loading dock at Consolidated Freightways' warehouse when Whitaker, his supervisor, instructed him to move some freight with the tow motor which had no brakes.

Both Mosley and Whitaker were aware that the tow motor was without brakes and had seen a handwritten "No Brakes" sign which had been taped on the tow motor. Both men thought, however, that the tow motor could be stopped without brakes by using the foot pedal to disengage the transmission and by changing gears from reverse to forward or vice versa. They had seen numerous employees at Consolidated Freightways using the accelerator or the lever controlling forward and backward movements to control the movement of tow motors without using the brakes. In fact, just prior to the accident which injured the plaintiff, Mosley used the foot pedal to stop the brakeless tow motor in question here, while moving the freight he was assigned to move. Mosley testified that the accident occurred after he had moved all

* The witnesses referred to the machine in question as a "forklift" or "tow motor" and seemed to use the two terms as equivalent or interchangeable references to the same machine. We use the term "tow motor" throughout this opinion for purposes of uniformity.

but two of four or five "skids" that he needed to move. Mosley testified that the accident was the result of the following three things: (1) the tow motor failed to reverse directions and go forward as it should have when he changed gears; (2) the tow motor had no brakes; and (3) he failed to be more "aware." Mosley further testified that the accident was his fault and that in retrospect he realized that he should not have used a tow motor without brakes. Whitaker agreed that a brakeless tow motor is unsafe even though alternative means can be used to stop the equipment.

As a result of his injuries, the plaintiff received extensive medical care. Based on the Industrial Commission's disability rating schedule, the plaintiff's leg was rated as thirty-five percent permanently disabled. Because of his injuries sustained as a result of the accident, the plaintiff applied for and received benefits totaling $65,485.60 from Consolidated Freightways' workers' compensation insurance carrier.

The trial court denied the defendants' motions for a directed verdict at the close of all of the evidence and submitted issues regarding Mosley's and Whitaker's liability to the jury. The trial court refused to submit the issue of punitive damages as to Consolidated Freightways to the jury. The jury found that the defendants Mosley and Whitaker were willfully, wantonly and grossly negligent and awarded the plaintiff $800,000 in compensatory damages. The jury also awarded the plaintiff $5,000 in punitive damages against Whitaker. The trial court denied the post-trial motion of Mosley and Whitaker for judgment notwithstanding the verdict.

The trial court submitted two issues to the jury relating to the defendant Consolidated Freightways. First, the jury was asked to decide whether the plaintiff was injured as a proximate result of "the intentional conduct" of Whitaker. If the jury reached an affirmative answer as to that question, they were then instructed to consider whether Whitaker was "at the time and in respect of such intentional conduct the agent of the Defendant, Consolidated Freightways Corporation of Delaware at the time the Plaintiff was injured?" The jury found that the plaintiff was not injured by "intentional conduct" of Whitaker and, therefore, never reached the question of whether Whitaker was an agent of

Consolidated Freightways. Therefore, the jury awarded no damages to the plaintiff against Consolidated Freightways.

The trial court entered judgment in accord with the verdict against the defendants Mosley and Whitaker. As a part of its judgment, the trial court ordered that the action against Consolidated Freightways be dismissed with prejudice. The plaintiff and the defendants appealed to the Court of Appeals. This Court allowed the plaintiff's and the defendants' petitions for discretionary review, prior to determination by the Court of Appeals, on 28 July 1987.

The defendants first assign as error the trial court's denial of their motions for directed verdict and, as to the defendants Mosley and Whitaker, their motions for judgment notwithstanding the verdict. In support of this assignment, they argue that the evidence tended to show, at most, ordinary negligence on the part of Mosley and Whitaker. They argue that, such being the case, the plaintiff was limited to recovery under the Workers' Compensation Act, and that the trial court had no jurisdiction over the plaintiff's claim. This argument is meritorious.

In reviewing a ruling upon a motion for judgment notwithstanding the verdict made pursuant to N.C.G.S. § 1A-1, Rule 50, the evidence must be viewed in the light most favorable to the non-movant "deeming all evidence which tends to support his position to be true, resolving all evidentiary conflicts favorably to him and giving the non-movant the benefit of all the inferences reasonably to be drawn in his favor." *Daughtry v. Turnage*, 295 N.C. 543, 544, 246 S.E. 2d 788, 789 (1978). The same standard is applied for review of a ruling upon a motion for a directed verdict. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974).

The provisions of the North Carolina Workers' Compensation Act with which we are primarily concerned are N.C.G.S. § 97-9 and § 97-10.1. N.C.G.S. § 97-9 provides:

> Every employer subject to the compensation provisions of this Article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee for personal injury or death by accident to the extent and in the manner herein specified.

N.C.G.S. § 97-10.1 provides:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall include all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

This latter provision of our Act, N.C.G.S. § 97-10.1, is commonly referred to as an "exclusivity provision."

In *Pleasant v. Johnson*, 312 N.C. 710, 713, 325 S.E. 2d 244, 247 (1985), we held that the Workers' Compensation Act does not bar an employee from recovering in a civil action against a co-employee for injuries received as a result of the co-employee's willful, wanton and reckless conduct. *See generally* Annotation, *Willful, Wanton or Reckless Conduct of Co-employee as Ground of Liability Despite Bar of Workers' Compensation Law*, 57 A.L.R. 4th 888 (1987). We also said, however, that the Act is the exclusive remedy for an employee who is injured by the ordinary negligence of a co-employee. *Pleasant v. Johnson*, 312 N.C. at 713, 325 S.E. 2d at 247. In *Pleasant* this Court delimited willful, wanton and reckless negligence as existing somewhere between ordinary negligence and intentional injury. We defined "wanton conduct as an act manifesting a reckless disregard for the rights and safety of others" and "willful negligence" as "the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed." *Id.* at 714, 325 S.E. 2d at 248. We further noted that there is a distinction between willful breach of duty and willful intent to cause an injury. We recognized, however, that intent to inflict an injury need not be actual, and that constructive intent to injure may provide the mental state necessary for an intentional tort. Constructive intent to injure exists where conduct threatens the safety of another and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified. *Id.*

In the case at bar, the evidence supports only a finding of ordinary negligence on the part of the defendants Whitaker and Mosley. Therefore, we follow established precedent and hold that

the plaintiff is barred from bringing this action against the defendants and is limited to recovery under the Workers' Compensation Act. *See Pleasant v. Johnson*, 312 N.C. at 713, 325 S.E. 2d at 247; *Strickland v. King*, 293 N.C. 731, 239 S.E. 2d 243 (1977). Since the evidence supports only a finding of ordinary negligence on the part of the plaintiff's co-employees Whitaker and Mosley, we find it unnecessary to decide, or even consider, whether an employer may be held vicariously liable in a civil action by one of its employees for the willful, wanton or reckless conduct of its other employees, arising out of and in the course of their employment. Nor do we find it necessary to address other issues raised by the parties.

In the present case, there is no evidence that either Mosley's or Whitaker's conduct was so reckless or manifestly indifferent to the consequences that it may be found equivalent in spirit to actual intent to inflict injury. A review of the evidence indicates that Whitaker and Mosley believed that a tow motor could be stopped safely without use of the brakes by using the foot pedal to disengage the transmission and by changing gears from reverse to forward or vice versa. The evidence also tends to show that Mosley, an employee with twenty years experience operating tow motors, thought that he could operate the brakeless tow motor safely. The evidence further tends to show that at the time of the accident, he had used the brakeless tow motor without incident for some ten to fifteen minutes and had moved all but two of the four or five "skids" that he was assigned to move. Only when the tow motor failed to change directions properly did the accident occur. We recognize that the jury could find that the prudent course of action would be for the supervisor to prohibit workers from using a tow motor without brakes. In the present case, however, Mosley's and Whitaker's decision to use the defective tow motor was an error in judgment which amounted to ordinary negligence at most.

The North Carolina Workers' Compensation Act provides the sole remedy for an employee who has been injured by the ordinary negligence of a co-employee. Here, the evidence tended at most to show ordinary negligence on the part of the co-employees. Therefore, the evidence revealed that the trial court was without jurisdiction as to them in this case. As the plaintiff only sought to hold Consolidated Freightways liable on a theory of vicarious

liability for the willful, wanton and reckless conduct of its employees, the trial court was also without jurisdiction as to Consolidated Freightways. The trial court erred in denying the defendants' motions for a directed verdict and the motion of the defendants Mosley and Whitaker for judgment notwithstanding the verdict.

That part of the judgment of the trial court dismissing with prejudice the claims against Consolidated Freightways is affirmed. The remainder of the judgment is vacated. This case is remanded to the trial court with instructions to enter judgment for the defendants.

Affirmed in part, vacated in part and remanded.

Justice MEYER concurring in result.

While I concur in the result reached by the majority, I find the majority's lengthy explanation and interpretation of *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E. 2d 244 (1985), inappropriate in view of the Court's decision that the evidence in this case reflects only "ordinary" negligence on the part of the co-employees.

Pleasant stands only for the proposition that our Workers' Compensation Act does not preclude a suit against a co-employee for the co-employee's willful, wanton, and reckless negligence, or, as stated by the majority in *Pleasant*, "[W]e now hold that the Workers' Compensation Act does not shield a co-employee from common law liability for willful, wanton and reckless negligence." *Id.* at 716, 325 S.E. 2d at 249.

Where, as here, the Court bases its decision upon evidence that supports "only a finding of ordinary negligence on the part of the plaintiff's co-employees," of what possible relevance is the majority's statement that "we find it unnecessary to decide, or even consider, whether an employer may be held vicariously liable in a civil action by one of its employees for the *willful, wanton* or *reckless conduct* of . . . other employees." (Emphasis added.) Where, as here, the level of negligence is determined to be only "ordinary" negligence, the majority's explanation and interpretation of *Pleasant's* definition and treatment of willful, wanton, and reckless negligence as "constructive intent to injure" is clearly irrelevant and constitutes the worst sort of *obiter dictum.*

Justice MARTIN dissenting.

I respectfully dissent from the holding of the majority that the conduct of defendants in this case does not rise to the level of being willful, wanton, or reckless negligence.

Clearly, the intentional operation of the forklift tractor on a loading dock where other people were working, with knowledge that the vehicle did not have any brakes, constituted gross, willful, or wanton negligence. The forklift had a "No Brakes" sign affixed to it, and defendants Mosley and Whitaker had actual knowledge that the vehicle did not have brakes. The forklift was used to move heavy loads from place to place and to stack and remove heavy freight on the loading dock.

The belief by Mosley and Whitaker that the forklift could be stopped, even though it had no brakes, by disengaging the clutch and changing the gears to the opposite direction, is incredible at best. The majority accepts this testimony as gospel; at the most it would be a question for the jury to decide whether the vehicle *could* be so stopped *and* whether Mosley and Whitaker actually had such a belief. As the majority recognizes, the evidence must be viewed in the light most favorable to plaintiff. *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E. 2d 788 (1978). Reviewing the evidence accordingly, this "defense" was for the jury.

The operation of moving vehicles without proper means of controlling them is indeed a dangerous occupation. It is negligence per se to operate a motor vehicle on the public highway without proper brakes. *Stephens v. Oil Co.*, 259 N.C. 456, 131 S.E. 2d 39 (1963). Consolidated Freightways, as employer of Mosley and Whitaker, had a nondelegable duty to provide them with safe machines with which to perform their work. *Kientz v. Carlton*, 245 N.C. 236, 96 S.E. 2d 14 (1957). The willful use of the unsafe forklift by Consolidated's employees, resulting in serious injuries to plaintiff, was sufficient evidence, under the circumstances of this case, to carry the issue of willful, wanton, or reckless negligence to the jury. Surely, the conduct by defendants manifested a reckless disregard for the rights and safety of others and the evidence was sufficient for a jury determination of whether the defendants intentionally failed to carry out their lawful duties necessary to protect the safety of others and, particularly, the plaintiff. *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E. 2d 244 (1985).

For these reasons, I cannot join the majority opinion.

MARTIN L. TAYLOR v. MARGIE V. TAYLOR

No. 139A87

(Filed 2 December 1987)

1. **Husband and Wife § 12— separation agreements—G.S. § 31A-1(b)(6) inapplicable**

N.C.G.S. § 31A-1(b)(6) is inapplicable to separation agreements entered into by parties contemplating a separation or divorce from a valid marriage.

2. **Husband and Wife § 12; Bigamy § 1— separation agreement—termination of support on bigamous remarriage**

The trial court correctly terminated plaintiff's obligation to pay alimony under a separation agreement where the agreement provided support until defendant's death or remarriage and defendant remarried without obtaining a divorce from plaintiff. Even though defendant's remarriage was *void ab initio*, defendant was estopped to deny that she was remarried as a defense to this action.

APPEAL by defendant from the decision of a divided panel of the Court of Appeals, 84 N.C. App. 391, 352 S.E. 2d 918 (1987), affirming judgment for the plaintiff entered by *Jones, J.*, at the 16 January 1986 Session of District Court, WAYNE County. Heard in the Supreme Court 11 November 1987.

Cecil P. Merritt, for plaintiff-appellee.

Hulse & Hulse, by B. Geoffrey Hulse, for defendant-appellant.

FRYE, Justice.

The sole question before this Court is whether the bigamous marriage of defendant bars further spousal support provided by a separation agreement. The Court of Appeals held that it does, and we affirm, although on different grounds.

The appellee, Martin L. Taylor, and the appellant, Margie V. Taylor, were married on 20 February 1961 and separated on 5 October 1984, at which time they entered into a written separation agreement. On 13 June 1985, plaintiff filed a complaint seeking a rescission of the separation agreement, alleging, *inter alia*, that defendant had substantially breached the terms of the agreement. On 16 September 1985, defendant filed an answer. On 21 November 1985, plaintiff filed a supplementary complaint alleging that defendant's remarriage terminated her rights to receive support

from plaintiff under the separation agreement. On 16 January 1986, the day of trial, defendant filed a counterclaim asking for specific performance of the parties' separation agreement. The trial judge made the following pertinent findings of fact:

> 4. The parties executed a written separation agreement on October 5, 1984, which provides in pertinent part in Paragraph 2 thereof, "Husband shall pay to Wife for her support and for support of the children the sum of ONE THOUSAND DOLLARS ($1,000.00) per month for one year, the payments beginning on October 10, 1984 and ending on September 10, 1985; thereafter, Wife shall receive one-half of the retirement pay of the Husband (the retirement pay at this time is EIGHT HUNDRED TWENTY-SEVEN AND 77/100 ($827.77) per month) and shall receive one-half of said retirement pay as it may increase or decrease until her remarriage or death."
>
> . . .
>
> 6. The Plaintiff paid to the Defendant the sum of ONE THOUSAND DOLLARS ($1,000.00) per month through and including the month of May, 1985, pursuant to the terms of the separation agreement.
>
> 7. On April 8, 1985, the Defendant applied for a license to marry George Dwight Davis at Dillon, South Carolina, at 5:25 p.m. She subsequently went with George Dwight Davis to Lumberton, North Carolina where they registered at Motel 6 and spent the night together and then returned to Dillon, South Carolina on April 9, 1985.
>
> 8. On April 9, 1985 at 5:25 p.m., the Defendant participated in a marriage ceremony with George Dwight Davis at Dillon, South Carolina and a License and Certificate for Marriage was duly issued to them by the State of South Carolina.
>
> . . .
>
> 11. The Plaintiff, Martin L. Taylor, testified that he was married to Margie V. Taylor on April 9, 1985; Margie V. Taylor testified that she has not divorced Martin L. Taylor.
>
> 12. Thereafter, the Defendant lived from time to time with George Dwight Davis in the State of Florida and has re-

ceived some support from George Dwight Davis since April 9, 1985.

Pertinent to this appeal, the trial judge made the following conclusion of law:

1. The obligation of the Plaintiff to pay support for the Defendant as provided in Paragraph 2 of the separation agreement between the parties dated October 5, 1984 was terminated upon the marriage ceremony of the Defendant on April 9, 1985 at Dillon, South Carolina.

Accordingly, the trial court entered a judgment for plaintiff relieving him of any support obligations he had pursuant to the parties' separation agreement. On appeal to the North Carolina Court of Appeals, defendant contended the trial court erred in allowing evidence regarding the bigamous marriage ceremony since bigamous marriages in North Carolina are *void ab initio* and may be impeached at any time. Because a bigamous marriage is void, defendant argued, the trial court erred in holding that the bigamous marriage was a remarriage, thus barring defendant's right to support as contemplated by the parties under the separation agreement.

In affirming the trial court the Court of Appeals held that N.C.G.S. § 31A-1 "is an absolute bar to defendant's claim to have plaintiff pay her one-half of his retirement pay pursuant to the deed of separation." The Court of Appeals noted that if defendant had not been married to plaintiff at the time of the separation agreement she would have had no right to claim anything from plaintiff. But since she was married to plaintiff at the time of the separation agreement her right to claim one-half of plaintiff's retirement pay was a property right "in consideration of the marriage." Therefore, the bigamous marriage of defendant, under "the plain language of G.S. 31A-1," relieved plaintiff from "his obligation to support defendant." *Taylor v. Taylor*, 84 N.C. App. 391, 395, 352 S.E. 2d 918, 920.

On appeal to this Court defendant argues that N.C.G.S. § 31A-1(b)(6) is inapplicable to separation agreements because it is substantively the same as the predecessor statute to § 31A-1 (b)(6), which was enacted to address the issues of antenuptial agreements and postnuptial agreements only. Defendant argues

that antenuptial agreements are in contemplation of marriage and postnuptial agreements contemplate the parties staying together in marriage, thus both would be addressed under § 31A-1(b)(6) since both agreements deal with settlements in consideration of the marriage. Conversely, defendant argues that the separation agreement in the case *sub judice* is an agreement in contemplation of the ending of the marriage, thus § 31A-1(b)(6) is inapplicable.

The pertinent part of N.C.G.S. § 31A-1, as relied on by the Court of Appeals, reads as follows:

> (a) The following persons shall lose the rights specified in subsection (b) of this section:
>
> (1) A spouse from whom or by whom an absolute divorce or marriage annulment has been obtained or from whom a divorce from bed and board has been obtained; or
>
> (2) A spouse who voluntarily separates from the other spouse and lives in adultery and such has not been condoned; or
>
> (3) A spouse who wilfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of such spouse's death; or
>
> (4) A spouse who obtains a divorce the validity of which is not recognized under the laws of this State; or
>
> (5) A spouse who knowingly contracts a bigamous marriage.
>
> (b) The rights lost as specified in subsection (a) of this section shall be as follows:
>
> (1) All rights of intestate succession in the estate of the other spouse;
>
> (2) All right to claim or succeed to a homestead in the real property of the other spouse;
>
> (3) All right to dissent from the will of the other spouse and take either the intestate share provided or the life interest in lieu thereof;
>
> (4) All right to any year's allowance in the personal property of the other spouse;

(5) All right to administer the estate of the other spouse; and

(6) Any rights or interests in the property of the other spouse which by a settlement before or after marriage were settled upon the offending spouse solely in consideration of the marriage.

. . .

N.C.G.S. § 31A-1 (1984).

[1] We disagree with the Court of Appeals' holding that the above statute creates a bar to defendant's claim under the separation agreement. In doing so we note at the outset that subsection (b)(6) of the statute, in its original form or as amended, has not heretofore been interpreted by this Court. However, we agree with defendant that the amended statute, pertinent to this appeal, is substantively the same as the prior statute. *See* W. Bolich, *Acts Barring Property Rights*, 49 N.C.L. Rev. 175, 178-82 (1962). Admittedly, subsection (b)(6) is unclear, *see* 2 R. Lee, *North Carolina Family Law*, § 219, n. 20 (4th ed. 1980), but the apparent purpose of the full statute is to bar the benefits of certain types of property rights and interests otherwise accruing to a person but for his wrongful acts or a divorce or annulment. *See* W. Bolich, *Acts Barring Property Rights*, 49 N.C.L. Rev. 175, 175 (1962). However, a respected authority has questioned the application of subsection (b)(6) to separation agreements. "It is doubtful that separation agreements, contemplating a separation or a divorce, are affected by N.C. Gen. Stat. § 31A-1(b)(6)." 2 R. Lee, *North Carolina Family Law*, § 219, n. 20 (4th ed. 1980). Also, N.C.G.S. § 50-20 provides that property settlement agreements may be entered before, during, or after the marriage, and the agreement is binding on the parties. *See Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E. 2d 97 (1984) (property settlement agreements may be entered prior to separation of the parties). Therefore, we agree in part with the dissenting opinion of Judge Greene: were we to hold that N.C.G.S. § 31A-1 was applicable to separation agreements then *all* separation agreements entered into prior to divorce would be unenforceable after the divorce. *See* N.C.G.S. § 31A-1(a)(1) (1984). Clearly, this is not the law of this jurisdiction. *See Haynes v. Haynes*, 45 N.C. App. 376, 263 S.E. 2d 783 (1980) (separation agreement is a contract, enforceable after the divorce). Therefore, we hold that N.C.G.S. § 31A-1(b)(6)

is inapplicable to separation agreements entered into by parties contemplating a separation or divorce from a valid marriage.

[2] Because we hold that N.C.G.S. § 31A-1(b)(6) is inapplicable to the instant case, we must decide whether a bigamous marriage is equivalent to "remarriage" as used in the parties' separation agreement. A bigamous marriage is *void ab initio* in this State. N.C.G.S. § 51-3 (1984) ("All marriages . . . between persons either of whom has a husband or wife living at the time of such marriage . . . shall be void."). A bigamous marriage is a nullity, with no legal rights flowing from it, and can be collaterally attacked at any time. *See Ivery v. Ivery*, 258 N.C. 721, 129 S.E. 2d 457 (1963). Therefore, because a bigamous marriage is void from the outset, we hold that the bigamous marriage of defendant is not the equivalent of remarriage as used in the parties' separation agreement.

However, our holding that a bigamous marriage is not legally recognized under our statutes is not dispositive of the issue on appeal. We must now address the issue whether defendant, who knowingly entered a bigamous marriage, is subsequently estopped from asserting the invalidity of that marriage in order to avoid the consequences flowing from her wrongful conduct.

Even though under N.C.G.S. § 51-3 a bigamous marriage is *void ab initio*, our courts have held that a party may be estopped from asserting the invalidity of the bigamous marriage. *See McIntyre v. McIntyre*, 211 N.C. 698, 191 S.E. 507 (1937). "Under quasi-estoppel doctrine, one is not permitted to injure another by taking a position inconsistent with prior conduct, regardless of whether the person had actually relied upon that conduct." *Mayer v. Mayer*, 66 N.C. App. 522, 532, 311 S.E. 2d 659, *disc. rev. denied*, 311 N.C. 760, 321 S.E. 2d 140 (1984).[1]

1. Professor Clark has noted that there are three factors involved in analyzing quasi-estoppel cases involving invalid divorce decrees. These factors are as follows: "(1) the attack on the divorce is inconsistent with prior conduct of the attacking party; (2) the party upholding the divorce has relied upon it, or has formed expectations based on it; (3) these relations or expectations will be upset if the divorce is held invalid." Clark, *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, 70 Yale L. J. 45, 56-57 (1960). However, under quasi-estoppel it is not necessary for all three factors to be present. *See* Restatement (Second) *Conflict of Laws* § 74 (1971).

In *McIntyre v. McIntyre*, 211 N.C. 698, 191 S.E. 507, defendant-husband asserted as a defense, in an action by plaintiff-wife for divorce and for alimony, the invalidity of their marriage. Prior to participating in a marriage ceremony with plaintiff, defendant, a North Carolina resident married to a North Carolina resident, went to Nevada to obtain a divorce. Upon his return to North Carolina defendant entered into a marriage ceremony with plaintiff. However, due to a lack of jurisdiction and an absence of personal service, the Nevada divorce decree was invalid in North Carolina. Thus, defendant's defense was that he and plaintiff were not legally married to each other. This Court upheld the trial court's instructions to the jury, which substantively stated "that the law of North Carolina prohibited the defendant from asserting the invalidity of a decree of divorce obtained by him in a foreign state." *McIntyre*, 211 N.C. at 699, 191 S.E. at 507. This Court further noted that "it would not seem to be in accord with reason and justice that one who has voluntarily invoked the jurisdiction of another state for the purpose of obtaining a divorce from a former wife, and has thereby been enabled to enter into marital relations with another, should be heard to impeach the decree which he had obtained, or to question its jurisdiction, when new rights and interests have arisen as a result of his second marriage." *Id.* In essence, this Court refused to allow one who voluntarily entered into a bigamous marriage to assert the invalidity of that marriage in order to avoid paying alimony.

Similarly, in *Mayer v. Mayer*, the Court of Appeals, relying in part on this Court's decision in *McIntyre*, applied a quasi-estoppel doctrine to bar a husband from asserting as a defense the invalidity of his second marriage. *Mayer*, 66 N.C. App. 522, 311 S.E. 2d 659, *disc. rev. denied*, 311 N.C. 760, 321 S.E. 2d 140. In *Mayer*, the husband had helped his soon-to-be wife procure an invalid foreign divorce from her prior husband. When this second marriage failed the husband asserted as a defense to a claim for alimony the invalidity of the foreign divorce. The husband claimed that his wife was still married to her first husband, thus the marriage to him was invalid with no legal rights flowing from it. In holding that the husband was estopped from denying the validity of the foreign divorce, the Court of Appeals noted that "in spite of the criticism that the application of a quasi-estoppel doctrine circumvents a state's divorce law, it would be even more inimical

to our law and to our public policy, to permit [the husband] to avoid his marital obligations by acting inconsistently with his prior conduct." *Mayer*, 66 N.C. App. at 532, 311 S.E. 2d at 666.

In *McIntyre* and in *Mayer* the parties involved in the litigation were those who participated in the bigamous marriage. In *McIntyre* the second wife was aware of the Nevada divorce and in *Mayer* the second spouse actively participated in obtaining the invalid divorce decree. However, neither this Court nor the Court of Appeals had difficulty in applying a quasi-estoppel doctrine to prevent one party from benefiting from his wrongful conduct by asserting the invalidity of the bigamous marriage. In the case *sub judice*, plaintiff is an innocent third party, a non-participant to the bigamous marriage. This case thus presents an even more compelling case for the application of a quasi-estoppel doctrine.

Like the offending parties in *McIntyre* and *Mayer*, defendant here seeks to assert the invalidity of a bigamous marriage into which she voluntarily entered. It would not seem to be in accord with reason and justice that one who has voluntarily entered into a marriage ceremony with another, and lived with that person as though they were married, should be heard to impeach that marriage in order to obtain alimony based on the dissolution of a previous marriage. It would be inimicable to our law and to our public policy, to permit the defendant here to voluntarily go to South Carolina, get a marriage license, enter into a marriage ceremony with another and receive benefits therefrom and then continue to obtain alimony from her first husband on the grounds that she has not remarried. To do so would make a mockery of our laws.

We hold that defendant is estopped to deny that she was remarried on 9 April 1985 as a defense to this action and that the trial court correctly terminated plaintiff's obligation to pay alimony under the separation agreement on that date. Accordingly, the decision of the Court of Appeals, which affirmed the trial court on different grounds, is modified and affirmed.

Modified and affirmed.

DAVIDSON COUNTY v. CITY OF HIGH POINT

No. 228PA87

(Filed 2 December 1987)

1. **Municipal Corporations § 4.4; Counties § 5— city-owned sewage treatment plant located in county—county zoning laws**

The Supreme Court expressed no opinion on the correctness of the Court of Appeals' conclusion that a city-owned public enterprise located outside corporate limits is not subject to the County's zoning laws.

2. **Municipal Corporations § 4.4; Counties § 5— municipal sewage treatment plant—located in county—county's authority to impose limitations**

In an action to determine whether a city-owned sewage treatment plant located outside the city but within the county which is upgraded pursuant to the County's special use permit may be used by the City to provide sewer service to its citizens in newly-annexed areas without complying with a condition attached to the special use permit requiring the County's prior approval to provide service to county citizens, the County could not use a condition in the permit to impose limitations outside the scope of its statutory authority, and the City could use the plant to meet its statutory mandate to provide sewer service to residents in its newly-annexed areas without seeking the County's approval. N.C.G.S. § 160A-47, N.C.G.S. § 153A-347.

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

ON discretionary review of a unanimous decision of the Court of Appeals, 85 N.C. App. 26, 354 S.E. 2d 280 (1987), reversing summary judgment for the plaintiff entered by *Cornelius, J.*, at the 16 September 1985 Civil Session of Superior Court, DAVIDSON County, and remanding to the trial court for entry of judgment for defendant. Heard in the Supreme Court 12 October 1987.

Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr., Gusti W. Frankel, and Garry W. Frank, for plaintiff-appellant.

Poyner & Spruill, by J. Phil Carlton, Susan K. Nichols, and Susanne F. Hayes, and Bryant T. Aldridge, Jr., City Attorney of the City of High Point, for defendant-appellee.

North Carolina League of Municipalities, by S. Ellis Hankins, Associate General Counsel, amicus curiae.

MEYER, Justice.

In this case we deal with the jurisdictional conflict between the statutory power cities possess to provide services through public enterprises and the statutory power counties possess to regulate the use of land within their boundaries through zoning ordinances. The issue to be resolved is whether a city-owned sewage treatment plant located outside the city but within the county, which is upgraded pursuant to the county's special use permit, may be used by the city to provide sewer service to its citizens in newly annexed areas without complying with a condition attached to the permit requiring the county's prior approval of service to county citizens. The Court of Appeals held that the city could indeed do so, based upon the conclusion that the sewage treatment plant was a public enterprise not subject to the county's zoning regulations. We modify and affirm.

On 27 May 1983, defendant City of High Point (the City) applied to plaintiff Davidson County (the County) for a special use permit to upgrade the Westside High Point Wastewater Treatment Facility (the Westside Facility) which is owned by the City and located outside the city limits in Davidson County. The Westside Facility has served the City and surrounding areas for about fifty years. A Davidson County zoning ordinance required that a permit be obtained from the County Board of Commissioners before the renovation to upgrade the facility could begin. The County sent the City a list of conditions as a prerequisite to the permit's issuance, including the following condition number 4:

> 4. SEWAGE TREATMENT CAPACITY FOR DAVIDSON COUNTY CITIZENS:
>
> The necessary documents shall be executed to clearly identify projected volume of sewage treatment capacity which can be assessed by the citizens of Davidson County. *The provision of sewer service to the citizens of Davidson County shall be subject to final approval of the Davidson County Board of Commissioners.*

(Emphasis added.) It is only the emphasized provision that is at issue here.

Although the City had reworded condition 4 in its reply to the County to reflect a proposed contractual agreement then under discussion dealing with provision for treatment of wastewater

from sewage collection systems located in the county, the County issued the special use permit on 4 October 1983 with condition 4 attached in its original form as set forth above. The special use permit also directed the attention of those who were dissatisfied with the Board's decision on the permit to the right of appeal to Davidson County Superior Court within thirty days after the applicant's receipt of the permit.

On 5 April 1984, the City annexed an eight-acre tract in the county which had an outfall from the Westside Facility running through it. The City provided sewer service to the residents there without seeking the County's approval. In September 1984, pursuant to a request for voluntary satellite annexation, the City gave notice of a public hearing to consider annexing a further sixty-acre tract in the county. This tract was not suitable for septic tanks and the County could not provide sewer service. The owner requested the City to provide it through an outfall from the Westside Facility which already ran through the property. The City did not plan to seek prior approval from the County in providing this sewer service.

In a 20 September 1984 letter to the Mayor of High Point, the Chairman of the Davidson County Board of Commissioners stated in part:

> The Board of Commissioners remains convinced that annexation by High Point into Davidson County will create unique problems to the county and the city. From our perspective, we have questions concerning increased population density; school attendance; school population; school bus transportation; school capital outlay; provision of public water, fire protection and emergency ambulance service. These are items that can severely impact our county budget.
>
> When the Board of Commissioners reached the decision to issue the special use permit one of the determining factors influencing the decision was the need to upgrade the plant to improve its negative impact to the streams and properties of Davidson County. The Commissioners feel that increased wastewater flow should await the completion of the new plant which will more adequately handle the additional capacity.

> Please be advised that annexation of the Ridge property [the sixty-acre tract] with subsequent provision of sewer would be, in our opinion, a clear violation of the agreed upon conditions of Special Use Permit # 2-83-S. Failure to adhere to the conditions set forth in the special use permit can only result in the revocation of the permit. We would hope this situation can be resolved without resorting to such a drastic step. We stand ready to discuss this matter at any time.

On 7 February 1985, the City annexed the sixty-acre tract by satellite (noncontiguous) annexation. In March 1985, the County filed a declaratory judgment action alleging in part:

> (a) the defendant's annexation and plans for the provision of sewer services to Davidson County residents using the Westside Wastewater Treatment Facility without the approval of the Davidson County Board of Commissioners violates the conditions upon which the special use permit was issued, and (b) the potential increased population density in the annexed area and the County's responsibility for school capital outlay, provision of public water, public health, social services, emergency ambulance service, adequate road and connector road access in addition to other services to residents of the annexed areas will severely impact on the Davidson County budget, as well as on its exercise of land use controls within its governmental jurisdiction.

The County asked the court (1) to issue an order declaring the 4 October 1983 special use permit issued to the City valid and binding; and (2) to enter an injunction prohibiting the City from annexing any areas located in the County for which the Westside Facility would be used to provide sewer service, and from using the Westside Facility to provide sewer service to residents of Davidson County *in the annexed areas* without prior approval from the County Board of Commissioners. The City answered on 6 June 1985, asserting that imposition of the pertinent provision of condition 4 was outside the scope of the County's authority and, further, that the condition was unenforceable because it did not promote the health, safety, morals, or general welfare of the County's citizens. On 22 July 1985, the County moved for summary judgment, which was granted on 18 September 1985. Judge C. Preston Cornelius enjoined the City

> from using the Westside Sewage Treatment Plant to provide sewer services to citizens of Davidson County, whether *within* or without the City of High Point, without first obtaining the approval of the Davidson County Board of Commissioners.

(Emphasis added.)

The City appealed. As both parties point out in their briefs before this Court, the Court of Appeals proceeded on a theory not briefed or argued by either party, finding that the Westside Facility was not a building within the meaning of N.C.G.S. § 153A-347 (which provides that a county's zoning regulations are applicable "to the erection, construction, and use of buildings") but was rather a public enterprise within the meaning of N.C.G.S. §§ 153A-274 and 160A-311. *Davidson County v. City of High Point*, 85 N.C. App. at 37, 354 S.E. 2d at 286-87. The Court of Appeals found that N.C.G.S. § 153A-340 did not specifically give a county the authority to regulate another jurisdiction's public enterprises located within its borders and held that the statute related to private property and was not to be broadened to include a municipality's use of land for a public enterprise as listed in N.C.G.S. § 160A-311. *Davidson County v. City of High Point*, 85 N.C. App. at 40, 354 S.E. 2d at 288. Thus, the Court of Appeals held that the City was not required to comply with the County's zoning ordinances in upgrading its Westside Facility or in using it to provide sewer service to newly annexed areas. *Id.* at 42, 354 S.E. 2d at 289. We granted discretionary review.

[1] While we agree with the result the Court of Appeals reached in this case, we do so for a different and narrower reason. We express no opinion as to the correctness of the Court of Appeals' conclusion that a city-owned public enterprise located outside corporate limits is not subject to the county's zoning laws. The City made no such contention or argument either in the trial court or before the Court of Appeals. While the broad question addressed by the Court of Appeals certainly underlies this case, its resolution was unnecessary given the specific issue the parties briefed and argued. The issue actually presented below and which this Court will address is the narrow question of whether the specific pertinent provision of condition 4 that the County seeks to impose is outside the scope of its authority because it attempts to regu-

late those who may be served by the Westside Facility within the City's newly annexed areas. We conclude that the pertinent provision of condition 4 as attached to the special use permit is beyond the County's authority to impose and is therefore unenforceable.

[2] Counties, like cities, exist solely as political subdivisions of the State and are creatures of statute. They are authorized to exercise only those powers expressly conferred upon them by statute and those which are necessarily implied by law from those expressly given. *O'Neal v. Wake County*, 196 N.C. 184, 145 S.E. 28 (1928); *Board of Commissioners v. Hanchett Bond Co.*, 194 N.C. 137, 138 S.E. 614 (1927). Powers which are necessarily implied from those expressly granted are only those which are indispensable in attaining the objective sought by the grant of express power. *O'Neal v. Wake County*, 196 N.C. 184, 145 S.E. 28. Statutorily granted powers are to be strictly construed. *Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E. 2d 78 (1969); *Insurance Co. v. Guilford County*, 225 N.C. 293, 34 S.E. 2d 430 (1945).

In North Carolina, the State has delegated to counties the authority to make ordinances and regulate buildings within their borders. N.C.G.S. § 153A-121(a) (1983). They may also issue special use permits, with "reasonable and appropriate conditions." N.C. G.S. § 153A-340 (Cum. Supp. 1985). A county's zoning authority, however, is limited: it can be applied only to buildings within the county's borders which are outside city limits, and it is confined to the purposes of promoting health, safety, morals, or the general welfare. N.C.G.S. § 153A-340 (1985). In this case, the pertinent provision of condition 4 as attached to the special use permit runs afoul of the first limitation.

A county has the power to impose reasonable zoning requirements on buildings operated by certain other governmental units within its boundaries. N.C.G.S. § 153A-347 provides in pertinent part:

> Each provision of this Part [Zoning] is applicable to the erection, construction, and use of buildings by the State of North Carolina and its political subdivisions.

N.C.G.S. § 153A-347 (Cum. Supp. 1985). In exercising their zoning authority, counties are further limited in that they are required by statute to exercise their zoning regulations "with reasonable

consideration to expansion and development of any cities within the county, so as to provide for their orderly growth and development." N.C.G.S. § 153A-341 (1983).

The statutes do not give the County authority over the provision of sewer services within the City, or over newly annexed areas of the City which also lie in the County. *Taylor v. Bowen*, 272 N.C. 726, 158 S.E. 2d 837 (1968). To hold otherwise would give the County unfettered discretion to control the City's population growth through zoning restrictions and would ignore the legislature's intent with regard to urban growth. N.C.G.S. § 160A-45(1) (1982); N.C.G.S. § 153A-341 (1983).

The County's territorial jurisdiction is delineated in N.C.G.S. § 153A-320:

> Each of the powers granted to counties by this Article, by Chapter 157A, and by Chapter 160A, Article 19 may be exercised throughout the county *except* as otherwise provided in G.S. 160A-360.

N.C.G.S. § 153A-320 (1983) (emphasis added).

N.C.G.S. § 160A-360(a) provides that all the zoning powers granted to cities as described in article 19 of chapter 160A "may be exercised by any city within its corporate limits." The statute goes on to provide:

> (f) When a city annexes, or a new city is incorporated in, or a city extends its jurisdiction to include, an area that is currently being regulated by the county, the county regulations and powers of enforcement shall remain in effect until (i) the city has adopted such regulations, or (ii) a period of 60 days has elapsed following the annexation, extension or incorporation, whichever is sooner. During this period the city may hold hearings and take any other measures that may be required in order to adopt its regulations for the area.

N.C.G.S. § 160A-360(f) (1982).

A county, therefore, may not exercise jurisdiction over any part of a city located within its borders. *Taylor v. Bowen*, 272 N.C. 726, 158 S.E. 2d 837; *County of Cumberland v. Eastern*

Federal Corp., 48 N.C. App. 518, 269 S.E. 2d 672, *cert. denied*, 301 N.C. 527, 273 S.E. 2d 453 (1980). A city, on the other hand, has statutory authority to annex areas both contiguous and noncontiguous to its primary corporate limits. N.C.G.S. §§ 160A-46, -58.1 (1982). It must stand ready to provide sewer service (among other services) to newly annexed areas on substantially the same basis and in the same manner in which these services are provided to the rest of the city. *Cockrell v. City of Raleigh*, 306 N.C. 479, 293 S.E. 2d 770 (1982); *In re Annexation Ordinance No. D-21927*, 303 N.C. 220, 278 S.E. 2d 224 (1981); N.C.G.S. § 160A-47(3) (1982). A city may "acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises" outside its corporate limits, within reasonable limitations. N.C.G.S. § 160A-312 (1982).

The focus in this case is solely upon the residents of the City's newly annexed areas. The County argues that it has zoning power over the Westside Facility because it is located within its borders, rather than within the City or the City's newly annexed areas. Under N.C.G.S. §§ 160A-46 to -49, the City took jurisdiction over residents in the newly annexed areas. *Taylor v. Bowen*, 272 N.C. 726, 158 S.E. 2d 837. The City is directed by N.C.G.S. § 160A-47 to provide sewer service to its residents. It appears that the City can best do so by using the Westside Facility. Since the County has no authority to restrict or regulate the City's provision of sewer service to its residents, the City can use the Westside Facility to meet its statutory mandate without seeking the County's prior approval, even though the facility is located in the county. In short, the County may not use condition 4 to impose limitations outside the scope of its statutory authority. *Surplus Co. v. Pleasants, Sheriff*, 264 N.C. 650, 142 S.E. 2d 697 (1965).

The County contends that because the City accepted the benefits of the special use permit and proceeded to upgrade the Westside Facility pursuant thereto, it is estopped to deny the permit's validity. We disagree. The City has never and is not now attacking the permit's *validity*. It is, rather, questioning only the *interpretation* of the pertinent provision of condition 4. *See State Trust Co. v. Finance Co.*, 238 N.C. 478, 78 S.E. 2d 327 (1953). This appeal presents only the narrow issue of the City's right to provide sewer service to residents in the newly annexed areas with-

out obtaining the County's prior approval. Resolution of this issue necessarily includes an interpretation of the pertinent provision of condition 4. The City is not estopped to put forward its arguments in support of its interpretation.

Finally, the County contends that the City is precluded from challenging the meaning of the pertinent provision of condition 4 in court because it failed to pursue the administrative remedies afforded under the special use permit. We disagree. Since the City was unaware of the County's differing interpretation of condition 4, it could not have known that it should have appealed the issue to Davidson County Superior Court within thirty days of receiving the permit. The permit was issued on 4 October 1983. The City's first intimation that interpretation of the pertinent provision of condition 4 was in contention was the 20 September 1984 letter from the County Board of Commissioners. The County cannot now be heard to assert that the City should have pursued administrative remedies for a problem it was unaware existed.

We hold as a matter of law that imposition of the pertinent provision of condition 4 on the City in providing sewer service to its citizens in the newly annexed areas is outside the scope of the County's authority and is therefore unenforceable.

Modified and affirmed.

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

JENNIFER LOVE CAMPBELL, BY AND THROUGH HER GUARDIAN AD LITEM, DUNCAN A. McMILLAN, MARGARET O. CAMPBELL AND JEFFREY L. CAMPBELL v. PITT COUNTY MEMORIAL HOSPITAL, INC.

No. 133A87

(Filed 2 December 1987)

1. Damages § 16.1; Rules of Civil Procedure § 59— injury to breech baby—verdict set aside as excessive—no abuse of discretion

In an action against a hospital to recover damages resulting from a brain injury suffered by the minor plaintiff during a footling breech birth, the "cold record" did not affirmatively demonstrate a manifest abuse of discretion by

the trial judge in setting aside the verdict of $4,850,000 for the minor plaintiff and ordering a new trial on the issue of the minor plaintiff's damages.

2. **Appeal and Error § 64— appellate court evenly divided—affirmance of Court of Appeals' decision—no precedential value**

Where one member of the Supreme Court took no part in the consideration or decision of this case, and the remaining members of the Court are equally divided on an issue, the decision of the Court of Appeals on such issue is thus left undisturbed and stands without precedential value.

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

APPEALS by plaintiff-child and defendant 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 84 N.C. App. 314, 352 S.E. 2d 902 (1987), reversing in part and finding no error in part in an order and judgment entered by *Phillips, J.*, on 12 June 1985 in Superior Court, PITT County. On 5 May 1987 we allowed defendant's petition for discretionary review of issues regarding expert witness fees and prejudgment interest which were not before us by virtue of the dissenting opinions. Heard in the Supreme Court 9 November 1987.

Tharrington, Smith & Hargrove, by John R. Edwards and Burton Craige; Kirby, Wallace, Creech, Sarda, Zaytoun & Cashwell, by Robert Zaytoun, for plaintiffs.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert M. Clay, Alene M. Mercer, and H. Lee Evans, Jr.; Poyner & Spruill, by J. Phil Carlton and Susan Nichols, for defendant.

WHICHARD, Justice.

Plaintiffs brought this action to recover damages for personal injury to Jennifer Love Campbell (plaintiff-child), minor child of Margaret O. Campbell (plaintiff-mother) and Jeffrey L. Campbell (plaintiff-father). They also sought damages for medical expenses for plaintiff-child's care, for loss of plaintiff-child's services, and for mental anguish and trauma to plaintiff-parents.

The complaint originally named Dr. Robert Deyton and Greenville Obstetrics and Gynecology, P.A., Dr. Deyton's professional association, as additional defendants. On 15 March 1985 plaintiffs entered into a settlement with Dr. Deyton and his pro-

fessional association in the sum of $1,500,000.00, leaving Pitt County Memorial Hospital as the sole defendant.

The evidence at trial tended to show that on 30 April 1979 plaintiff-mother was admitted to defendant-hospital for the delivery of a baby. Plaintiff-father accompanied her. Shortly after plaintiff-mother's admission, Dr. Deyton, the attending obstetrician, determined that the baby was in the footling breech, or feet first, presentation. Dr. Richard Taft, plaintiff-mother's treating physician at the time, had told plaintiff-mother earlier that the baby was in a breech presentation, and that if that presentation continued until labor began, the method of delivery would be by Cesarean section rather than vaginally.

By 1:30 p.m. on the date of delivery, both Dr. Deyton and nurses assigned to monitor plaintiff-mother's delivery knew that the baby was in the footling breech presentation. No one informed plaintiff-parents of this fact or its significance, however, and Dr. Deyton proceeded with a vaginal delivery despite the position of the baby.

For several hours prior to delivery, the nurses monitoring the baby, who were employees and agents of defendant-hospital, observed complications which they believed were affecting the condition of the fetus adversely. One nurse expressed some of these concerns to Dr. Deyton, but she did not contact her immediate supervisor or anyone else when Dr. Deyton failed to address her concerns.

The baby's umbilical cord became wrapped around her legs. The baby, plaintiff-child, sustained brain damage due to severe asphyxia from the "entangled cord." Plaintiff-child has cerebral palsy and requires constant care and supervision.

The issues submitted to the jury, and the jury's answers, were as follows:

> 1. Were plaintiffs, Jennifer Love Campbell and Jeffrey L. Campbell, injured by the negligence of Nurses Cannon and/or Copeland, acting as agents of defendant Pitt County Memorial Hospital, Inc.?
>
> ANSWER: No

2. Were the plaintiffs, Jennifer Love Campbell and Jeffrey L. Campbell, injured by the negligent failure of the defendant, Pitt County Memorial Hospital to insure the plaintiffs['] informed consent ha[d] been obtained?

ANSWER: Yes

3. Were the plaintiffs, Jennifer Love Campbell and Jeffrey L. Campbell, injured by the corporate negligence of the defendant, Pitt County Memorial Hospital, Inc.?

ANSWER: Yes

4. What amount, if any, is plaintiff, Jeffrey L. Campbell, entitled to recover for emotional pain and suffering?

ANSWER: $5,000

5. What amount, if any, is the plaintiff, Jeffrey L. Campbell, parent of Jennifer Love Campbell, entitled to recover?

ANSWER: $1,646,000

6. What amount, if any, is the plaintiff, Jennifer Love Campbell, entitled to recover?

ANSWER: $4,850,000

The trial court allowed defendant's motion for judgment notwithstanding the verdict as to issue three. It found that the awards in issues five and six were excessive, appeared to have been made under the influence of passion and prejudice, and were unsupported by the evidence. As to issue five, an agreed-upon remittitur of $1,000,000 was entered, reducing the award to $646,000. The parties did not agree to a remittitur as to issue six, and the trial court allowed defendant's motion for a new trial on that issue. With the above modifications, and after making an adjustment for plaintiffs' settlement with Dr. Deyton and his professional association, the trial court entered judgment in accordance with the verdict and ordered that defendant pay a portion of plaintiffs' costs. Plaintiffs and defendant appealed.

In defendant's appeal, the Court of Appeals held, *inter alia*, that the trial court erred in submitting issue four to the jury and allowing plaintiff-father to recover $5,000 for emotional pain and suffering. It reversed as to that issue, but otherwise found no er-

ror. Judge Orr dissented "from that portion of the majority opinion imposing a duty on the hospital to insure that a patient's informed consent has been obtained prior to treatment performed by a privately retained physician [issue two]." *Campbell v. Pitt County Memorial Hosp.*, 84 N.C. App. 314, 336, 352 S.E. 2d 902, 914 (1987).

In plaintiffs' appeal, the Court of Appeals declined to disturb the order setting aside the jury's award of $4,850,000 to plaintiff-child on issue six. It reversed the trial court's grant of judgment notwithstanding the verdict on issue three. In light of its disposition of defendant's appeal, it did not reach plaintiffs' remaining arguments. Judge Becton dissented from the majority's refusal to hold that the trial court abused its discretion in setting aside the verdict and ordering a new trial on issue six. *Id.* at 331, 352 S.E. 2d at 911-12.

By virtue of the dissents, plaintiff-child and defendant appealed to this Court as a matter of right. N.C.G.S. § 7A-30(2) (1986). On 5 May 1987 we allowed defendant's petition for discretionary review of two issues, related to expert witness fees and prejudgment interest, which were not before us by virtue of the dissents.

PLAINTIFF-CHILD'S APPEAL

[1] The sole issue presented by plaintiff-child's appeal is whether the Court of Appeals erred in failing to find an abuse of discretion in the trial court's grant of defendant's motion to set aside the verdict of $4,850,000 for plaintiff-child and award a new trial as to issue six. We find no error.

We have established a high threshold for appellate intervention in discretionary rulings by trial courts granting or denying motions to set aside verdicts and order new trials. Appellate review "is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E. 2d 599, 602 (1982). The trial court's discretion is " 'practically unlimited.' " *Id.*, 290 S.E. 2d at 603 (quoting from *Settee v. Electric Ry.*, 170 N.C. 365, 367, 86 S.E. 1050, 1051 (1915)). A "*discretionary* order pursuant to [N.C.] G.S. 1A-1, Rule 59 for or against a new trial upon *any* ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly

shown." *Id.* at 484, 290 S.E. 2d at 603. "[A] manifest abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an abuse bearing that heavy burden of proof." *Id.* at 484-85, 290 S.E. 2d at 604. "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* at 487, 290 S.E. 2d at 605.

The record here reveals no request by plaintiff-child for findings of fact and conclusions of law supporting the trial court's grant of defendant's motion to set aside the verdict and award a new trial on plaintiff-child's damages. Findings and conclusions on such motions, while always helpful to an appellate court, are necessary only when requested by a party. N.C.G.S. § 1A-1, Rule 52(a)(2) (1983); *Andrews v. Peters*, 318 N.C. 133, 347 S.E. 2d 409 (1986). Absent findings and conclusions, our review is informed only by the "cold record," which does not convince us "that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington v. Bynum*, 305 N.C. at 487, 290 S.E. 2d at 605.

As noted in *Worthington v. Bynum*:

> Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case.

305 N.C. at 487, 290 S.E. 2d at 605. The presiding judge here had the superior advantage to make the best determination of what justice required in this case. We cannot conclude from the "cold record" that his ruling setting aside the verdict and awarding a new trial on plaintiff-child's damages probably amounted to a substantial miscarriage of justice. Like the Court of Appeals, we thus decline to disturb the ruling.

DEFENDANT'S APPEAL

[2] The second issue submitted to the jury was: "Were the plaintiffs, Jennifer Love Campbell and Jeffrey L. Campbell, injured by the negligent failure of the defendant . . . to insure that plain-

tiffs['] informed consent ha[d] been obtained?" The sole issue presented of right by defendant's appeal is whether the Court of Appeals erred in upholding the submission of this issue, the allowance of evidence thereon, the instructions thereon, and the failure to grant a directed verdict or to set aside the verdict thereon.

Justice Webb took no part in the consideration or decision of this case. The remaining members of the Court are equally divided on the issue presented, with three members voting to affirm the Court of Appeals and three members voting to reverse. The decision of the Court of Appeals on this issue is thus left undisturbed and stands without precedential value. *Forbes Homes, Inc. v. Trimpi*, 313 N.C. 168, 326 S.E. 2d 30 (1985).

The dissenting opinion dealt only with issue two; thus, only that issue is properly before us as a matter of right. N.C.R. App. P. 16(b). Defendant nevertheless argues that the Court of Appeals erred in reversing the trial court's grant of judgment notwithstanding the verdict on issue three. Even if this argument were properly before us, our affirmance, without precedential value, of the decision of the Court of Appeals on issue two is determinative of the rights of the parties. Thus, arguments relating to issue three become moot and need not be considered. *Foods, Inc. v. Super Markets*, 288 N.C. 213, 227, 217 S.E. 2d 566, 576 (1975). This disposition should not, however, be viewed as indicating our approval of the Court of Appeals' treatment of issue three. *See Blanton v. Moses H. Cone Hosp.*, 319 N.C. 372, 354 S.E. 2d 455 (1987).

The additional issues presented by defendant's appeal by virtue of our allowance of discretionary review are: (1) whether the trial court erred in its computation of prejudgment interest, an issue the Court of Appeals did not address, and (2) whether the Court of Appeals erred in affirming the award of fees to plaintiffs' expert witnesses. We now hold that discretionary review of these issues was improvidently allowed.

Affirmed.

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

STATE OF NORTH CAROLINA v. ALEXANDER McLAUGHLIN

No. 353A87

(Filed 2 December 1987)

1. **Burglary and Unlawful Breakings § 5.7— breaking and entering of motor vehicle—no evidence of items of value inside motor vehicle—evidence insufficient**

The trial court should not have submitted breaking and entering a motor vehicle to the jury where there was no evidence that the victim's vehicle contained items of value. N.C.G.S. § 14-56 requires as an element of the offense that the vehicle contain "goods, wares, freight, or other thing of value."

2. **Larceny § 7.7— larceny of automobile—evidence sufficient**

The trial court properly denied defendant's motion to dismiss the charge of larceny of an automobile where the victim had left her car keys on the edge of her vanity on the night of the offenses; the keys were missing the next morning; the victim noticed that her car was also missing when she left her house; she had not consented to anyone taking her keys or the car; a witness told officers that defendant and another man arrived at his house at 4:00 a.m. driving two cars, one of which was the same color as the victim's; defendant told the witness that they had taken so much stuff that they had had to take the victim's car, too; and the victim testified that she had received $1,800 as the trade-in value of the car eleven months after the offenses and that she thought it was worth $1,800 at the time it was taken.

3. **Larceny § 10— larceny of automobile consolidated with breaking and entering of motor vehicle—breaking and entering reversed—larceny remanded**

When a larceny of an automobile count was consolidated for sentencing with a count for breaking and entering a motor vehicle and the breaking and entering conviction was reversed, the larceny count was remanded for resentencing.

4. **Criminal Law § 150.1; Constitutional Law § 34— conviction for larceny and common law robbery—double jeopardy issue waived by failure to object**

A defendant who was convicted of both larceny and common law robbery waived his right to raise double jeopardy on appeal by failing to move in the trial court to arrest judgment on either conviction or to otherwise object to the convictions or sentences on double jeopardy grounds.

5. **Criminal Law § 117.4— instructions on testimony of accomplices—no prejudicial error**

There was no prejudicial error in a prosecution arising from a burglary, rape, and kidnapping where the court did not instruct the jury prior to the testimony of three State's witnesses that the witnesses were testifying under grants of immunity. There was no evidence of a formal grant of immunity and order to testify, the court instructed the jury at the close of all the evidence to consider the witnesses' evidence in light of their possible bias, and their accomplice roles were abundantly clear from the evidence. N.C.G.S. § 15A-1052(c).

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) (1986) from judgments of life imprisonment entered by *Read, J.*, on 16 February 1987 in Superior Court, CUMBERLAND County. On 6 July 1987 we allowed defendant's motion to bypass the Court of Appeals in appeals from additional convictions for which the trial court entered judgments of imprisonment for terms of years. Heard in the Supreme Court 11 November 1987.

Lacy H. Thornburg, Attorney General, by Francis W. Crawley, Assistant Attorney General, for the State.

James R. Parish for defendant-appellant.

WHICHARD, Justice.

Defendant was charged in a single indictment with first degree burglary, felonious larceny, first degree rape (four counts), first degree kidnapping, breaking and entering a motor vehicle, larceny of an automobile, and common law robbery. At his first trial, the jury returned verdicts of guilty on all charges. We awarded a new trial for error in the admission of an accomplice's confession. *State v. McLaughlin*, 316 N.C. 175, 340 S.E. 2d 102 (1986). Upon retrial, the jury again returned verdicts of guilty on all charges.

Pursuant to our decision in *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35 (1986), the trial court arrested judgment on the first degree kidnapping conviction and entered sentence as upon a conviction of second degree kidnapping. The court sentenced as follows: first degree burglary and felony larceny (consolidated), life imprisonment; first degree rape (two counts consolidated), life imprisonment, consecutive to the life sentence for first degree burglary and felony larceny; first degree rape (two remaining counts consolidated), life imprisonment, consecutive to the life sentence for the previous two counts of first degree rape; second degree kidnapping, thirty years imprisonment, consecutive to the life sentence for the last two counts of first degree rape; breaking or entering a motor vehicle and larceny (consolidated), ten years imprisonment, consecutive to the thirty year sentence for second degree kidnapping; and common law robbery, ten years imprisonment, consecutive to the ten year sentence for breaking or entering a motor vehicle and larceny.

The State's evidence, in pertinent part, showed the following:

On 20 December 1983 the victim, a sixty-nine year old widow who lived alone, went to bed between 11:00 and 11:30 p.m. Sometime during the night, she was awakened by something hitting her mouth. She saw four eyes and realized that there were two other people in the room. They wore what appeared to be ski masks over their heads and gloves on their hands.

The two men each had intercourse with the victim twice against her will. On each occasion, one of the men held the victim down while the other performed the sexual act. The men tied the victim to her bed. While in the bedroom, the men forced her and her late husband's wedding rings from the victim's fingers. A diamond ring was later found on the floor, but the victim did not recover the wedding rings.

The men then ransacked the victim's house. When the victim subsequently went through the house, some money and several items of her personal property were missing. The victim's insurance company valued the missing property at $1,400.00, and the victim believed it to be worth at least that amount. The victim's car keys were among the items missing.

The victim was afraid to leave the house until daylight. When she finally left to go next door, she noticed that her car was gone. She had seen the car the last time she had come into the house.

The victim did not identify the perpetrators at trial.

Shortly before 21 December 1983, Larry McLaughlin, defendant's second cousin, had talked with defendant in a poolroom. Defendant asked Larry if he could "get rid of" some stolen goods for him. Larry was physically disabled and unable to work at the time. He saw this as "an easy way of . . . making some money" and told defendant he could.

Defendant and Quincy Corbett then came to Larry's house at about 4:00 a.m. on 21 December 1983. Both men wore gloves and rolled-up ski masks. There were two cars outside. Larry recognized one as defendant's father's car but did not recognize the other. Defendant and Corbett went out to the cars and "brought back the goods." They told Larry that they got the goods from

Gray's Creek, the community where the victim lived, "from a lady named Mrs. [victim's last name] place." Larry's description of the goods he saw on that occasion generally matched the victim's description of the items taken from her home.

Later that day, Larry sold the items to Robert McRae for $300.00. He gave defendant $200.00 of that amount. McRae sold some of the items to Joe McGeachy, the husband of McRae's niece.

Larry McLaughlin's wife's testimony generally corroborated his testimony. Defendant testified and offered a defense in the nature of an alibi.

[1] Defendant first contends that the trial court erred in denying his motion to dismiss the charge of breaking and entering a motor vehicle. We are constrained to agree.

The indictment charged that defendant "unlawfully, willfully and feloniously did break and enter a [described] motor vehicle . . . which contained the goods and chattels of [the victim], with the intent to commit larceny therein, in violation of [N.C.G.S. §] 14-56." N.C.G.S. § 14-56 (1983) provides, in pertinent part: "If any person with intent to commit any felony or larceny therein, breaks or enters any . . . motor vehicle . . . *containing any goods, wares, freight, or other thing of value* . . . that person is guilty of a Class I felony." (Emphasis supplied.) The statute requires, as an element of the offense, that the vehicle broken or entered must contain "goods, wares, freight, or other thing of value." Our Court of Appeals has held that even items of trivial value satisfy this element of the offense. *See State v. Goodman*, 71 N.C. App. 343, 349-50, 322 S.E. 2d 408, 413 (1984) (registration card, hubcap key); *State v. Quick*, 20 N.C. App. 589, 590-91, 202 S.E. 2d 299, 300-01 (1974) (papers, cigarettes, shoe bag). The record here, however, is devoid even of evidence that the victim's vehicle contained items of trivial value that belonged to the victim or to anyone else. The State concedes in its brief that "[i]n the case at bar there was no evidence of items of personal property being present in the car on the date of the offense . . . ."

"Prior to submitting the issue of a defendant's guilt to the jury, the trial court must be satisfied that substantial evidence has been introduced tending to prove each essential element of

the offense charged and that the defendant was the perpetrator." *State v. Covington*, 315 N.C. 352, 361, 338 S.E. 2d 310, 316 (1986). Because there was no evidence here of an essential element of the offense established by N.C.G.S. § 14-56, the trial court should not have submitted the issue of defendant's guilt of this offense to the jury. Accordingly, defendant's conviction on the charge of breaking and entering a motor vehicle is reversed.

[2] Defendant contends that the trial court erred in denying his motion to dismiss the charge of larceny of the victim's automobile for insufficiency of the evidence. We disagree.

> On a motion to dismiss on the ground of insufficiency of the evidence, the question for the court is whether there is substantial evidence of each element of the crime charged and of defendant's perpetration of such crime. (Citations omitted.) In evaluating the motion the trial judge must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. (Citation omitted.)

State v. Williams, 319 N.C. 73, 79, 352 S.E. 2d 428, 432 (1987) (quoting *State v. Young*, 312 N.C. 669, 680, 325 S.E. 2d 181, 188 (1985)).

> Larceny is a common law crime which consists of
>
> the . . . taking and carrying away from any place at any time of the personal property of another, without the consent of the owner, with the . . . intent to deprive the owner of his property permanently and to convert it to the use of the taker or to some other person than the owner.

State v. Booker, 250 N.C. 272, 273, 108 S.E. 2d 426, 427 (1959). *See also State v. Revelle*, 301 N.C. 153, 163, 270 S.E. 2d 476, 482 (1980). If the value of the property taken exceeds $400.00, the crime is a Class H felony. N.C.G.S. § 14-72(a) (1986).

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

The State's evidence showed that on the night of the offenses the victim had left her car keys on the edge of her vanity. The next morning the keys were missing. When the victim left her house, she noticed that her automobile—a 1976 Buick Le-

Sabre, brown with a light vinyl top—was also missing. She had not consented for anyone to take the keys or the car.

Larry McLaughlin told investigating officers that when defendant and Quincy Corbett arrived at his house at approximately 4:00 a.m. on 21 December 1983, they were driving two cars. One was an orange-colored car that belonged to defendant's father, Larry's uncle. The other was a tan-colored car. Defendant told Larry "they took so much stuff that they had to take [the victim's] car too."

The victim testified that she received $1,800.00 as the trade-in value of the car some eleven months after the offense. She valued the car at the time it was taken at in excess of $1,800.00.

Considered in the light most favorable to the State, as required, the foregoing constituted substantial evidence of each element of felonious larceny of the victim's automobile and of defendant as one of the perpetrators. The court thus properly denied the motion to dismiss.

[3] We note, however, that the larceny of an automobile count was consolidated for sentencing with the count for breaking and entering a motor vehicle. Since we have reversed the conviction for breaking and entering a motor vehicle, the larceny of an automobile count must be remanded for resentencing.

[4] Defendant contends that larceny is a lesser included offense of common law robbery and that the trial court subjected him to double jeopardy by allowing his convictions for both larceny and common law robbery to stand. He argues that the felonious taking of all the personal property after the victim was tied to her bed resulted in a single common law robbery. By failing to move in the trial court to arrest judgment on either conviction, or otherwise to object to the convictions or sentences on double jeopardy grounds, defendant has waived his right to raise this issue on appeal. *State v. Dudley*, 319 N.C. 656, 659, 356 S.E. 2d 361, 363-64 (1987); *State v. Freeman*, 319 N.C. 609, 618, 356 S.E. 2d 765, 769-70 (1987).

[5] Defendant finally contends that the trial court erred in failing to instruct pursuant to N.C.G.S. § 15A-1052(c)—prior to testimony by the State's witnesses Larry McLaughlin, Robert McRae, and Joe McGeachy—that the witnesses were testifying under

grants of immunity. He admits in his brief, however, that "there was no evidence of a formal grant of immunity and order to testify." "Unless a witness has been formally granted immunity there is no statutory requirement for any such cautionary instruction prior to testimony." *State v. Murray*, 310 N.C. 541, 546, 313 S.E. 2d 523, 528 (1984), citing *State v. Bare*, 309 N.C. 122, 305 S.E. 2d 513 (1983). *See also State v. Maynard*, 65 N.C. App. 81, 82-84, 308 S.E. 2d 665, 666-68 (1983), *disc. rev. denied*, 310 N.C. 628, 315 S.E. 2d 694 (1984) (statute and commentary indicate that N.C.G.S. § 15A-1052(c) applies only where a judicial order granting immunity has been issued; N.C.G.S. § 15A-1054(c) provides a different safeguard, *i.e.*, a requirement of written advance notice to defense counsel, where arrangement for truthful testimony is made in exercise of prosecutorial discretion pursuant to N.C.G.S. § 15A-1054).

Further, at the close of all the evidence, the trial court instructed the jury as follows:

> [T]here is evidence which tends to show that [the three witnesses] were testifying under a grant of immunity. If you find that [they] testified in whole or in part for this reason, you should examine their respective testimony with great care and caution in deciding whether . . . to believe [it]. If, after doing so, you believe [it] in whole or in part, you should treat what you believe the same as any other believable evidence.

The jury thus was clearly instructed to consider the witnesses' testimony in light of their possible bias. In light of this instruction and of the fact that the witnesses' accomplice roles were abundantly clear from the evidence, we do not believe there is a reasonable possibility that the absence of a cautionary instruction prior to the witnesses' testimony influenced the verdict. Thus, while we detect no error, defendant has failed to carry his burden of showing prejudice from any possible error that may have occurred. N.C.G.S. § 15A-1443 (1983). This assignment of error is overruled.

The result is:

No. 84CRS16258—count 8—reversed;

Count 9—remanded for resentencing;

Counts 1, 2, 3, 4, 5, 6, 7 and 10—no error.

JANE B. LAWSON v. JOEL E. LAWSON

No. 72PA87

(Filed 2 December 1987)

Husband and Wife § 10— separation agreement—signing in presence of notary—acknowledgment—subsequent affixing of certificate

The acts of the parties in signing a separation agreement in the presence of a notary public satisfied the statutory requirements of an acknowledgment, and the notary could affix a certificate of acknowledgment to the separation agreement two years later so that the document "speaks the truth" where no rights of creditors or third parties are involved. N.C.G.S. § 52-10.1.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 84 N.C. App. 51, 351 S.E. 2d 794 (1987), affirming an order granting defendant's motion for summary judgment entered by *Harrell, J.*, on 26 February 1986, in District Court, BUNCOMBE County. Heard in the Supreme Court 11 September 1987.

Long, Parker, Payne & Warren, P.A., by Ronald K. Payne, for plaintiff-appellant.

Gum and Hillier, P.A., by Howard L. Gum, for defendant-appellee.

Bailey, Dixon, Wooten, McDonald, Fountain & Walker, by David M. Britt and Gary S. Parsons, for Lawyers Mutual Liability Insurance Company of North Carolina, amicus curiae.

FRYE, Justice.

The specific question presented in this case is whether the acts of the parties in signing a separation agreement in the presence of a notary public satisfy the requirements of an acknowledgment under the appropriate statute. We answer this question in the affirmative. Thus, the Court of Appeals erred in affirming the trial court's granting of defendant's summary judgment motion because it was plaintiff who was entitled to summary judgment as a matter of law.

Plaintiff wife filed this action seeking to enforce a separation agreement the parties had signed prior to divorce, contending the defendant husband owed her $1,500, which was apparently back alimony. She attached to her complaint a copy of the separation

agreement, which did not contain the certificate of a certifying officer. Defendant filed a Rule 12(b) motion to dismiss and for judgment on the pleadings. Both parties subsequently moved for summary judgment with supporting affidavits. The deposition of the notary, Mr. Radeker, was also taken and filed with the court.

Defendant's attorney informed Mr. Radeker, who drafted the separation agreement, that the document in question was not notarized. Radeker, without being requested to do so by anyone, then affixed his notarial seal and added a certificate to the separation agreement indicating that the parties had personally appeared before him "this 14th day of November, 1983 and acknowledged the execution of the foregoing instrument." No attempt was made to conceal the fact that the certificate was added some two years after the document had been signed.

Plaintiff wife stated in her affidavit that at the time the separation agreement was signed before Radeker, he indicated to the parties that he was a notary public. Through deposition, Radeker stated that he did tell the parties at the time they signed the separation agreement that he was a notary public. Radeker further stated that plaintiff and defendant signed the document while sitting at his desk in his presence. He told them they would need to record the document if either was going to transfer property without the joinder of the other spouse and "that as a Notary Public, [he] could actually fill the blank out at any time were that necessary."

During the course of the deposition, counsel for defendant asked Radeker if he had the parties state before him that they were signing voluntarily. Radeker indicated that he had not and that he did not think that was ordinarily done. He further stated that his ordinary practice was to either observe the parties sign the document or if the document was signed when presented to him, to simply ask them "is this your signature?"

Defendant husband now contends that he was never told that Radeker was a notary. He further states that he did not acknowledge the separation agreement before Radeker.

The trial court found, and the Court of Appeals later affirmed, that a notary public could not affix his certificate of acknowledgment after the divorce of the parties even though the

instrument was signed in his presence prior to the divorce between the parties. This was error. We hold that the certificate of acknowledgment may be subsequently affixed to a separation agreement if the agreement was valid under the appropriate statute, no rights of creditors or third parties being involved.

To be valid, a separation agreement "must be in writing and acknowledged by both parties before a certifying officer." N.C. G.S. § 52-10.1 (1984). The statute further provides that a person acting in the capacity of a notary public may serve as a certifying officer. N.C.G.S. § 52-10(b) (1984).

Plaintiff wife argues that the decision of the trial court and the Court of Appeals is inconsistent with this Court's holding in *Banks v. Shaw*, 227 N.C. 172, 41 S.E. 2d 281 (1947). We agree.

In *Banks*, a deed of trust had been executed by husband and wife and then registered, but only showed the notarial acknowledgment of the wife. Foreclosure had been completed when it was discovered that the notary had inadvertently omitted the name of the husband from his certificate of acknowledgment. Subsequent to foreclosure, the notary amended his certificate to include the husband so as to represent clearly the intentions of the husband and wife. The deed of trust with the amended certificate was again registered. This Court held that "the certificate could be amended subsequently to speak the truth, no rights of creditors or third parties being involved." *Id.* at 173, 41 S.E. 2d at 921. The case permits the amendment of the certificate on a properly executed and acknowledged document.

Defendant and the Court of Appeals have read the facts of this case to be controlled by *Bolin v. Bolin*, 246 N.C. 666, 99 S.E. 2d 920 (1957). In that case, this Court held that the failure to comply with the statutory requirements of N.C.G.S. § 52-12 in the execution of the separation agreement rendered it *void ab initio*. The agreement there was void, the husband contended, because the purported acknowledgment took place before a military officer who was not a certifying authority under the statute and because the officer did not make the necessary findings of fact as required by N.C.G.S. § 52-12. Here, defendant asserts a similar defect in fulfilling the dictates of the statute, namely that the acknowledgment requirement has gone unsatisfied. Defendant does not deny that he signed the document but argues that he did

not acknowledge it. Therefore, he asserts, the agreement is *void ab initio* under *Bolin*. Defendant, however, ignores the holding of *Banks*.

Banks allows the notary public to amend his certificate so that it "speaks the truth" and fulfills the intentions of the parties at the time of the signing. *Bolin*, decided some ten years later, did not effectively overrule *Banks*. *Bolin* stands for the proposition that a separation agreement that has not been executed properly under N.C.G.S. § 52-12 is *void ab initio*. In *Bolin*, the execution was defective because the certifying official had not conducted the privy examination of the wife as then required by N.C.G.S. § 52-12, a defect incapable of correction by amendment. The agreement had to fail because it did not comply with the statute. On the other hand, in *Banks* the defect was not fatal. The omission of the husband's name did not represent the wishes of the parties and the certificate of acknowledgment could be amended to "speak the truth," to show what in fact occurred, since the document was in all other respects properly executed. The two cases read together then stand for the proposition that while the certificate of acknowledgment on a properly executed agreement may be amended, an improperly executed separation agreement is void.

In this case, the defect alleged by defendant is that acknowledgment did not occur. Clearly, N.C.G.S. § 52-10.1 requires a writing and acknowledgment. To be "legal, valid, and binding," plaintiff must show the presence of both elements. The absence of either would be a fatal defect. Defendant contends the separation agreement ignored the statutory requirement of acknowledgment, and summary judgment was therefore appropriate because the agreement was void from its inception. We disagree.

Defendant does not dispute the fact that he signed the document in the presence of Mr. Radeker. He insists, however, that what he did was not acknowledgment. He states that he was never provided with a copy of any such document containing an acknowledgment; he was never requested to acknowledge the document; he has never given any authority to anyone to acknowledge the document; and not since the signing of the document has he appeared before any officer and acknowledged his signature or the voluntary execution of it. The fatal flaw in defendant's argu-

ment is the exacting procedures he finds necessary for acknowledgment to have occurred. This Court has held that less satisfies the statutory dictates of acknowledgment.

In *Freeman v. Morrison*, 214 N.C. 240, 199 S.E. 2d 12 (1938), this Court was asked to determine the acts necessary for acknowledgment. In that case, whether acknowledgment had occurred was decisive as to the priority given to competing instruments. Then N.C.G.S. §§ 3308 and 3311 (1935) required, among other things, that leases be acknowledged. The statute further provided that the form of acknowledgment should be in substance that of the statutory model. The statute then set out the customary notary certification providing for entry of the county in which the notary resides, a statement that the maker personally appeared before the notary, a statement that the notary witnessed the signing thereof, and for the notary to sign and place his seal on the certificate.

Although the certificate of acknowledgment did not precisely follow the dictates of the legislature in that case, it was held that the acknowledgment was sufficient under the statute and thus the lease prevailed over the disputed deed as being first in time. There, this Court said that "the word 'acknowledge,' as used with respect to the execution of instruments, is a 'short-hand' expression descriptive of the act of personal appearance before a proper officer and there stating to him the fact of the execution of the instrument as a voluntary act." *Id.* at 243, 199 S.E. 2d at 16. This having occurred in that case, the acknowledgment requirement of the statute had been met. In so holding, the Court adopted a liberal interpretation of the meaning of the word "acknowledge." *Id.*

Applying the above to the instant case, we hold that the acts of defendant husband constituted acknowledgment. Defendant, in signing the separation agreement in the presence of the notary, performed acts sufficient to qualify as an acknowledgment under the statute. Since the signing was in the presence of the notary, it was unnecessary for defendant to state to the notary the fact of the execution of the instrument as his voluntary act. Because acknowledgment had occurred, the later addition of the certificate by the notary on the document is valid so that the document "speaks the truth" under this Court's ruling in *Banks* since no rights of creditors or third parties are involved. Therefore, summary judgment in favor of the defendant was improperly granted.

We must now determine whether plaintiff's summary judgment motion should have been allowed. The purpose of a summary judgment hearing is to allow the court to determine from a forecast of the evidence if there is a material issue of fact that is triable. *Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate*, 39 N.C. App. 1, 249 S.E. 2d 727 (1978), *aff'd*, 297 N.C. 696, 256 S.E. 2d 688 (1979). Here, the affidavit submitted by the plaintiff indicated to the trial court that plaintiff would testify that both she and defendant executed the separation agreement in the presence of Mr. Radeker after being advised that Radeker was a notary public. Mr. Radeker's testimony during his deposition tends to confirm the evidence stated in plaintiff's affidavit, while defendant's affidavit states he did not acknowledge the separation agreement. Defendant, however, does not deny that he signed the document in the presence of Radeker. The facts as stated by plaintiff and Mr. Radeker and not denied by defendant constitute a forecast of competent evidence which would establish acknowledgment as a matter of law. Therefore, summary judgment on this question should rightfully have been granted in favor of plaintiff wife.

For the reasons discussed herein, the trial court erred in granting defendant's motion for summary judgment. The decision of the Court of Appeals is therefore reversed, the summary judgment for defendant is vacated, and the case remanded to the Court of Appeals for further remand to the District Court, Buncombe County, with directions to enter summary judgment for plaintiff.

Reversed and remanded.

CHARLES J. TRAVIS v. KNOB CREEK, INC. AND ETHAN ALLEN, INC.

No. 151PA87

(Filed 2 December 1987)

Master and Servant § 10; Torts § 7— employment contract—release of claims and causes of action—subsequent discharge

The trial court erred by permitting the jury to determine that a release barred plaintiff's claim for breach of an employment contract where plaintiff

was an officer and stockholder of Knob Creek, Inc.; plaintiff negotiated a ten-year employment contract with Knob Creek in 1979 after learning that the company was going to be sold; Knob Creek was shortly thereafter sold to Ethan Allen; plaintiff and the other principal stockholders executed releases discharging Knob Creek "from all claims, demands, causes of action on account of, connected with, or growing out of any matter or thing whatsoever"; and Ethan Allen terminated plaintiff's employment in 1984. The release did not specifically include future claims or non-asserted rights and did not contain any language implying that such claims or rights were being released; plaintiff neither had a cause of action nor had asserted a legal right to continue working for Knob Creek at the time he signed the general release.

Justice MEYER dissenting.

Justices WEBB and WHICHARD join in the dissenting opinion.

ON discretionary review of a decision of the Court of Appeals, 84 N.C. App. 561, 353 S.E. 2d 229 (1987), which affirmed a judgment entered by *Ferrell, J.*, on 7 January 1986 in Superior Court, CATAWBA County. Heard in the Supreme Court 15 October 1987.

Patrick, Harper & Dixon, by Stephen M. Thomas and R. Allen Ingram, Jr., for the plaintiff appellant.

Blakeney, Alexander & Machen, by W. S. Blakeney, for the defendant appellee.

MITCHELL, Justice.

The sole issue before us is whether the trial court erred in permitting the jury to find that the plaintiff's general release of prior and existing claims against the defendants relieved them of their obligation to provide the plaintiff employment according to the terms of an employment contract. We conclude that the trial court erred. Accordingly, we reverse the Court of Appeals' decision, which found no error in the judgment of the trial court.

Evidence at trial tended to show that the plaintiff, Charles J. Travis, was an employee as well as a stockholder and officer of Knob Creek, Inc., a furniture manufacturing plant in Morganton, North Carolina. In 1979 the plaintiff learned that the company was going to be sold to Ethan Allen, Inc., and he negotiated with Knob Creek, Inc. for a ten year employment contract at a specified salary. Gerald McBrayer, the president of Knob Creek,

sketched out and signed a memorandum of the agreement between the parties. It stated:

> 10 year + Contract—for C.J.T. with K.C. Inc.—40,000 + Min. 7% Increase + Bonus—Renewable—Gerald T. McBrayer, Jr.

The plaintiff told McBrayer that the contract was a "good deal." A few weeks later the plaintiff dated and signed the document.

Shortly after this event Knob Creek sold all of its stock to Ethan Allen. As part of this transaction, the plaintiff and the other principal stockholders of Knob Creek were asked and agreed to execute certain releases. Each release stated in pertinent part: "[T]he said officer doth hereby release and forever discharge Knob Creek . . . from all claims, demands, actions, causes of action, on account of, connected with, or growing out of any matter or thing whatsoever."

For the next five years the plaintiff remained employed by Knob Creek under the new ownership and top management of Ethan Allen. In 1984, however, the Ethan Allen management became dissatisfied with the plaintiff's performance and terminated his employment. He sued for breach of his employment contract. The defendants based their denial of liability, in part, on the release signed by the plaintiff.

At trial the jury found that the parties had entered an employment contract, that the plaintiff had performed and the defendants had breached the employment contract, but that the release barred the plaintiff's action.

On appeal the plaintiff contended that, as a matter of law, his release executed in December of 1979 could not bar his claim, which arose when he was discharged on 27 January 1984. The Court of Appeals disagreed. It reasoned that "[t]he scope and extent of the release should be governed by the intention of the parties, which is to be determined by reference to the language, subject matter and purpose of the release." *Travis*, 84 N.C. App. at 563, 353 S.E. 2d at 230 (citing *Econo-Travel v. Taylor*, 45 N.C. App. 229, 262 S.E. 2d 869, *rev'd on other grounds*, 301 N.C. 200, 271 S.E. 2d 54 (1980)). The court stated, "Where a contract does not clearly and unambiguously set out its scope, the parties' intentions become a question for the jury. *See Gore v. George J.*

Ball, Inc., 279 N.C. 92, 182 S.E. 2d 389 (1971). *See generally* 66 Am. Jur. 2d *Release* § 30 (1973)." *Id.*, 353 S.E. 2d at 230.

The Court of Appeals noted that the release in this case was worded "very broadly" and executed by the plaintiff and the other officers of Knob Creek in consideration for a favorable price for their stock. *Id.*, 353 S.E. 2d at 230. The plaintiff signed the release within a month after signing his employment contract. For such reasons the Court of Appeals concluded that "[t]he question whether the release was intended by the parties to cover any 'claims, demands, actions [or] causes of action . . . growing out of . . .' this employment contract was one for the jury." *Id.*, 353 S.E. 2d at 230. We disagree.

The general rule with respect to the scope of a release is that:

> A release ordinarily operates on the matters expressed therein which are already in existence at the time of the giving of the release. Accordingly, demands originating at the time a release is given or subsequently, and *demands subsequently maturing or accruing, are not as a rule discharged by the release unless expressly embraced therein or falling within the fair import of the terms employed.*

76 C.J.S. *Release* § 53 (1952) (emphasis added); *Accord* 66 Am. Jur. 2d *Release* § 29 (1973). *See also Moore v. Maryland Casualty Co.*, 150 N.C. 153, 63 S.E. 675 (1909) ("[T]he release shall be construed from the standpoint which the parties occupied at the time of its execution, and confined to the intention of the parties at the time of such execution").

In this case the plaintiff had a ten year employment contract with Knob Creek. When Knob Creek was acquired by Ethan Allen, the officers and shareholders of Knob Creek, including the plaintiff, each signed general releases stating, "[T]he said officer doth hereby release and forever discharge Knob Creek . . . from all *claims, demands, actions, causes of action,* on account of, connected with, or growing out of any matter or thing whatsoever." (Emphasis added.) The defendant argues that the jury should have been allowed to find that this release waived all of the plaintiff's rights, including his contractual right to employment.

We disagree with the defendant and conclude, instead, that the terms of the release were unambiguous. As used in this release, "claims" and "demands" referred to then existing or matured causes of action. In legal terms a "claim" is a "cause of action," and a "demand" is "the assertion of a legal right." Black's Law Dictionary 224, 386 (5th ed. 1979). There is no ambiguity to be examined and no unclear language to be interpreted by a jury.

At the time he signed his general release, the plaintiff neither had a cause of action nor had he asserted a legal right to continue working for Knob Creek. Until Knob Creek sought to discharge him, there was no reason for him to make such an assertion. His "claim" did not arise until over four years after the date of the release. The release did not specifically include future claims or existing non-asserted rights, and it did not contain any language implying that such claims or rights were being released. As a matter of law, the release here could not bar the plaintiff's claim or his right to work under the terms of the employment contract, because the release did not specifically refer to future claims or existing rights. Therefore, the Court of Appeals erred in holding that the trial court correctly permitted the jury to determine that the release barred the plaintiff's action.

The defendants have called our attention to another issue that they presented to the Court of Appeals but which that court found no need to address. In their new brief filed with this Court, the defendants presented no arguments or authorities on this issue. Therefore, the issue must be deemed abandoned. Rule 28(a), North Carolina Rules of Appellate Procedure.

The decision of the Court of Appeals is reversed, and this case is remanded to that court for its further remand to the trial court for proceedings consistent with this opinion.

Reversed and remanded.

Justice MEYER dissenting.

I dissent for the reasons stated by the panel of the Court of Appeals in its unanimous opinion reported at 84 N.C. App. 561, 353 S.E. 2d 229 (1987).

Justices WEBB and WHICHARD join in this dissenting opinion.

STATE OF NORTH CAROLINA v. HOWARD RAYMOND BREWER, JR.

No. 735A86

(Filed 2 December 1987)

1. **Criminal Law § 138.29— guilty plea to second degree murder—premeditation and deliberation as aggravating factor**

Premeditation and deliberation may be used as an aggravating factor for sentencing a defendant who pled guilty to second degree murder.

2. **Criminal Law § 138.29— second degree murder—premeditation and deliberation as aggravating factor—sufficiency of evidence**

The State's evidence during the sentencing hearing was sufficient to support the trial court's finding of premeditation and deliberation as an aggravating factor for a second degree murder to which defendant pled guilty where it tended to show that the murder was committed in furtherance of defendant's planned robbery of the victim; defendant told his girlfriend's father that he shot the deceased in the mouth and, when deceased fell, then shot him five times in the back of the head; any one of such bullets would have caused the victim's death; and three of the shots were discharged when the firearm was within a matter of inches from the back of the victim's head.

APPEAL of right by defendant pursuant to N.C.R. App. P. 4(d) and N.C.G.S. § 15A-1444(a1) from a judgment imposing a sentence of life imprisonment entered by *DeRamus, J.*, at the 23 September 1986 Criminal Session of Superior Court, FORSYTH County, upon a plea of guilty to murder in the second degree. Pursuant to Rule 30(d) of the Rules of Appellate Procedure, the case was submitted for decision before the Supreme Court on the written briefs.

Lacy H. Thornburg, Attorney General, by George W. Boylan, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gayle L. Moses, Assistant Appellate Defender, for defendant-appellant.

FRYE, Justice.

Defendant was charged with murder in the first degree and tendered a plea of guilty to murder in the second degree. After conducting a hearing to establish a factual basis for the plea, the trial judge accepted defendant's plea and made findings of aggravating and mitigating factors. Upon the judge's finding that the aggravating factors outweighed the mitigating factors, defendant

was sentenced to life imprisonment. Defendant now assigns as error the trial judge's finding of premeditation and deliberation as a non-statutory aggravating factor.

We are limited on appeals made pursuant to N.C.G.S. § 15A-1444(a1) to the issue of whether the sentence entered is supported by evidence introduced at the trial and the sentencing hearing. *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983). The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. *Id.* at 380, 298 S.E. 2d at 680. We hold that the trial judge had ample evidence from which to find the aggravating factor of premeditation and deliberation.

At the sentencing hearing, the evidence for the State tended to show that on 8 August 1986, the deceased told his wife that he planned to see defendant later that day. The deceased indicated to his brother-in-law that he was going to see defendant and exchange some marijuana for cocaine on the evening of 8 August 1986. The victim's body was found on 9 August 1986 in a ditch. Decedent had been shot in the head five times with an automatic weapon. One of the pockets of his pants had been turned inside out.

The decedent's wife testified that the deceased was carrying about $4,000 when he left home that day. He wore two gold chains, one with a twenty dollar gold piece on it, a diamond watch and a diamond ring. Only the gold chain with the twenty dollar gold piece was found with the body. The testimony of the medical expert disclosed that there were three bullet wounds in the back of the deceased's head, one on the left side of the head and one in the right side of the mouth. According to the medical witness, any one of the bullet wounds could have caused death.

The State further offered the testimony of several witnesses that tended to show that at approximately 11 p.m. on 8 August 1986, a car and truck were seen near the vicinity where the decedent's body was found. One of the witnesses testified to seeing the truck and car pass her mobile home, then to hearing shots and seeing "a flashlight going across the field." Another witness testified to seeing a car and truck pass, go down Beason Road, stay five or ten minutes, then leave. Later, the vehicles returned to the same place, five shots were heard and the vehicles left.

In his argument as to aggravating factors, the prosecutor asked the trial judge to consider two points in finding that the murder was premeditated and deliberated: (1) that the two vehicles seen on the road prior to shots being heard had been seen in the same area earlier that night and on the previous night and, (2) that the deceased had been shot five times. The trial judge found that the murder was premeditated and deliberated. We hold that such a finding by the trial judge was not improper and was supported by the record.

[1] In *State v. Melton*, this Court rejected arguments challenging the use of premeditation and deliberation as an aggravating factor in second degree murder plea situations. We held that a determination by the preponderance of the evidence that defendant premeditated and deliberated the killing was reasonably related to the purposes of sentencing. *Melton*, 307 N.C. 370, 298 S.E. 2d 673. There, this Court held that notwithstanding the plea of guilty to second degree murder, "the fact that defendant premeditated and deliberated the killing was transactionally related to this offense of murder in the second degree and was therefore properly considered by the judge during sentencing." *Id.* at 378, 298 S.E. 2d at 679. That holding is no less applicable today.[1]

Because premeditation and deliberation are not usually susceptible of direct proof, they must generally be established by circumstances from which the facts sought to be proven may be inferred. *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769 (1961). Inquiry as to the circumstances surrounding the actual killing may also be properly considered in establishing such aggravating factors. Accordingly, this Court has held that the number of blows inflicted constitutes a circumstance to be considered in determining whether a killing is committed with premeditation and deliberation. *State v. Love*, 296 N.C. 194, 250 S.E. 2d 220 (1978). Additionally, it has been held that the dealing of lethal blows after the victim has been felled and rendered helpless is evidence from which the trier of fact could infer a defendant's deliberated

1. As in *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 n.2 (1983), we note that the *plea* of guilty to second degree murder is fundamentally different from a *conviction* of second degree murder when the defendant has been tried on a charge of first degree murder. There, a jury would have decided that there was insufficient evidence to find beyond a reasonable doubt that defendant had premeditated and deliberated the killing.

and premeditated purpose. *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673 (1986).

[2] Here, the State's evidence during the sentencing hearing tended to show that the murder committed by defendant was in furtherance of his planned robbery of the victim. The evidence showed that defendant arranged to exchange with the victim cocaine for marijuana. He was aware that the victim carried a considerable amount of cash on his person. Defendant left to consummate his exchange with only fifty dollars in his pocket. After returning from the scene of the incident, however, defendant gave $2,000 in hundred and twenty dollar bills to his girlfriend. When arrested, defendant was also wearing the gold rope chain necklace belonging to the victim.

Moreover, there was testimony that defendant told his girlfriend's father that he shot the deceased in the mouth and then when the deceased fell, the defendant shot him five times in the back of the head. The State's evidence established that any one of such bullets would have caused the death of the victim and that three of such shots had been discharged when the firearm had been within a matter of inches from the back of the victim's head.

For these reasons, we hold that there was ample evidence to support the trial judge's finding of premeditation and deliberation as an aggravating factor. The judgment of the trial court is therefore affirmed.

Affirmed.

Harshaw v. Mustafa

DORIS HARSHAW D/B/A HARSHAW BONDING COMPANY AND JO WILKINS D/B/A JO WILKINS BONDING COMPANY, PLAINTIFFS v. HUSSAIN MUSSALLAM MUSTAFA, DEFENDANT; JOHN ESSA AND NABIL HANHAN, INDIVIDUALLY AND DOING BUSINESS AS SULTANA INVESTMENTS, A PARTNERSHIP, INTERVENOR DEFENDANTS

No. 109PA87

(Filed 2 December 1987)

Arrest and Bail § 11.2— appearance bond—forfeiture order—accrual of surety's action against principal

The trial judge should have allowed intervenor defendants' motions to set aside a judgment and to dismiss an action under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiffs were sureties on an appearance bond, the intervening defendants claimed that the principal had conveyed real property to them, the principal had fled the jurisdiction, and plaintiff sureties had made no payment on the bond. A surety's cause of action does not accrue until he makes payment on the debt of the principal. N.C.G.S. § 26-312(a).

ON intervenor defendants' petition for discretionary review of the decision of the Court of Appeals, 84 N.C. App. 296, 352 S.E. 2d 247 (1987), affirming orders of *Williams, J.*, at the 27 January 1986 session of Superior Court, GUILFORD County, denying intervenor defendants' motions to dismiss plaintiffs' complaint and to vacate default judgment against defendant. Heard in the Supreme Court 11 November 1987.

Hatfield & Hatfield, by John B. Hatfield, Jr., for plaintiff-appellees.

Benjamin D. Haines for intervenor defendants, appellants.

MARTIN, Justice.

This appeal raises the issue of whether plaintiffs, who are sureties on bonds issued by their principal, defendant Mustafa, can sue their principal before paying all or part of the penal amount of the bonds. We conclude that they cannot and therefore reverse the Court of Appeals.

Plaintiffs brought this action alleging that they are sureties on two appearance bonds, in the total amount of $25,000, to assure the appearance of defendant Mustafa in the District Court of Guilford County on 31 May 1985. Defendant failed to appear. Although the presiding judge ordered forfeiture of the bonds,

plaintiffs do not allege, nor is there proof, that they have made any payment on the bonds. Plaintiffs seek to recover from their principal, Mustafa, judgment for $25,000. By ancillary proceedings, plaintiffs also attached certain real property allegedly owned by Mustafa.

The intervening defendants claim that Mustafa conveyed the real property to them on 28 May 1985, although the deed was not recorded until 12 June 1985, after the attachment against the property on 7 June 1985. Intervening defendants made a motion under Rule 60(b) of the North Carolina Rules of Civil Procedure to set aside the judgment against Mustafa and a motion to dissolve the attachment pursuant to N.C.G.S. § 1-440.43, as well as a motion to dismiss plaintiffs' complaint under N.C.R. Civ. P. 12(b)(6). All motions were denied, and intervenor defendants appealed to the Court of Appeals.[1]

Although the facts appear to be complex, the legal issue on appeal is narrow: May a surety on an appearance bond sue his principal before the surety has paid all or part of the bond? The Court of Appeals answered in the affirmative, holding that a surety's cause of action accrues where forfeiture of an appearance bond is ordered and the principal has evaded process by leaving the jurisdiction. We disagree.

Since the opinion of Justice Ruffin in *Hodges v. Armstrong*, 14 N.C. 253 (1831), this Court has steadfastly held that a surety's cause of action does not accrue until he makes payment on the debt of the principal. A judgment against the surety will not suffice. *Id.* The principal is not obligated to his surety until his surety has made a payment. *Insurance Co. v. Gibbs*, 260 N.C. 681, 133 S.E. 2d 669 (1963). The surety's right of action accrues at the time of payment, not before. *Id.*

These rules of law have now been substantially codified in N.C.G.S. § 26-3.1(a):

> A surety who has *paid* his principal's note, bill, bond or other written obligation, may either sue his principal for reimbursement or sue his principal on the instrument and may

1. Mustafa has evidently fled the jurisdiction and has made no appearance in this action.

maintain any action or avail himself of any remedy which the creditor himself might have had against the principal debtor. No assignment of the obligation to the surety or to a third-party trustee for the surety's benefit shall be required.

(Emphasis added.)

We continue to adhere to the principles above stated. Because plaintiffs' causes of action had not accrued against Mustafa, the trial judge should have allowed intervenor defendants' motions to set aside the judgment and to dismiss the action under N.C.R. Civ. P. 12(b)(6).

The decision of the Court of Appeals is reversed and the case is remanded to that court for remand to the Superior Court, Guilford County, for further proceedings not inconsistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. CURTIS EUGENE SMITH

No. 63A87

(Filed 2 December 1987)

1. **Criminal Law § 138.40— mitigating circumstance—acknowledgment of wrongdoing—effect of motion to suppress confession**

When a defendant moves to suppress a confession, he repudiates it and may not use evidence of the confession to prove the voluntary acknowledgment of wrongdoing mitigating circumstance set forth in N.C.G.S. § 15A-1340.4(a)(2)l.

2. **Criminal Law § 138.34— mitigating circumstance—limited mental capacity—finding not required**

The trial court was not required to find as a mitigating circumstance for second degree murder that defendant's limited mental capacity significantly reduced his culpability for the offense where the evidence was uncontradicted that defendant had a limited mental capacity but was in conflict as to whether this limited mental capacity significantly reduced defendant's culpability. N.C.G.S. § 15A-1340.4(a)(2)e.

APPEAL by defendant from a life sentence imposed by *Downs, Judge*, at the 10 November 1986 session of Superior

Court, GASTON County. Heard in the Supreme Court 12 November 1987.

The defendant pled guilty to first degree murder at the 24 May 1984 session of Superior Court of Gaston County. Before he entered the plea, he reserved the right to appeal an order overruling his motion to suppress the introduction of his confession. This Court in *State v. Smith*, 317 N.C. 100, 343 S.E. 2d 518 (1986), reversed the superior court and ordered a new trial.

The defendant then pled guilty to second degree murder. The evidence at the sentencing hearing showed that the defendant was 16½ years of age at the time of the offense. He and Judson Lee Ross, an 18-year-old friend, entered the office of the Paschall Oil Company. The defendant struck Mr. Marvin Hunt, an employee of Paschall Oil Company, twice with a blunt object, spattering blood on three walls and the ceiling, fracturing Mr. Hunt's skull, and sending a piece of the skull to the floor. Defendant and Ross then robbed Mr. Hunt. Mr. Hunt remained in a coma until he died 39 days later.

The court found as an aggravating circumstance that the offense was especially heinous, atrocious or cruel. The court found no mitigating circumstances and enhanced the defendant's sentence to life in prison. The defendant appealed.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General and H. Julian Philpott, Jr., Associate Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant appellant.

WEBB, Justice.

[1] The defendant assigns error to the court's failure to find two mitigating circumstances, the first being that "prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer." N.C.G.S. § 15A-1340.4(a)(2)l.

The assignment of error brings to the Court the question of whether a defendant may use as evidence of the above mitigating

circumstance the fact that he confessed at an early stage of the proceedings after he moves to suppress the confession. In *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985), this Court held that a defendant could not use a confession to prove the mitigating circumstance after he had repudiated the confession. In *State v. Robbins*, 319 N.C. 465, 526, 356 S.E. 2d 279, 315 (1987), we said, "[D]efendant made a motion to suppress these statements. This Court has held that if a defendant repudiates his incriminatory statement, he is not entitled to a finding of this mitigating circumstance." We hold that when a defendant moves to suppress a confession, he repudiates it and is not entitled to use evidence of the confession to prove this mitigating circumstance. We believe this holding is consistent with the holdings of previous cases and is a better reasoned rule than that for which the defendant contends.

[2] The defendant also contends it was error not to find as a mitigating circumstance that, "The defendant's immaturity or his limited mental capacity at the time of commission of the offense significantly reduced his culpability for the offense." N.C.G.S. § 15A-1340.4(a)(2)e. There was uncontradicted evidence that the defendant was 16½ years old at the time of the offense and that he had an I.Q. ranging from 60 to 65 which placed him in the bottom one percent of the population in intelligence. A psychiatrist testified he is "more like a ten year old" than a sixteen year old.

It is true that the evidence is uncontradicted that the defendant is of limited mental capacity. The evidence is not uncontradicted, however, that this limited mental capacity significantly reduced his culpability for the offense. There was evidence that the defendant and Ross had discussed robbing the Paschall Oil Company two weeks before the offense at the suggestion of the defendant. They had planned to tell Mr. Hunt that a woman needed oil and wanted his address. They planned to hit him while he was writing his address for the fictitious woman. There was evidence that they carried out this plan. While Mr. Hunt was writing the address defendant hit him in the head with a stick. When Mr. Hunt grabbed Ross, defendant hit him again so hard that brains, blood, and bone flew from his head.

We do not believe we should hold that because the evidence shows a defendant is of limited mental capacity, a court has to find this mitigating circumstance. The evidence must also show

this limited mental capacity significantly reduced the defendant's culpability. The evidence was in conflict on this part of the mitigating circumstance and it was not error for the court not to find it. *See State v. Moore*, 317 N.C. 275, 345 S.E. 2d 217 (1986).

Affirmed.

JUDSON PALMER MELLOTT, JR. AND WIFE, JOANNE M. MELLOTT v. PINEHURST, INC., PURCELL CO., INC., AND PINEHURST RECEIVABLES ASSOCIATES, INC.

No. 233PA87

(Filed 2 December 1987)

ON discretionary review of the unpublished decision of the Court of Appeals, 85 N.C. App. 170, 354 S.E. 2d 775 (1987), affirming the granting of a directed verdict for defendants by *Honeycutt, J.*, entered 27 January 1986 in District Court, MOORE County. Heard in the Supreme Court on 12 November 1987.

Pollock, Fullenwider, Cunningham & Patterson, P.A., by Bruce T. Cunningham, Jr., for plaintiff appellants.

Douglas R. Gill 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.

GEORGE R. HUNT v. CHARLES J. HUNT AND AMELIA P. HUNT

No. 421A87

(Filed 2 December 1987)

APPEAL by defendants from the decision of a divided panel of the Court of Appeals, reported at 86 N.C. App. 323, 357 S.E. 2d 444 (1987), vacating an order of partial summary judgment entered by *Farmer, J.*, on 27 May 1986 in Superior Court, WAKE County, and remanding the case for trial. Heard in the Supreme Court 10 November 1987.

Jernigan & Maxfield, by Leonard T. Jernigan, Jr., and John A. Maxfield, for plaintiff appellee.

Young, Moore, Henderson & Alvis, P.A., by David P. Sousa and Theodore S. Danchi, for defendant appellants.

PER CURIAM.

Affirmed.

JIMMY GRAHAM, JR., ADMINISTRATOR OF THE ESTATE OF LINK C. GRAHAM v. JAMES F. JACKSON ASSOCIATES, INC., AND REPUBLIC INSURANCE COMPANY

No. 140PA87

(Filed 2 December 1987)

ON discretionary review of the decision of the Court of Appeals, 84 N.C. App. 427, 352 S.E. 2d 878 (1987), affirming in part, reversing in part, judgment entered by *Llewellyn, Judge*, on 14 March 1986 in Superior Court, LENOIR County, and remanding the cause with instructions. Heard in the Supreme Court 9 November 1987.

Ferguson, Stein, Watt, Wallas & Adkins, P.A., by Frank E. Emory, Jr., for plaintiff appellee.

Moore & Van Allen, by George M. Teague and Sarah Wesley Fox, for defendant appellants.

PER CURIAM.

We conclude that defendant appellants' petition for discretionary review was improvidently allowed.

Discretionary review improvidently allowed.

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

BEROTH v. BEROTH

No. 522P87.

Case below: 87 N.C. App. 93.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1987.

BLUE STRIPE, INC. v. U.S. FIDELITY & GUARANTY CO.

No. 536P87.

Case below: 87 N.C. App. 167.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 December 1987.

BUCHANAN v. HUNTER DOUGLAS, INC.

No. 521P87.

Case below: 87 N.C. App. 84.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 December 1987.

COTTON v. STANLEY

No. 483P87.

Case below: 86 N.C. App. 534.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 December 1987.

COUGLE v. CAPITAL SUPPLY CO.

No. 587P87.

Case below: 87 N.C. App. 426.

Petition by defendant for writ of supersedeas and temporary stay denied 23 November 1987. Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 23 November 1987.

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

HOFFMAN v. N.C. DEPT. OF MOTOR VEHICLES

No. 615P86.

Case below: 82 N.C. App. 761.

Upon reconsideration of the notice of appeal filed by plaintiff pursuant to G.S. 7A-30, the motion by defendant to dismiss the appeal for lack of a substantial constitutional question, and the petition by plaintiff for discretionary review pursuant to G.S. 7A-31, the motion to dismiss the appeal is allowed and the petition for discretionary review is denied 2 December 1987.

HOME ELECTRIC CO. v. HALL AND UNDERDOWN HEATING AND AIR COND. CO.

No. 487PA87.

Case below: 86 N.C. App. 540.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 2 December 1987.

IN RE BRACEY

No. 163P87.

Case below: 84 N.C. App. 567.

Petition by Thurman McKinney for discretionary review pursuant to G.S. 7A-31 denied 2 December 1987.

MACON v. CAMPBELL CO.

No. 525P87.

Case below: 87 N.C. App. 176.

Petition by defendant (Allen M. Campbell Co. General Contractors, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 2 December 1987.

NEW BERN ASSOC. v. THE CELOTEX CORP.

No. 523P87.

Case below: 87 N.C. App. 65.

Petition by third-party defendant (T. A. Loving Co.) for discretionary review pursuant to G.S. 7A-31 denied 2 December 1987.

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

ROWAN COUNTY BD. OF EDUCATION v. U.S. GYPSUM CO.

No. 548P87.

Case below: 87 N.C. App. 106.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1987.

STATE v. BARNES

No. 544P87.

Case below: 87 N.C. App. 293.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1987.

STATE v. BLACKMON

No. 482P87.

Case below: 86 N.C. App. 639.

Petitions by defendants (Faircloth and Kuiken) for discretionary review pursuant to G.S. 7A-31 denied 2 December 1987.

STATE v. DENEHY

No. 557P87.

Case below: 78 N.C. App. 443.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 December 1987.

STATE v. EDGERTON

No. 433PA87.

Case below: 86 N.C. App. 329.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 2 December 1987.

STATE v. MIDYETTE

No. 577A87.

Case below: 87 N.C. App. 199.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 2 December 1987.

STATE v. SANDERS

No. 519P87.

Case below: 87 N.C. App. 178.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1987.

STATE v. SUGGS

No. 565P87.

Case below: 86 N.C. App. 588.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 December 1987.

STATE v. WALL

No. 621P87.

Case below: 87 N.C. App. 621.

Petition by defendant for writ of supersedeas and temporary stay denied 8 December 1987.

STATE v. WATSON

No. 504P87.

Case below: 85 N.C. App. 173.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 2 December 1987.

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

STATE v. WOXMAN

No. 554P87.

Case below: 87 N.C. App. 295.

Petition by defendant for writ of supersedeas denied and temporary stay previously entered is dissolved 2 December 1987. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 December 1987. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1987.

STATE ex rel. ROHRER v. CREDLE

No. 480PA87.

Case below: 86 N.C. App. 633.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 2 December 1987.

PETITION TO REHEAR

IN RE WILL OF HESTER

No. 184A87.

Case below: 319 N.C. 673.

Petition by propounder-appellees denied 2 December 1987.

STATE OF NORTH CAROLINA v. OSCAR LLOYD

No. 577A85

(Filed 3 February 1988)

1. **Jury § 6.4— capital case—prospective jurors—exclusion of questions concerning religious affiliations**

The trial court in a first degree murder case did not abuse its discretion by prohibiting defense counsel from inquiring into prospective jurors' religious denominations and the extent of their participation in church activities where defendant was able to determine potential jurors' beliefs about capital punishment by asking them other questions.

2. **Jury § 7.12; Criminal Law § 135.3— capital punishment views—exclusion of jurors**

The trial court in a first degree murder case properly excluded two prospective jurors for cause where their answers to the prosecutor's questions clearly disclosed that they could not follow the law or instructions of the trial court if to do so would result in a death sentence.

3. **Criminal Law § 169.3— admission of evidence over objection—similar evidence admitted without objection**

Where evidence is admitted over objection, but the same or similar evidence has been admitted previously or is admitted subsequently without objection, the benefit of the objection is lost, and the defendant is deemed to have waived his right to assign as error the admission of the evidence.

4. **Criminal Law § 73.4— excited utterances—exclusion as harmless error**

Even if it is assumed that statements made by defendant as he emerged from the crime scene that he had found the victim's body on the floor and turned it over were admissible as excited utterances, the exclusion of such evidence was not prejudicial error in light of the overwhelming evidence of defendant's guilt of the first degree murder of the victim. N.C.G.S. § 8C-1, Rule 803(2).

5. **Criminal Law § 135.9— capital case—mitigating circumstance—no significant history of prior criminal activity—sufficient evidence**

The trial court in a first degree murder case did not err in submitting for the jury's consideration over defendant's objection the statutory mitigating circumstance of "no *significant* history of prior criminal activity" where there was evidence tending to show that defendant had been convicted of two felonies almost twenty years before his trial in the present case, that defendant had been convicted of seven alcohol-related misdemeanors in the last ten years, and that defendant had suffered from episodic alcohol abuse for the past ten years. N.C.G.S. § 15A-2000(f)(1).

6. **Criminal Law § 135.9— capital case—nonstatutory mitigating circumstances—no prior capital offenses and no felonies in past ten years—court's refusal to submit**

The trial court in a first degree murder case did not err in refusing to submit to the jury the nonstatutory mitigating circumstances that the defendant had no prior record of capital offenses and that the defendant had not been convicted of a felony in the past ten years since the court's submission of the mitigating circumstance of "no significant history of prior criminal activity," coupled with the submission of the mitigating circumstance of "any other circumstances arising from the evidence which the jury deems to have mitigating value," allowed the jury to consider defendant's criminal record as a whole and afforded the jury the flexibility necessary to give the defendant the benefit of any parts of his record it deemed of mitigating value.

7. **Criminal Law § 135.6— capital case—penalty phase—exclusion of psychological evaluation—absence of prejudice**

Defendant was not prejudiced by the trial court's exclusion of a psychological evaluation concerning defendant's competency to stand trial during the penalty phase of a first degree murder case where the purpose for introducing the psychological evaluation was to establish a mitigating circumstance regarding defendant's alcohol abuse, and the jury found as a mitigating circumstance that defendant had suffered from episodic alcohol abuse since 1973.

8. **Constitutional Law § 31— capital case—mitigating circumstances—funds for psychiatrist—insufficient preliminary showing**

Defendant did not make a sufficient showing that his mental condition was likely to be a significant factor during the sentencing phase of his first degree murder trial so as to require the trial court to allow defendant's motion for funds to hire a private psychiatrist or psychologist to assist him in preparing and presenting evidence concerning mitigating circumstances where counsel for defendant merely tendered to the court a psychiatric evaluation which included a notation that defendant had suffered from episodic alcohol abuse, and the only other "showing" made in support of the motion was defense counsel's statement to the effect that he felt the examination of defendant had been inadequate and that defendant was "constitutionally entitled to more." N.C.G.S. § 7A-450(b); N.C.G.S. § 7A-454.

9. **Criminal Law § 135.8— first degree murder—especially heinous, atrocious, or cruel aggravating circumstance—sufficient evidence**

The trial court in a first degree murder case properly submitted to the jury the "especially heinous, atrocious, or cruel" aggravating circumstance in that the evidence would support a finding that the level of brutality of the murder exceeded that normally found in first degree murder cases and that the murder was pitiless and unnecessarily torturous to the victim where the evidence tended to show: defendant deliberately sought out and robbed the victim when he knew the victim would be alone in his laundry; the victim was stabbed seventeen times during the struggle in which the victim attempted to fend off defendant's blows; after the victim lay fatally wounded on the floor, defendant kicked him about the head and shoulders with such force as to cause

the victim's brain to swell and hemorrhage and ultimately cause his death; and the victim did not die immediately but lingered for at least five to ten minutes before dying.

10. Criminal Law § 135.9— capital case—mitigating circumstances—requirement of unanimous decisions

Requiring jurors in a capital case to reach unanimous decisions regarding the presence of mitigating circumstances does not deprive a defendant of his right to a reliable sentencing hearing, his right to due process of law, or his right to be free from cruel and unusual punishment.

11. Criminal Law § 135.9— capital case—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.

12. Criminal Law § 102.12— first degree murder—effect of jury disagreement on death sentence—jury argument not permitted

The trial court did not err in prohibiting defendant from arguing to the jury in a first degree murder case that a life sentence would be imposed if the jury could not agree upon a sentence.

13. Criminal Law § 135.9— especially heinous, atrocious, or cruel aggravating circumstance—constitutionality

The "especially heinous, atrocious, or cruel" aggravating circumstance of N.C.G.S. § 15A-2000(e)(9) is neither unconstitutionally vague nor overbroad.

14. Criminal Law § 135.10— first degree murder—death sentence not disproportionate

A sentence of death for first degree murder was not imposed under the influence of passion, prejudice or any other arbitrary factor, and the record supported the jury's findings of the aggravating circumstances on which the sentence of death was based—that the murder was especially heinous, atrocious or cruel and was committed while defendant was engaged in the commission or attempt to commit a robbery. Furthermore, the death sentence was not excessive or disproportionate to the penalty imposed in similar cases where defendant was convicted of first degree murder on the basis of premeditation and deliberation and of robbery; defendant deliberately sought out and robbed the victim when he knew the victim would be alone in his laundry; the victim was stabbed seventeen times and repeatedly kicked about the head after he was on the floor in a prone position; and the victim did not die immediately but remained helpless on the floor awaiting his impending death for a minimum of five to ten minutes after sustaining the most significant blows.

APPEAL from judgment and sentence of death entered by *Friday, J.*, at the 15 July 1985 Criminal Session of Superior Court, CHEROKEE County. The defendant was charged in bills of indictment, proper in form, with robbery with a dangerous weapon and

murder of Burton B. Cornwell, Jr. The jury found the defendant guilty of murder in the first degree and robbery with a dangerous weapon. Following a sentencing hearing held pursuant to N.C.G.S. § 15A-2000, the jury recommended that the defendant be sentenced to death for the murder conviction. The trial court complied with the jury's recommendation and also sentenced the defendant to a term of fourteen years imprisonment for the armed robbery conviction. From the judgment imposing a sentence of death, the defendant appealed to the Supreme Court as a matter of right under N.C.G.S. § 7A-27(a). On 21 October 1985, the Supreme Court allowed the defendant's motion to bypass the Court of Appeals on his appeal of the armed robbery conviction. Heard in the Supreme Court on 10 December 1987.

Lacy H. Thornburg, Attorney General, by J. Michael Carpenter, Special Deputy Attorney General, for the State.

Ann B. Petersen, for the defendant-appellant.

MITCHELL, Justice.

The defendant was convicted of the 12 March 1985 armed robbery and murder of Burton B. Cornwell, Jr. and sentenced to death and a term of fourteen years. He has brought forward assignments of error relative to the guilt-innocence phase and the sentencing phase of his trial. Having considered with care the entire record and each of the assignments, we find no prejudicial error in either phase of the defendant's trial. We decline to disturb the defendant's convictions or sentences.

The evidence presented by the State tended to show that at 8:00 a.m. on Tuesday, 12 March 1985, Burton Cornwell went to work at Murphy Laundry and Dry Cleaning in Murphy, North Carolina. The laundry, located adjacent to a service station and directly across the street from Ivie Funeral Home, had been owned and operated by Cornwell for about thirty-five years. On Tuesdays, Cornwell worked alone at the laundry doing alterations and taking in and giving out laundry.

The defendant had been employed as a washer at Murphy Laundry for approximately four years. He worked at the laundry until 21 December 1984 when he left on a two-week vacation. When he returned to work six weeks later, Cornwell fired him.

Pat Tagliarini testified that she went into Murphy Laundry and spoke briefly with Cornwell at 8:14 a.m. on 12 March 1985, the morning of Cornwell's murder. Cornwell was the only person in the laundry at that time.

At approximately 8:15 a.m. Marvin Cook, an employee of Ivie's Funeral Home, observed the defendant enter the laundry. He testified that the defendant came back outside at about 8:30 a.m. "hollering and motioning" for Cook to come over to the laundry. Cook ran across the street and, upon entering the laundry, saw Cornwell lying on the floor behind the service counter. Cook described the victim as lying on his back with "blood from one end to the other."

Officer Williford Dills of the Murphy Police Department testified that on 12 March 1985 when he arrived at the scene, he observed the cash register turned from its normal position on the counter. The drawer was open and several coins were on the floor. Officer Dills positively identified a knife found at the murder scene as the defendant's. He stated that the knife had hair and blood on it when he seized it at the scene.

Murphy Police Chief C. C. Howard testified that when he entered the laundry on 12 March 1985, he observed that the gumball machine was broken, the cash register was turned from its normal position, the cash drawer was open and coins and straight pins were all over the floor. Chief Howard further testified that there were bloody shoe prints on the laundry floor. These shoe prints had a pattern described by several witnesses as being a "waffle" or "grid" pattern.

Highway Patrolman Tom Cheek, who transported the defendant from Murphy Laundry to the jail, testified that the defendant's tennis shoes were covered with blood which had "seeped or soaked into the material part of the shoes." Cheek recovered from the defendant's right front pants pocket a fifty-dollar bill folded in a distinct way and stained with blood.

Sharon Donahue was at the service station adjacent to Murphy Laundry when she saw Grier Ivie and Marvin Cook running across the street from the funeral home to the laundry. Donahue went into the laundry and observed the victim lying on the floor. While she was in the laundry, she heard the defendant yelling,

"Oh, shit. Oh, no. No, No." After Donahue checked the victim's pulse and found none, the defendant exclaimed, "You shouldn't have done it." Donahue further recalled that she had seen the defendant in the laundry on 2 March 1985, the day before her husband's birthday. She testified that as she walked by the laundry on that day, she heard Cornwell yelling at the defendant in an angry tone of voice and pointing to the door.

On the day following the murder, Officer Dills and Chief Howard made a more detailed search of the premises and discovered the victim's wallet hidden in a washer on the premises. The wallet contained, among other things, two fifty-dollar bills folded in the same distinct way as the fifty-dollar bill recovered from the defendant.

Kenneth Cope, an agent for the State Bureau of Investigation, searched the premises on 13 March 1985 and discovered a letter from the Employment Security Commission among other business papers on the victim's desk. This letter was admitted into evidence over the defendant's objection.

A pathologist's report indicated that Cornwell had suffered thirty-six wounds on his body. These wounds included both sharp-edged lacerations, suggesting stabs by a knife, and jagged lacerations, suggesting blows by a blunt object. Specifically, Cornwell's death was caused by a blunt trauma to the head which caused his brain to swell and hemorrhage. In the pathologist's opinion, the victim lived a minimum of five to ten minutes after sustaining the most significant blows. The pathologist further opined that several of the blunt force wounds to the head were consistent with being kicked about the head while in a prone position.

An expert in the field of footwear impressions testified that in his opinion the defendant's shoes could have made the impression on the victim's forehead. He also opined that the defendant's shoes were the same shoes that made bloody shoe prints observed all over the laundry floor.

I.

GUILT-INNOCENCE DETERMINATION PHASE

[1] In the defendant's first assignment of error he contends that the trial court abused its discretion during jury selection by pro-

hibiting defense counsel from inquiring into prospective jurors' religious denominations and the extent of their participation in church activities. The trial court is vested with broad discretion in controlling the extent and manner of questioning of prospective jurors, and its decisions in this regard will not be disturbed absent a showing of an abuse of discretion. *State v. Brown*, 315 N.C. 40, 55, 337 S.E. 2d 808, 820 (1985), *cert. denied*, --- U.S. ---, 90 L.Ed. 2d 733 (1986). In the present case, we conclude that the trial court properly prohibited the defense counsel's inquiry into the religious affiliations and practices of prospective jurors.

Even though the State and the defendant are entitled to inquire into a prospective juror's beliefs and attitudes, neither has the right to delve without restraint into all matters concerning potential jurors' private lives. There are numerous questions wholly unrelated to specific religious affiliations and practices which may be asked to determine a potential juror's attitudes and biases. In the present case the defendant was afforded broad latitude during jury selection. For example, he was able to determine jurors' attitudes about the death penalty by asking, *inter alia*, whether they had "any conscientious, moral or religious objections to the infliction of the death penalty." By asking such questions the defendant was able to determine potential jurors' beliefs about capital punishment without intrusive delving into their private religious beliefs. Since the defendant was able to elicit the information necessary to select competent, fair and impartial jurors without questioning potential jurors about their personal religious beliefs and affiliations, we conclude that the trial court did not abuse its discretion in limiting *voir dire* questioning of prospective jurors as to their religious affiliations. *Cf. State v. Huffstetler*, 312 N.C. 92, 322 S.E. 2d 110 (1984) (not error to prevent defendant from asking prospective jurors about views of their church leaders), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985).

We also note that the defendant in the present case failed to exhaust his peremptory challenges. The record indicates that the defendant was not forced to accept any juror objectionable to him, since he still had two peremptory challenges remaining after the last juror was accepted. The defendant has, therefore, failed to show any possible prejudice resulting from the trial court's rulings regarding jury selection and may not now be heard to com-

plain. *See, e.g., State v. Wilson*, 313 N.C. 516, 524-25, 330 S.E. 2d 450, 457 (1985). This assignment of error is overruled.

[2] The defendant by his next assignment of error contends that two of the jurors challenged for cause due to their opposition to capital punishment may have been improperly dismissed in violation of the standard established in *Witherspoon v. Illinois*, 391 U.S. 510, 21 L.Ed. 2d 776 (1968). In *Wainwright v. Witt*, 469 U.S. 412, 83 L.Ed. 2d 841 (1985), the Supreme Court clarified *Witherspoon* and held that the proper standard for determining whether a prospective juror may be excluded for cause due to views concerning the death penalty 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.' " 469 U.S. at 433, 83 L.Ed. 2d at 851-52 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L.Ed. 2d 581, 589 (1980)). We have carefully examined the *voir dire* testimony of each of the two jurors whom the defendant contends were improperly excluded. Their answers to the prosecutor's questions clearly disclosed that they could not follow the law or instructions of the trial court, if to do so would result in a death sentence. Therefore, they were properly excluded under the standard set out in *Witt*. This assignment of error is without merit and is overruled.

[3] The defendant next contends that the trial court erred in admitting over objection the contents of a letter from the Employment Security Commission found on the victim's desk. This letter stated that the defendant had been discharged from the victim's employ, and it was offered by the State as evidence of the defendant's motive for killing Cornwell. The defendant objected to the admission of the contents of the letter as being irrelevant and because no proper foundation for its admissibility had been established.

Even if it is assumed *arguendo* that the evidence was inadmissible, this assignment of error is not properly before this Court. On cross-examination Leona Cornwell, the victim's wife, testified without objection that the defendant had been fired from the Murphy Laundry. Where evidence is admitted over objection, but the same or similar evidence has been admitted previously or is admitted subsequently without objection, the benefit of the objection is lost, and the defendant is deemed to have waived his

right to assign as error the admission of the evidence. *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450; *State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982); *State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978). We therefore overrule this assignment of error.

[4] The defendant next assigns as error the trial court's exclusion of hearsay evidence of certain exculpatory statements made by him as he emerged from the scene of the crime. On direct examination, Grier Ivie testified that he went across the street to the Murphy Laundry after the defendant ran out of the laundry waving his arms and hollering. On cross-examination, the defendant attempted to present evidence of the statements he made to Ivie to the effect that the defendant found the victim's body on the floor and turned it over. The trial court ruled that the evidence was inadmissible. The defendant contends that evidence of these statements was admissible because his statements were excited utterances under N.C.G.S. § 8C-1, Rule 803(2).

It is well established that a trial court's ruling on an evidentiary point will be presumed to be correct unless the complaining party can demonstrate that the particular ruling was in fact incorrect. *State v. Milby*, 302 N.C. 137, 273 S.E. 2d 716 (1981). Even if the complaining party can demonstrate that the trial court erred in its ruling, relief will not be granted absent a showing of prejudice. *Id.*; N.C.G.S. § 15A-1443(a) (1983). "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached." *Id.* In the present case, even if it is assumed *arguendo* that the exclusion of testimony as to the defendant's self-serving statements was erroneous, we conclude that the defendant has not shown that he was prejudiced.

The evidence presented at trial tended to show that the defendant had been fired from the victim's employ sometime during February, 1985. The defendant was very familiar with the operating schedule of Murphy Laundry and knew that Cornwell always worked alone on Tuesdays. Witnesses testified that the defendant was the only person seen going into Murphy Laundry during the fifteen minute period between the time the victim was last seen alive and the time he was found murdered. A bloody

knife, positively identified as the defendant's, was recovered from the crime scene. Bloody shoe prints matching the "grid" pattern of the defendant's shoes were found all over the laundry floor and on the victim's forehead. Moreover, a bloodstained fifty-dollar bill folded in the same unusual manner as those in the victim's wallet was seized from the defendant after his arrest. In light of the overwhelming evidence of the defendant's guilt, we conclude that there is no reasonable possibility that, had the statements he made when he ran out of the laundry been admitted into evidence, a different result would have been reached at trial. Thus, any possible error in this regard was harmless in light of the other evidence properly admitted at trial, and the defendant's assignment of error is overruled. *See, e.g., State v. Morgan*, 315 N.C. 626, 640, 340 S.E. 2d 84, 93 (1986).

II.

SENTENCING PHASE

In the defendant's next assignment of error he contends that the trial court erred by refusing to submit two nonstatutory mitigating circumstances to the jury for their consideration and by, instead, submitting the statutory mitigating circumstance of "no significant history of prior criminal activity." N.C.G.S. § 15A-2000 (f)(1) (1983).

During the penalty phase, the defendant tendered to the trial court a list of mitigating circumstances including, *inter alia*, the defendant had no prior record of capital offenses and the defendant had not been convicted of a felony in the last ten years. In support of these mitigating circumstances, the defendant offered into evidence a certified copy of his criminal record in Cherokee County, North Carolina, which consisted of a series of convictions for being drunk in public, being drunk and disorderly and for driving under the influence. In rebuttal, the State offered into evidence certified copies of two Michigan convictions for felonies committed by the defendant in 1965 and 1966. After reviewing the evidence, the trial court submitted the following eight mitigating circumstances for the jury's consideration: (1) the defendant has no significant history of prior criminal offenses; (2) since his arrest, the defendant has shown no tendencies of violence towards others; (3) since his arrest, the defendant has abided by

the rules and regulations of the Cherokee County Jail; (4) the defendant has adapted well to life as a prisoner; (5) the defendant has suffered from episodic alcohol abuse since 1973; (6) the defendant has been a loving and affectionate son to his mother; (7) the defendant has been a loving and affectionate father to his son; (8) any other circumstances arising from the evidence which the jury deems to have mitigating value.

The defendant contends that the trial court committed prejudicial error of a constitutional dimension by refusing to submit the nonstatutory mitigating circumstances relating to the defendant's criminal record and by submitting, over the defendant's objection, the statutory mitigating circumstance of "no significant history of prior criminal activity." The defendant argues that the trial court's ruling deprived him of his constitutionally guaranteed rights of effective assistance of counsel, due process of law and freedom from cruel and unusual punishment. We disagree.

[5] First, we consider and reject the defendant's argument that the trial court erred in submitting, over his objection, the statutory mitigating circumstance of "no significant history of prior criminal activity." N.C.G.S. § 15A-2000(b) which controls the submission of aggravating and mitigating circumstances in capital cases states:

> Instructions determined by the trial judge to be *warranted by the evidence shall be given* by the court in its charge to the jury prior to its deliberation in determining sentencing. In all cases in which the death penalty may be authorized, the judge *shall include* in his instructions to the jury that it *must consider* any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which *may be supported by the evidence*, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

N.C.G.S. § 15A-2000(b) (1983) (emphasis added).

When evidence is presented in a capital case which may support a statutory mitigating circumstance, the trial court is mandated by the language in N.C.G.S. § 15A-2000(b) to submit that

circumstance to the jury for its consideration. Once the trial court determines that the jury could reasonably find a mitigating circumstance, the statute affords the trial court no discretion in submitting the mitigating circumstance. Our review of this issue is, therefore, limited to determining whether there was evidence in the present case which would support a reasonable finding of the mitigating circumstance of "no significant history of prior criminal activity." We conclude that in the case at bar such evidence was present and, under the mandates of N.C.G.S. § 15A-2000(b), the trial court was correct in submitting this mitigating circumstance for consideration.

N.C.G.S. § 15A-2000(b) unequivocally sets forth the legislature's intent that in every case the jury be allowed to consider all statutory aggravating or mitigating circumstances which the jury might reasonably find supported by the evidence. It is clear that the legislature did not intend that the State or the defendant be allowed to limit in any way the jury's consideration of these statutorily established aggravating and mitigating circumstances. Allowing jurors to consider and weigh all of the statutory aggravating and mitigating circumstances which they reasonably might find supported by the evidence is the only way to ensure that juries distinguish cases in which the death penalty properly may be imposed from those in which it may not be imposed.

In the present case, the defendant's criminal record included two felony convictions. In 1965 the defendant, then age twenty-three, was convicted in Michigan of "assault with intent to rob not being armed." In 1966, the defendant was convicted in Michigan of "breaking and entering a business place with intent to commit larceny." From 1966 until the time of Cornwell's murder in 1985, the defendant was not charged with any serious criminal violations. During the years 1973-1984 the defendant was, however, convicted of seven alcohol-related misdemeanors. We do not suggest that the evidence in the present case would support a finding of *no* history of prior criminal activity. N.C.G.S. § 15A-2000(b) does not require such evidence before the mitigating circumstance must be submitted for the jury's consideration. Rather, the statute places upon the trial court the duty to determine whether the evidence will support a reasonable finding of the mitigating circumstance of "no *significant* history of

prior criminal activity." In the case at bar, the trial court was required to consider the evidence of the defendant's misdemeanor convictions in conjunction with his twenty-year-old felony convictions to determine whether his record as a whole would support a reasonable jury finding of the mitigating circumstance of "no significant history of prior criminal activity." The trial court correctly concluded that the evidence in this case would support such a finding.

A review of the defendant's record reveals that his only felony convictions occurred almost twenty years before his trial in the present case. This passage of time coupled with the fact that the defendant had no subsequent felony convictions tended to lessen the significance of his criminal activities. Further, all of the defendant's misdemeanor convictions were alcohol related, e.g., public drunkenness and driving while under the influence. The fact that the evidence tended to show that the defendant had suffered from episodic alcohol abuse since 1973 further tended to lessen the significance of the defendant's alcohol-related misdemeanor convictions. For these reasons, we conclude that the trial court was correct in its view that a jury could reasonably find the mitigating circumstance of "no *significant* history of prior criminal activity" and that the trial court was correct in submitting that factor for consideration in the present case.

[6] We now consider the defendant's argument that the trial court committed prejudicial error in refusing to submit the nonstatutory mitigating circumstances that the defendant had no prior record of capital offenses and that the defendant had not been convicted of a felony in the last ten years. Generally, a defendant is entitled to have a jury consider any circumstance that may have mitigating value. *State v. Zuniga*, 320 N.C. 233, 357 S.E. 2d 898 (1987). Our legislature ensured that a defendant would have the benefit of every circumstance having mitigating value by providing that the jury always consider, in addition to other statutory mitigating circumstances, "[a]ny circumstance arising from the evidence which the jury deems to have mitigating value." N.C.G.S. § 15A-2000(f)(9) (1983).

By submitting for the jury's consideration the statutory mitigating circumstance of "no significant history of prior criminal activity" the trial court allowed the jury to consider the

defendant's criminal record as a whole. In so doing, the trial court insured that the jury had at its disposal all of the information necessary to weigh the "significance" of or importance of the defendant's complete prior criminal record. The jury could see from a review of the defendant's record that he had not been convicted of any felonies for a period of ten years, that he had no prior record of capital offenses and any number of other points that they may have found favorable to the defendant. The submission of the mitigating circumstance "no significant history of prior criminal activity" coupled with the submission of the mitigating circumstance "any other circumstances arising from the evidence which the jury deems to have mitigating value" afforded the jury the flexibility necessary to give the defendant the benefit of any parts of his record it deemed of mitigating value. In light of the authority given to the jury to consider any and all facts of mitigating value, we conclude that the trial court properly instructed the jury regarding mitigating circumstances to be considered concerning the defendant's prior criminal record. For the foregoing reasons, we overrule this assignment of error.

[7] The defendant next assigns as error the trial court's exclusion of a psychological evaluation prepared by Dorothea Dix Hospital regarding the defendant's competency to stand trial. Twice during the penalty phase the defendant sought to introduce this report as evidence in support of the nonstatutory mitigating circumstance that the defendant had suffered from episodic alcohol abuse since 1973. The defendant contends that the report was admissible under N.C.G.S. § 8C-1, Rule 803(8)(c) (public records exception to the hearsay rule). Even assuming *arguendo* that the psychological evaluation was admissible, we conclude that its exclusion was harmless. The purpose for introducing the psychological evaluation was to establish the mitigating circumstance regarding the defendant's alcohol abuse. Only one brief notation in the report mentioned this condition. Since the jury found as a mitigating circumstance that the defendant had suffered from episodic alcohol abuse since 1973, the omission of this evidence could not have prejudiced the defendant. This assignment of error is overruled.

[8] The defendant next contends that the trial court erred by denying his motion for funds to hire a private psychologist to aid him in preparation and presentation of evidence during the penal-

ty phase of the trial. The defendant bases his entitlement to such help upon N.C.G.S. § 7A-450(b) which provides for the State to furnish an indigent defendant "with counsel and the other necessary expenses of representation," and N.C.G.S. § 7A-454, which provides that the trial court may in its discretion "approve a fee for the service of an expert witness who testifies for an indigent person, ..." *See State v. Gardner*, 311 N.C. 489, 498, 319 S.E. 2d 591, 599 (1984).

On 25 June 1985, the defendant moved for the appointment of an expert to examine the defendant for the purposes of determining his "present state of mental health." By order dated 26 June 1985, the defendant was committed to Dorothea Dix Hospital to determine his capacity to stand trial. The psychiatrist's report, made available to the parties, indicated that the defendant was competent to stand trial and that there was "nothing to suggest that [the defendant] would not be responsible for his actions."

On 5 July 1985, the defendant moved that funds be made available to hire a private psychologist or psychiatrist to assist him in the investigation of potential mitigating circumstances for the penalty phase of the trial. Following a hearing, the trial court denied this motion.

It is well established in this jurisdiction that the issue of whether a private psychiatrist should be appointed under N.C.G.S. §§ 7A-450(b) and 7A-454 to assist an indigent defendant ordinarily rests within the sound discretion of the trial court. *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976). Experts should be provided under those statutes only when there is a reasonable likelihood that they will materially assist the defendant in the preparation of his defense or that without such help it is probable that the defendant will not receive a fair trial. *State v. Gray*, 292 N.C. 270, 278, 233 S.E. 2d 905, 911 (1977); *see also State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981), *cert. denied*, 456 U.S. 932, 72 L.Ed. 2d 450 (1982). Further, neither the state nor the federal constitution requires that expert assistance always be made available simply for the asking.

The defendant concedes that he did not make a sufficient showing to require the trial court to authorize funds for a private psychologist or psychiatrist to assist him in the guilt-innocence phase of the trial. He argues, however, that he made a showing

sufficient to establish a constitutional right to the employment, at State expense, of a psychiatric expert to assist him in preparing and presenting evidence concerning mitigating circumstances during the sentencing phase of his trial.

In support of this argument, the defendant relies upon *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed. 2d 53 (1985), and *State v. Gambrell*, 318 N.C. 249, 347 S.E. 2d 390 (1986). Both *Ake* and *Gambrell* held that:

> when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one.

Ake, 470 U.S. at 74, 84 L.Ed. 2d at 60, *quoted in Gambrell*, 318 N.C. at 255, 347 S.E. 2d at 393. The defendant argues that we should expand the holdings of *Ake* and *Gambrell* and hold here that due process requires the State to provide an indigent defendant access to a psychiatrist's assistance for the preparation and presentation of his case in the penalty phase of a capital trial, when he has made a showing that a mitigating circumstance relating to his mental condition will be a significant factor. We find it unnecessary to decide in this case whether the holdings of *Ake* and *Gambrell* may be expanded in any such fashion.

Assuming, *arguendo*, that *Ake* and *Gambrell* require the State to provide the defendant psychiatric assistance in the preparation and presentation of evidence as to mitigating circumstances concerning his mental condition, the defendant still has the burden of making the necessary showing *to the trial court* at the time of his motion that such mitigating circumstances will likely be significant factors during the sentencing phase. *Ake*, 470 U.S. at 83, 84 L.Ed. 2d at 66. Here, the defendant failed to make the necessary showing in the trial court.

On 5 July 1985, the defendant filed a motion for funds to hire a psychiatrist or psychologist to examine him and assist him in the investigation of potential defenses and potential mitigating circumstances. A pretrial hearing was held on 25 July 1985, at which time the trial court considered this and other motions. At the hearing, counsel for the defendant tendered the psychiatric

report finding the defendant competent to stand trial and stated the following:

> Also, in a separate Motion, Motion For The Payment Of Fees For A Psychological Examination Of Defendant. Whether or not he has the intent and so forth necessary to formulate the elements of this crime, but also in the sentencing phase may it please the Court. I believe the Court is fully aware of the mitigating circumstances and the Defendant's right to introduce anything basically that he feels might be in mitigation of this matter. There has been a psychological examination done or at least allegedly a psychological examination done down at Dorothea Dix Hospital. If I could hand that up to the Court as part of this argument and ask that it be made a part of this Motion. We would say to the Court that that amounts to, we would say that that amounts to nothing. We got the Defendant down there one or two days I think he arrived in the afternoon they kept him one day and he was back on his way to Franklin the next day may it please the Court. There was no IQ testing done, there is no history given in that report. All it basically says is that we talked to him and he said he didn't do it and we think he was in good shape. We think he is rightfully and constitutionally entitled to more than that may it please the Court, by way of psychological evaluation and examination. He is indigent, he can't have it, if he had money he would pay it, we think he is entitled to it and we certainly think he is entitled to more than he is given in this report. We have also been contacting psychologists, as I think we outlined in that Motion who is available, has agreed to this and is ready, willing, and able, and we think that this certain request should not be taken lightly and we think it is essential to our case as I've said before, not only for the guilt phase but as far as the sentencing phase as well, your honor. And by that I am not abandoning the request for the psychologist aid in the selection of the jury, but these are two separate things, may it please the Court, the same would possibly be utilized but is not one in the same.

This "showing" before the trial court in support of the motion was entirely inadequate.

Even assuming *arguendo* the applicability of the rationale of *Ake* and *Gambrell* to motions for psychiatric assistance in the preparation and presentation of evidence concerning mitigating circumstances at the sentencing phase, the "showing" before the trial court in the present case is a far cry from the showing made in those cases. In both *Ake* and *Gambrell*, the defendants informed the trial court prior to trial that they would rely upon the insanity defense. In *Ake*, the trial court knew that the defendant had been diagnosed by a psychiatrist as being a paranoid schizophrenic who, because of his illness, was dangerous, was subject to rages, and was required to be confined within the maximum security facility of a psychiatric hospital. *Ake*, 470 U.S. at 71, 84 L.Ed. 2d at 58-59. In *Gambrell*, similar evidence was introduced in the trial court in support of Gambrell's motion for psychiatric assistance. *Gambrell*, 318 N.C. at 253-55, 347 S.E. 2d at 392.

In the present case, counsel for the defendant merely tendered to the Court a psychiatric evaluation which included a notation that the defendant had suffered from episodic alcohol abuse. The only other "showing" made in support of the motion was defense counsel's statement to the effect that he felt the examination had been inadequate and that the defendant was "constitutionally entitled to more . . . ." This "showing" by the defendant fell far short of a demonstration to the trial court that his mental condition at the time of the offense was likely to be a significant factor during the sentencing phase of his trial. *See Ake v. Oklahoma*, 470 U.S. at 74, 84 L.Ed. 2d at 60; *State v. Gambrell*, 318 N.C. at 255, 347 S.E. 2d at 393. Certainly, this "showing" was entirely inadequate to meet the defendant's statutory burden to show "a reasonable likelihood that [the expert] would materially aid in the preparation of his defense." *State v. Gray*, 292 N.C. at 278, 233 S.E. 2d at 911. The trial court did not err in denying the defendant's motion, given the paucity of the showing made by the defendant prior to the trial court's ruling on the motion.

[9] The defendant next assigns as error the submission for the jury's consideration of the aggravating circumstance that the killing was "especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9) (1983). He contends that the evidence did not support the existence of this aggravating circumstance and that he is, therefore, entitled to a new sentencing hearing. We do not agree.

Although every murder may be characterized as heinous, atrocious, and cruel, our legislature has made it clear that this aggravating circumstance may be found only in cases in which the first-degree murder committed was either *especially* heinous, *especially* atrocious, or *especially* cruel. N.C.G.S. § 15A-2000(e)(9) (1983). Therefore, a finding that this statutory aggravating circumstance exists is permissible when the level of brutality involved exceeds that normally found in first-degree murder or when the first-degree murder in question was conscienceless, pitiless or unnecessarily torturous to the victim. *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). We have also stated that this circumstance is present when the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder. *State v. Stanley*, 310 N.C. 332, 345, 312 S.E. 2d 393, 401 (1984).

In *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983), we identified two of the types of first-degree murders which would warrant the submission of the especially heinous, atrocious, or cruel aggravating circumstance to the jury. One type consists of killings which are physically agonizing for the victim or which are in some other way dehumanizing. The other type consists of those killings which are less violent, but involve the infliction of psychological torture, including placing the victim in agony in his last moments, aware of, but helpless to prevent, impending death.

In determining whether the evidence is sufficient to support a finding of essential facts which would support a determination that a murder was "especially heinous, atrocious, or cruel," the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984).

The evidence in the instant case supported a finding that the level of brutality exceeded that normally found in first-degree murder cases and that it was pitiless and unnecessarily torturous to the victim. The evidence taken in the light most favorable to the State tended to show that the defendant entered Murphy Laundry at a time when he knew the victim would be working alone. During the struggle in which Cornwell attempted to fend off the defendant's blows, Cornwell was stabbed seventeen times.

After Cornwell lay fatally wounded on the floor, the defendant kicked him about the head and shoulders with such force as to cause the victim's brain to swell and hemorrhage and ultimately cause his death. Evidence further tended to show that the victim did not die immediately; rather, he lingered for at least five to ten minutes before dying. We have repeatedly held, in factual situations comparable to the present one, that the "especially heinous, atrocious, or cruel" aggravating circumstance is properly submitted where there is evidence that the killing involved a prolonged death or was committed in a fashion beyond that necessary to effect the victim's death. *See, e.g., State v. Reese*, 319 N.C. 110, 353 S.E. 2d 352 (1987). In the present case the evidence was sufficient to support the jury's finding of the aggravating circumstance that the first-degree murder was "especially heinous, atrocious, or cruel" beyond a reasonable doubt. N.C.G.S. § 15A-2000(c)(1) (1983) (for imposition of death sentence, aggravating circumstances must be found beyond a reasonable doubt). Therefore, defendant's assignment of error is overruled.

[10] In his remaining assignments of error concerning the sentencing phase of his trial, the defendant asks this Court to reconsider issues we have recently resolved. First, the defendant argues that requiring jurors to reach unanimous decisions regarding the presence of mitigating circumstances deprives him of his right to a reliable sentencing hearing, his right to due process of law and his right to be free from cruel and unusual punishment. We have recently rejected this argument. *State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1 (1987). We decline to overrule our recent holding in *Brown*.

[11] Second, the defendant requests that we reject our holding in *State v. Barfield*, 298 N.C. 306, 353-54, 259 S.E. 2d 510, 544 (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), *reh'g denied*, 454 U.S. 1117, 70 L.Ed. 2d 655 (1981), and hold, instead, that the concept of due process requires 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. Brown*, 320 N.C. at 216, 358 S.E. 2d at 25.

[12] Third, the defendant argues that the trial court erred in prohibiting him from arguing to the jury that if it could not agree upon a sentence, a life sentence would be imposed. In *State v. Johnson*, 317 N.C. 343, 346 S.E. 2d 596 (1986), we held that it is improper for the jury to be told that a sentence of life imprisonment will be imposed upon the defendant in the event that the jury is unable to reach unanimous agreement on the proper sentence to recommend. The defendant has brought forth no arguments that persuade us to overrule our decision in *Johnson*. This assignment is, therefore, overruled.

[13] Finally, the defendant asks that we overrule a long line of cases in which we have held that the "especially heinous, atrocious, or cruel" aggravating circumstance of N.C.G.S. § 15A-2000(e)(9) is consistent with the mandates of our state and federal constitutions. *E.g., State v. Stanley*, 310 N.C. at 332, 312 S.E. 2d at 393; *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. denied*, 454 U.S. 983, 70 L.Ed. 2d 240 (1981). We decline to do so. We have reviewed our interpretation of N.C.G.S. § 15A-2000(e)(9), and we again conclude that the statute is neither unconstitutionally vague nor overbroad. This assignment of error is overruled.

III.

STATUTORY REVIEW OF SENTENCE BY SUPREME COURT

[14] Having determined that the defendant's trial was free from prejudicial error during the guilt-innocence and sentencing phases, we turn to duties reserved by statute for this Court in reviewing the judgment and sentence of death. N.C.G.S. § 15A-2000(d)(2) (1983). We must ascertain whether the record supports the jury's findings of the aggravating circumstances on which the sentence of death was based; whether the death sentence was imposed under the influence of passion, prejudice, or other arbitrary circumstance; and whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *Id.*

We have thoroughly examined the record, transcripts, and briefs in this case. We have also closely examined those exhibits which were forwarded to the Court. We find that the record fully supports the submission of the aggravating circumstances which were considered and found by the jury. Further, we find no in-

dication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary circumstance.

We now undertake our final statutory duty of proportionality review. This duty requires the Court to determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant.

> 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.

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).

In conducting this review, we use *all* of the cases in the "pool" of similar cases announced 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). *See also State v. Jackson*, 309 N.C. 26, 45, 305 S.E. 2d 703, 717 (1983). Although the "pool" is used for comparison purposes, in every proportionality review, this Court's emphasis is on an "independent consideration of the individual defendant and the nature of the crime or crimes which he has committed." *State v. Pinch*, 306 N.C. 1, 36, 292 S.E. 2d 203, 229, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983). In *Williams*, we expressly rejected any approach that would utilize "mathematical or statistical models . . . ." *Williams*, 308 N.C. at 80, 301 S.E. 2d at 355. We indicated our view that reliance upon any such quantitative analysis would tend to deny the defendant "the constitutional right to 'individualized consideration' as that concept was expounded in *Lockett v. Ohio*, 438 U.S. 586, 604-05, 98 S.Ct. 2954, 2964-65, 57 L.Ed. 2d 973 (1978) (Burger, C.J., plurality opinion)." *State v. Williams*, 308 N.C. at 81, 301 S.E. 2d at 356. Instead, we said that we would "rely upon our own case reports

in the 'similar cases' forming the pool" in order to carry out this review. *Id.*

In the present case, the defendant was convicted by the jury of first-degree murder on the basis of premeditation and deliberation. The jury found two aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel; and (2) the murder was committed by the defendant while he was engaged in the commission of or an attempt to commit robbery. The jury found four mitigating circumstances: (1) Since the arrest of the defendant for the murder, the defendant had shown no tendencies of violence toward others; (2) Since the arrest of the defendant, he had abided by the rules and regulations of the Cherokee County Jail; (3) The defendant had adapted well to life as a prisoner; and (4) The defendant had suffered from episodic alcohol abuse since 1973. Having compared the first-degree murder and the defendant in this case with those in the pool of similar cases we use for proportionality review, we conclude that, as is so often the situation we face, no case in the pool arose from identical facts or involved a situation in which the jury, as here, convicted the defendant of premeditated and deliberate murder and found the identical aggravating and mitigating circumstances found by the jury in this case.

Where juries have found either the aggravating circumstance that the first-degree murder was especially heinous, atrocious, or cruel or the aggravating circumstance that the murder was committed during the commission of a robbery, juries have not consistently recommended either life or death sentences. *See generally State v. Stokes*, 319 N.C. 1, 352 S.E. 2d 653 (1987). This is not surprising and, indeed, was anticipated by this Court in *Williams*, since the nature of the crime and the defendant will vary markedly from case to case. *See generally State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335.

We turn then to a comparison of the present case with cases in which this Court has ruled upon the proportionality issue. This case is not closely similar to any of the cases in which this Court has found the death penalty disproportionate and entered a sentence of life imprisonment. Each of those cases included facts not present here.

In *State v. Stokes*, 319 N.C. at 1, 352 S.E. 2d at 335, for example, the defendant was convicted solely on a felony murder theory, and the majority of this Court felt there was little or no evidence of a premeditated killing. Here, the defendant was convicted of murder by premeditation and deliberation and, additionally, of robbery. *Stokes* is also easily distinguishable from the present case because Stokes' co-defendant, whom the majority of this Court seemed to believe more culpable than Stokes, was sentenced to life imprisonment.

In *State v. Rogers*, 316 N.C. 203, 341 S.E. 2d 713 (1986), the only aggravating circumstance found by the jury was that the murder for which Rogers was convicted was part of a course of conduct which included the commission of violence against another person or persons. This Court was of the view that the murder in *Rogers*, unlike that in the present case, did not evidence the viciousness and cruelty present in cases in which juries had recommended death. Therefore, the death sentence was vacated and a sentence of life imprisonment was imposed.

In *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985), the defendant was convicted of first-degree murder, first-degree burglary and robbery with a dangerous weapon. The jury found as aggravating circumstances that the murder was committed during the commission of a robbery or burglary and that it was committed for pecuniary gain. Unlike the present case, the jury considered but rejected the aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

In *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163 (1984), the defendant was convicted of first-degree murder. The single aggravating circumstance found was that the murder was committed against a law enforcement officer engaged in the performance of his official duties. The officer had chased down the defendant on foot, and the two men had struggled until the officer was shot with his own weapon. This Court felt that:

> Given the somewhat speculative nature of the evidence surrounding the murder here, the apparent lack of motive, the apparent absence of any simultaneous offenses, and the incredibly short amount of time involved, together with the jury's finding of three mitigating circumstances tending to show defendant's lack of past criminal activity and his being

> gainfully employed, and the unqualified cooperation of defendant during the investigation, we are constrained to hold as a matter of law that the sentence imposed here is disproportionate within the meaning of G.S. 15A-2000(d)(2).

Id. at 479, 319 S.E. 2d at 172. It is readily apparent that both the facts and the aggravating and mitigating circumstances in *Hill* were entirely unlike those in the present case.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983), the evidence tended to show that the defendant and a group of drunken friends were riding in a car when the defendant taunted the victim by telling him he would shoot him and questioning whether the victim believed the defendant would shoot him. The defendant shot the victim, then directed the driver to proceed immediately to the emergency room of the local hospital. The jury found as aggravating circumstances that the crime was especially heinous, atrocious, or cruel, and that it was a part of a course of conduct including crimes of violence against other persons.

In concluding that the death penalty was disproportionate in *Bondurant*, this Court emphasized that, unlike the present case, the murder was not committed in the perpetration of another felony, and the defendant did not calculate the commission of the crime over a significant period of time. This Court also emphasized that the evidence indicated that the defendant and his companions were highly intoxicated at the time of the killing, that there was no apparent motive for the killing, and that the defendant sought immediate medical attention for the deceased. Although the evidence in the present case could be viewed as showing that the defendant sought assistance for the victim, the evidence also would have supported the jury in believing that this was merely a ruse by the defendant in an effort to remove suspicion from himself after he knew that his crime was about to be discovered and that his victim was already dead. Otherwise, the facts in *Bondurant* were entirely unlike the facts in the present case.

In *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983), the defendant was on foot and waved down the victim as the victim passed in his truck. Not long thereafter, the victim's body was discovered in the truck. He had been shot twice in the head, and his wallet was gone.

In finding the sentence of death disproportionate, this Court stated that:

> A primary reason for this result is that there is no evidence of what occurred after defendant left with [the victim]. The crime was heinous, but there is no evidence to show that it was "especially heinous" within the meaning of the statute.

Id. at 46, 305 S.E. 2d at 717. As previously discussed in this opinion, the evidence in the present case was more than sufficient to establish the aggravating circumstance that the first-degree murder was especially heinous, atrocious, or cruel. Therefore, our holding that the death sentence was disproportionate in *Jackson* is of little assistance in our proportionality review in the present case.

We turn next to the cases in which we have found the death penalty to be proportionate. Although we review all of the cases in the pool when engaging in our statutorily mandated duty of proportionality review, we have indicated that we will not undertake to discuss or cite all of those cases each time we carry out that duty. *State v. Williams*, 308 N.C. at 81, 301 S.E. 2d at 356. Here, we note that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence of death disproportionate. *E.g.*, *State v. Huffstetler*, 312 N.C. 92, 322 S.E. 2d 110 (1984) (victim battered to death by multiple heavy blows of an iron skillet), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985); *State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493 (1984) (murder of elderly victim in his home), *cert. denied*, 471 U.S. 1120, 86 L.Ed. 2d 267 (1985); *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308 (victim stabbed twenty-two times), *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983); *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335 (sexual assault and murder of elderly victim in her home), *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983).

Having compared the crime and the defendant in this case to those in the pool of similar cases, we do not find the sentence of death entered here to be disproportionate. The evidence presented at trial supports the view that the defendant deliberately sought out and robbed the victim when he knew the victim would be alone in his laundry. The physical evidence tended to show

that the victim was stabbed seventeen times and repeatedly kicked about the head after he was on the floor in the prone position. The evidence indicates that the victim did not die immediately, but remained helpless on the floor awaiting his impending death for a minimum of five to ten minutes after sustaining the most significant blows.

Thus, the record before us reveals a senseless, exceptionally brutal and murderous assault. Having compared this case to others in the pool of similar cases: "We cannot say that it does not fall within the class of first degree murders in which we have previously upheld the death penalty." *State v. Brown*, 315 N.C. at 71, 337 S.E. 2d at 830.

We have dealt with all of the defendant's assigned errors. In addition, we have considered all of the trial proceedings which are in the record and transcript before us. We find no error.

No error.

STATE OF NORTH CAROLINA v. BILLY KEVIN MOORE

No. 616A86

(Filed 3 February 1988)

1. **Constitutional Law § 31; Criminal Law § 75.4— motion for court appointed psychiatrist—confession by retarded defendant—denial of motion for psychiatrist erroneous**

The trial court erred in a prosecution for first degree sexual offense, first degree burglary, and assault with a deadly weapon with intent to kill inflicting serious injury by denying defendant's motion for a court appointed psychiatrist where defendant submitted detailed evidence of his suggestive nature, the potentially coercive environment in which he made his statement, and the pivotal nature of his confession in the State's case. The evidence was sufficient to show that defendant had a particularized need for the assistance of a psychiatrist in the preparation of his defense.

2. **Constitutional Law § 31— denial of court appointed psychiatrist—appointment of psychiatrist to determine competency—not sufficient**

The appointment of a psychiatrist to determine defendant's competency to stand trial did not in effect provide defendant with the assistance of a psychiatrist for the purpose of assisting in his defense and did not satisfy the State's constitutional obligation.

3. **Constitutional Law § 31; Criminal Law § 75.4— denial of State appointed psychiatrist—confession by retarded defendant—showing of material assistance at trial**

The trial court erred in a prosecution for first degree sexual offense, burglary, and assault with a deadly weapon with intent to kill inflicting serious injury by denying defendant's motion for a court appointed psychiatrist where defendant showed that the appointment of an independent psychiatrist would have been of material assistance to him at trial even though the voluntariness of his confession was litigated at a hearing on his motion to suppress. Although the confession was admissible, defendant retained the right to introduce evidence relevant to its weight or credibility, and a psychiatrist might have assisted defendant by facilitating the preparation and presentation of a renewed motion to suppress on the grounds that he did not knowingly and intelligently waive his constitutional rights in that the retarded defendant's affirmative responses to a detective's questions were more the product of fear and a desire to please than an intelligent weighing of the choices before him.

4. **Constitutional Law § 31; Criminal Law § 60— denial of appointment of fingerprint expert—erroneous**

The trial court in a prosecution for first degree sexual offense, burglary, and assault erred by denying defendant's motion for a fingerprint expert where defendant made the requisite threshold showing of specific necessity by showing that absent a fingerprint expert he would be unable to assess adequately the State's expert's conclusion that defendant's palm print was found at the scene of the attack; defendant demonstrated that, because the victim could not identify her assailant, this testimony was crucial to the State's ability to identify defendant as the perpetrator of the crimes; and defendant showed that, due to his mental retardation, he had extremely limited communication and reasoning abilities and thus could provide defense counsel with little assistance in making a defense. A showing of a specific basis for questioning the accuracy of the State's determination that the print found at the scene of the offense matched a print taken from defendant was not required.

Justice MITCHELL concurring in the result.

Justice MEYER joins in the concurring opinion.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by *Burroughs, J.*, at the 23 June 1986 Criminal Session of Superior Court, GASTON County, upon defendant's conviction of first degree sexual offense. We allowed defendant's motion to bypass the Court of Appeals for review of his convictions for first degree burglary and assault with a deadly weapon with intent to kill inflicting serious injury for which lesser sentences were imposed. Heard in the Supreme Court on 14 October 1987.

Lacy H. Thornburg, Attorney General, by Norma S. Harrell, Assistant Attorney General, and Elizabeth G. McCrodden, Associate Attorney General, for the state.

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

EXUM, Chief Justice.

The questions presented by this appeal are whether the hearing courts erred when they denied defendant's pre-trial motions for the appointment of a psychiatrist and fingerprint expert to assist in the preparation and presentation of his defense. We hold that the hearing courts erred with regard to both motions and order a new trial on this account.

I.

On 7 January 1986, the Gaston County grand jury returned indictments charging defendant with first degree sexual offense, first degree burglary, and assault with a deadly weapon with intent to kill inflicting serious injury. All of the charges arose out of an assault on G. G.[1]

On 19 February 1986, defendant filed a motion to suppress a statement in which he confessed to assaulting G. G. On 4 March 1986 defendant filed a motion requesting the appointment of experts to facilitate the preparation and presentation of his defense. Defendant requested the appointment of a psychiatrist to assist him in preparing for the hearing on his motion to suppress. Defendant also requested the appointment of a fingerprint expert to evaluate the state's claim that defendant's palm print was found at the scene of the assault.

Defendant's motion for the appointment of expert witnesses was heard initially at the 10 March 1986 Criminal Session of Superior Court, Gaston County, Judge Claude S. Sitton presiding. The hearing court denied the motion. Defendant renewed his motion for the appointment of a psychiatrist on 20 June 1986. This renewed motion was heard and denied at the 23 June 1986 Crimi-

1. Throughout this opinion the victim and those in her family will be referred to by their initials in order to protect their identities.

nal Session of Superior Court, Judge Robert M. Burroughs presiding.

Defendant's motion to suppress his confession was heard and denied at the 2 June 1986 Criminal Session of Superior Court, Gaston County, Judge Robert M. Burroughs presiding.

At trial, the state's evidence tended to show that late in the evening on 12 October 1985 G. G. was surprised by an intruder when she went out on her back porch to put laundry in the washing machine. The intruder, a white male, struck G. G. on the face, and she fell to the floor semiconscious. Because of her semiconscious state, G. G. could not identify her assailant. She was aware, however, that he "had his hands in [her] vagina."

Neighbors of G. G. testified that they saw defendant walking up and down the street in front of her home at a time near the attack. Based on information from these neighbors, T. G., the victim's husband, sought and found defendant on the afternoon after the attack. He turned defendant over to the police.

Detective Fred Crawford of the Gastonia City Police questioned defendant on two occasions regarding the attack on G. G. On the first occasion defendant denied entering G. G.'s porch and attacking her. The second time Crawford questioned defendant, defendant confessed to beating G. G. with an object, pulling off her panties, and placing his fingers in her vagina.

Gastonia City Policeman R. L. Williams testified concerning his investigation at the scene of the assault. He lifted a partial palm print from a can of dog food found on the back porch. According to Williams, the print matched a palm print of defendant.

Defendant's evidence tended to show that defendant is mentally retarded and that due to his mental retardation he could not understand the implications of his pretrial statement. Dr. Kehlil S. Tanas, a forensic psychiatrist at Dorothea Dix Hospital, testified that defendant had a second or third grade vocabulary and would be "easily suggestible" by people in positions of authority over him. Defendant's family members and friends testified to defendant's limited intellectual ability and passive nature. They also declared defendant was easily led and wanted to please others.

Ruth Moore, defendant's stepmother, and Ray Moore, defendant's stepbrother, testified that they saw defendant the evening G. G. was attacked, as well as the morning after. On both occasions defendant was wearing a white t-shirt and dark blue pants. According to these witnesses, defendant's clothing showed no bloodstains the morning after G. G. was assaulted.

II.

[1] Defendant contends that the court committed reversible error when it denied his renewed motion for the appointment of a psychiatrist to assist in the preparation of his defense. We agree.

Before denying defendant's renewed motion for the appointment of a psychiatrist, Judge Burroughs had conducted an extensive hearing on defendant's earlier motion to suppress his confession. At this hearing Gastonia Police Department Detective Fred Crawford recounted the two occasions on which he questioned defendant. The first was on the afternoon after the assault on G. G., 12 October 1986, when defendant admitted to being in G. G.'s neighborhood on the evening of the assault, but denied entering her home or attacking her. Detective Crawford declared that he advised defendant of his rights by reading from a standard form containing *Miranda* warnings and a waiver of *Miranda* rights. The defendant signed the form and agreed to have his photograph taken. Detective Crawford took defendant home.

Detective Crawford next questioned defendant on 15 October 1986. He went to defendant's residence and, pursuant to a warrant, arrested him for the first degree rape of G. G. Detective Crawford took defendant to the police station and reminded him of his rights by reading from the same standard form used three days previously. The colloquy between Detective Crawford and defendant, which was read in its entirety at the suppression hearing, went as follows:

> Detective Crawford: Mr. Moore, we previously went over your rights and I would like to go over them with you again. Answer yes or no if you understand. You understand that you have a right to remain silent?
>
> Defendant: Yes, sir.
>
> Detective Crawford: Anything you say can and will be used against you in court?

Defendant: Yes.

Detective Crawford: You have a right to talk to a lawyer for advice before I ask you any questions and have him with you during questioning?

Defendant: Yes.

Detective Crawford: If you cannot afford a lawyer, one will be appointed before any questioning if you wish?

Defendant: Yes, sir.

Detective Crawford: If you decide to answer questions now without a lawyer present, you still have the right to stop answering at any time. You also have the right to stop answering any time until you talk to a lawyer.

Defendant: Yes.

Detective Crawford: Do you understand each of these rights that I have just explained to you?

Defendant: Yes, sir.

Detective Crawford: Do you each of these rights that I have just explained to you? (sic)

Defendant: Yes, sir.

Detective Crawford: Mr. Moore, you previously stated that you cannot read. I have got to read this paragraph and I am going to read it for you. (sic) If you understand that, answer yes. The paragraph states: "I have read a statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand what I am doing. No promises or threats have been made to me. No pressure or coercion of any kind has been used against me." Do you understand this paragraph?

Defendant: Yes.

Detective Crawford: Okay, with that paragraph in mind, are you still willing to talk to me and answer questions I might ask you, knowing that you have the right to have a lawyer with you?

Defendant: Yes.

Detective Crawford: Are you willing to talk with me without a lawyer present at this time knowing full well you have the right to have one at this time?

Defendant: Yes.

Detective Crawford: Is this your signature there?

Defendant: Yes.

Defendant then made a statement in which he admitted assaulting G. G. on her back porch.

On cross-examination Detective Crawford acknowledged that he never explained the meaning of any of the words in the standard forms he read to defendant. Specifically, Detective Crawford did not explain the meaning of "coercion," and "pressure." Also, Detective Crawford did not inform the defendant about how to obtain the assistance of a court appointed lawyer.

At the conclusion of the state's evidence, the court asked Detective Crawford a series of questions concerning whether defendant appeared confused or incoherent, whether he ever asked for an explanation of his rights, and whether his answers were reasonable in light of the questions Detective Crawford asked. Detective Crawford testified that defendant did not appear confused or incoherent, that he never asked for an explanation, and that his answers were reasonable.

Defendant presented evidence from Dr. Tanas, a forensic psychiatrist who had examined defendant at Dorothea Dix Hospital for the sole purpose of determining whether defendant was competent to stand trial. Dr. Tanas testified that he had tested defendant and determined that defendant had an intelligence quotient ("IQ") of fifty-one, defendant's "mental age" was eight or nine years, and defendant had the vocabulary of an average fourth or fifth grader. Dr. Tanas declared that he did not believe defendant could understand the meaning of the word "coercion." He added that "with his sub-average intelligence and functions [defendant] would be easily led and easily influenced." Tanas testified that he believed defendant capable of proceeding to trial.

Defendant testified in his own behalf. He declared that on the morning of 12 October 1986 T. G., the husband of the victim, and two other men came to the site where defendant was working. T. G. asked defendant to accompany them to the G. home. En route, T. G. told defendant about the attack on his wife. When they arrived, T. G. showed defendant the scene of the assault. Defendant testified that he tried to leave, but that T. G. told him to stay until the police arrived. The police arrived, handcuffed defendant, and took him to the police station.

Concerning the occasions when Detective Crawford questioned him, defendant stated that he did not understand the questions. Defendant declared that he answered "yes" to all of Detective Crawford's questions because he wanted to get the interview over with as quickly as possible. According to defendant, Detective Crawford had told him that he did not believe defendant's denials of involvement, and that if defendant told the "truth" Detective Crawford would see what could be done for the defendant. Defendant testified that although he had previously been represented by a lawyer he did not understand how to acquire appointed counsel. On the previous occasions, defendant's mother arranged for counsel. Defendant stated that he did not understand the meaning of the word "appoint."

Defendant's mother, Betty Moore, and stepmother, Ruth Moore, both testified that they did not believe defendant could understand the *Miranda* rights as recited to him by Detective Crawford. Both witnesses said that unless Detective Crawford explained the *Miranda* rights, defendant would not have understood them. Defendant's stepbrother, Charles Ray Moore, testified to the same effect.

Karen Whitlaw, a friend of the defendant's, testified that the defendant could be intimidated easily. According to Ms. Whitlaw, "anybody can just, you know, run over Kevin."

At the conclusion of the hearing, the court denied the motion to suppress. The court made findings of fact and conclusions of law to the effect that defendant knowingly and intelligently waived his rights. The court also concluded that defendant made his confession voluntarily.

Subsequent to the denial of his motion to suppress, defendant renewed his motion for funds to hire an independent psychiatrist. In support of this motion defendant maintained that expert assistance was necessary in order to enable him to defend at trial on the ground that, under all the circumstances, his confession was not to be believed. Defendant contended that, in light of the paucity of evidence linking him to the assault on G. G., the validity of his confession was likely to be one of the most important issues at trial. Defendant pointed out that Dr. Tanas, the forensic psychiatrist appointed to assess defendant's competence to stand trial, did not assist him in preparing the defense that his confession was not believable.

The court denied defendant's renewed motion. The court made no findings of fact or conclusions of law when it denied this motion.

We hold under *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed. 2d 53 (1985), and our cases decided under *Ake*, that the hearing court erred in denying defendant's renewed motion for a court appointed psychiatrist to assist in the preparation of his defense.

In *Ake* the Supreme Court held that when a defendant makes a preliminary showing that his sanity will likely be a "significant factor at trial," the defendant is entitled, under the Constitution, to the assistance of a psychiatrist in preparation of his defense. *Id.* at 74, 84 L.Ed. 2d at 60. We have applied the holding in *Ake* to instances when an indigent defendant moved for the assistance of experts other than psychiatrists, holding that such experts need not be provided unless the defendant "makes a threshold showing of specific necessity for the assistance of the expert" requested. *State v. Penley*, 318 N.C. 30, 51, 347 S.E. 2d 783, 795 (1986) (pathologist). *See State v. Hickey*, 317 N.C. 457, 468, 346 S.E. 2d 646, 654 (1986) (investigator); *State v. Johnson*, 317 N.C. 193, 199, 344 S.E. 2d 775, 779 (1986) (medical expert).

In order to make a threshold showing of specific need for the expert sought, the defendant must demonstrate that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it will materially assist him in the preparation of his case. *State v. Johnson*, 317 N.C. at 198, 344 S.E. 2d at 778. This test was developed originally under N.C.G.S. § 7A-450(b), which provides that the state must furnish

an indigent defendant "with counsel and the other necessary expenses of representation." Subsequent to the Supreme Court's *Ake* decision, we reaffirmed this standard as that which the defendant must meet in order to assert a constitutional right to the assistance of experts. *State v. Johnson*, 317 N.C. at 199, 344 S.E. 2d 775 at 778; *State v. Massey*, 316 N.C. 558, 566, 342 S.E. 2d 811, 816 (1986). In determining whether the defendant has made the requisite showing of his particularized need for the requested expert, the court "should consider all the facts and circumstances known to it at the time the motion for psychiatric assistance is made." *State v. Gambrell*, 318 N.C. 249, 256, 347 S.E. 2d 390, 394 (1986).

The issue in the present case is whether, under all the circumstances known to the hearing court at the time defendant made his renewed motion for a court appointed psychiatrist, defendant demonstrated a specific need for the assistance of a psychiatric expert. *Id.* We hold defendant demonstrated such a need.

At the time defendant renewed his motion for a psychiatric expert the court had conducted an extensive hearing on defendant's motion to suppress in which defendant showed, *inter alia*, that:

(1) Defendant has an IQ of 51;

(2) Defendant's "mental age" is equivalent to that of an eight or nine year old;

(3) Defendant's vocabulary is equivalent to that of a fourth or fifth grade elementary student;

(4) According to expert testimony, defendant cannot understand complicated instructions;

(5) According to family members, defendant could not understand the rights read by Detective Crawford without further explanation;

(6) According to the expert testimony, defendant is easily led and intimidated by others;

(7) According to a friend of defendant, defendant can be "run over" by "anybody";

(8) Defendant's low intelligence level may have rendered him unable to understand the nature of any statement he may have made;

(9) Defendant's mental retardation may have rendered him unable to knowingly waive his rights;

(10) The state's case against defendant was predicated in significant measure on defendant's confession because G. G. could not identify her assailant.

We conclude, as defendant argues, that this evidence suffices to show that defendant had a particularized need for the assistance of a psychiatrist in the preparation of his defense.

Defendant showed that the credibility of his confession was pivotal in the state's case against him. Since G. G. could not identify her assailant, the central issue before the jury was the perpetrator's identity. Aside from defendant's confession, and the palm print found at the scene of the assault which allegedly matched a palm print of defendant's, the state had little evidence linking defendant to the crimes in question. Thus, the state's case rested, heavily, on the jury's acceptance of defendant's confession as true.

Defendant also demonstrated that his confession was of questionable credibility. Defendant showed that he has an IQ of 51. This places him at the lowest level of mild mental retardation. Through the detailed testimony of a forensic psychiatrist, defendant demonstrated that he is "easily led and easily influenced" by those exercising authority. Family and friends testified to the same effect. Through these same witnesses defendant demonstrated he is unable to understand subjects with the least degree of complication, thus indicating that defendant very well may not have grasped the implications of what he was saying in his inculpatory statement.

Having demonstrated the centrality of his confession to the state's case, and having cast doubts on its credibility, we conclude defendant made the requisite threshold showing of his need for the assistance of a psychiatrist in the preparation and presentation of his defense.

The state contends this case is indistinguishable from *Massey*, in which this Court concluded that the trial court did not err

when it denied the request of a mentally retarded defendant for the appointment of a psychiatrist. *State v. Massey*, 316 N.C. at 566, 342 S.E. 2d at 816. We disagree. *Massey* is similar to the instant case in that a mentally retarded defendant was convicted of a felony based largely on a confession. *Id.* at 562, 342 S.E. 2d at 813. As in the present case, defendant moved to have a psychiatrist appointed to assist him in preparing his defense. His motion was denied. *Id. Massey* differs from the present case in that the defendant in *Massey* failed to make a sufficiently specific demonstration of his need for the assistance of a psychiatrist. In *Massey* defendant did not specify the precise degree of his retardation, neither did he put on any evidence indicating the effect his particular mental condition might have had on his ability to understand either his rights or the implications of his statement. *Id.* at 566, 342 S.E. 2d at 816. In support of his motion for funds to hire a psychiatrist to assist in the presentation of his case, the defendant in *Massey* relied solely on a single psychological evaluation which indicated that he was mildly mentally retarded. Because the defendant in *Massey* made only the bald assertion that because of his mild mental retardation he needed the assistance of a psychiatrist, we held that he did not demonstrate the requisite threshold showing of specific need. *Id.*

The instant case stands in contrast to *Massey*. Here defendant submitted detailed evidence of his suggestible nature, the potentially coercive environment in which he made his statement, and the pivotal nature of his confession in the state's case. We believe that in making this showing, defendant demonstrated a particularized need for the assistance of a psychiatrist in the preparation of his defense.

[2] The state also argues that defendant was, in effect, provided with the assistance of a psychiatrist in the person of Dr. Tanas, the forensic psychiatrist who examined defendant in order to determine his competency to stand trial. The state notes that defendant called Dr. Tanas to testify at the hearing on defendant's motion to suppress, as well as at trial, and suggests that further assistance by a psychiatrist could have added little in the way of assisting defendant.

This argument stands at odds with our recent *Gambrell* decision. In *Gambrell* we addressed this argument and declared that

"what is required, as *Ake* makes clear, is that defendant be furnished with a competent psychiatrist for the purpose of not only examining defendant but also assisting defendant in evaluating, preparing, and presenting his defense. . . ." *State v. Gambrell*, 318 N.C. at 259, 347 S.E. 2d at 395. In this case, Dr. Tanas was not appointed for the purpose of assisting defendant in preparation of his defense. He was appointed solely for the purpose of assessing defendant's competency to stand trial. Therefore, Dr. Tanas' involvement with defendant did not satisfy the state's constitutional obligation. *Id.*

[3] Finally, the state maintains defendant has failed to show that the appointment of an independent psychiatrist would have been of material assistance to him at trial. The state argues that the voluntariness of defendant's confession was fully litigated at the hearing on defendant's motion to suppress, and that the appointment of a psychiatrist would not have enabled defendant to make his case any stronger at trial. The state notes especially that after an extensive hearing on defendant's motion to suppress, the hearing court concluded that defendant waived his rights knowingly and intelligently, and that his confession was voluntarily made.

This argument fails to recognize the many ways a psychiatrist might have aided defendant in preparing and presenting his defense that, under all the circumstances surrounding his confession, the statement was not to be believed. Although the hearing court ruled that defendant's statement was admissible, defendant retained the right "to introduce before the jury evidence relevant to [the statement's] weight or credibility." N.C.G.S. 8C-1 Rule 104(e). "Admissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge." *State v. Walker*, 266 N.C. 269, 273, 145 S.E. 2d 833, 836 (1966). A psychiatrist, unlike lay witnesses, could have gathered and analyzed pertinent information about the nature of defendant's confession, and drawn plausible conclusions about its trustworthiness.[2] A psychiatrist also could have im-

2. In *Ake* the Court made a similar point concerning the manner a psychiatrist can facilitate the preparation and presentation of an insanity defense. The Court declared that when a "defendant's mental condition is relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Ake*, 470 U.S.

pressed upon the jury the frequent plight of the mentally retarded when they become embroiled in a criminal prosecution. It has long been recognized that

> [t]he retarded are particularly vulnerable to an atmosphere of threats and coercion, as well as to one of friendliness designed to induce confidence and cooperation. A retarded person may be hard put to distinguish between the fact and the appearance of friendliness. If his life has been molded into a pattern of submissiveness, he will be less able than the average person to withstand normal police pressures. Indeed they may impinge on him with greater force because their lack of clarity to him, like all unknowns, renders them more frightening. Some of the retarded are characterized by a desire to please authority: if a confession will please, it may be gladly given. 'Cheating to lose,' allowing others to place blame on him so that they will not be angry with him, is a common pattern among the submissive retarded. It is unlikely that a retarded person will see the implications or consequences of his statements in the way a person of normal intelligence will.

President's Panel on Mental Retardation, Report of the Task Force on Law 33 (1963). *See also* Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 451-52 (1985).

Another way in which a psychiatrist might have assisted defendant at trial was by facilitating the preparation and presentation of a renewed motion to suppress defendant's confession on the grounds that he did not knowingly and intelligently waive his

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at 80, 84 L.Ed. 2d at 64. The Court concluded that through the "process of investigation, interpretation and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense." *Id.*

The Court's analysis is applicable to the cases where the issue concerns the credibility of a confession made by a mentally retarded defendant. The resolution of this issue is equally critical to the outcome of the case. The presentation of the defense that the defendant, due to his mental retardation, confessed to crimes he did not commit, is sufficiently complex to necessitate the assistance of experts.

constitutional rights.[3] Although the hearing court found the confession was made knowingly and intelligently, it did so without the benefit of expert opinion addressing these issues. A psychiatrist appointed to assist defendant presenting his defense could have brought to the trial court's attention the particular problems attending the waiver of rights by a mentally retarded defendant.

In *State v. Spence*, 36 N.C. App. 627, 244 S.E. 2d 442 (1978), the testimony of psychiatrists played a pivotal role in the Court of Appeals' determination that the mentally retarded defendant might not have waived his rights knowingly and intelligently. In *Spence* the defendant was a twenty-year-old mentally retarded male who possessed the general understanding of a child of six to eight years of age. The defendant, through the assistance of expert testimony by psychiatrists, demonstrated that he had difficulty understanding his rights as read to him, and that he did not grasp the consequences of waiving these rights. The psychiatrists also testified that the defendant had an eagerness to please the police. The court declared that these facts tended to indicate "that defendant might have been inclined to state that he understood even when he did not. . . ." The court went on to hold that, under these circumstances, the state did not carry its burden of proving that the defendant waived his rights knowingly and intelligently. *Id.* at 629, 244 S.E. 2d at 441-42.

Reliable research supports the evidence offered by defendant at the suppression hearing concerning his limited ability to under-

3. It seems clear from defendant's renewed motion for the appointment of a psychiatrist that defendant contemplated making a second motion to suppress on these grounds if the expert assistance was provided. His verified motion reads:

> The defendant continues to contend that [an independent psychiatrist] is essential to the preparation and conducting of his defense. In support of this Motion, the defendant shows unto the Court the following:
>
> 5. That Dr. Tannas (sic) never addressed the issue of the ability of the defendant to understand the Constitutional Rights to which he was entitled and therefore to freely and voluntarily waive said rights;
>
> WHEREFORE, the defendant prays for an Order providing him with funds with which to hire an independent psychiatrist to examine him and to make a specific determination and examination of his ability to understand the Constitutional rights to which he is entitled, whether or not the defendant could freely and voluntarily waive those rights under all the circumstances present in these case. . . . (sic)

stand the explanation of his rights, and it demonstrates why expert assistance might have been helpful on this aspect of the case. It reveals that even when a mentally retarded suspect's responses appear normal, his answers may not be reliable. *See* Rosen, Floor & Zisfein, *Investigating the Phenomenon of Acquiescence in the Mentally Handicapped: 1 Theoretical Model, Test Development and Normative Data*, 20 Britt J. Mental Subnormality, 58, 68 (1974); *see generally* Sigdman, Budd, Stankel & Schoenrock, *When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 Mental Retardation 53 (1980). "[M]any people with mental retardation are predisposed to 'biased responding' or answering in the affirmative questions regarding behaviors they believe are desirable, and answering in the negative questions concerning behaviors they believe are prohibited. The form of a question can also directly affect the likelihood of receiving a biased response. . . ." Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 428 (1985).

Responses by the mentally retarded to "yes-no" questions posed by persons in authority present special problems. According to one study, the danger of response bias in this situation is so great that questioners should abandon altogether the use of "yes-no" questioning techniques. Budd, Sigelman & Sigelman, *Exploring the Outer Limits of Response Bias*, 14 Sociological Focus 297, 305-06. *See* Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 428, n.72 (1985).

In the instant case, defendant waived his rights pursuant to a series of "yes-no" questions by Detective Crawford. According to Detective Crawford, defendant did not appear confused, and his answers were reasonable in light of the questions asked him. Largely on this basis, the hearing court concluded that defendant waived his rights knowingly and voluntarily. A psychiatrist, assisting defendant in presenting his defense, would have enabled the trial court to assess more fully and accurately the validity of defendant's responses. He would have been able to alert the court to the possibility that defendant's affirmative responses to Detective Crawford's questions were more the product of fear and a desire to please than an intelligent weighing of the choices before him. *See* Rosen, Floor & Zisfein, *Investigating the Phenomenon of Acquiescence in the Mentally Handicapped: 1 Theoretical Model,*

Test Development and Normative Data, 20 Britt J. Mental Subnormality, 58, 68 (1974).

We do not agree with the state, therefore, that a psychiatrist would not have been able to provide material assistance to defendant in the preparation and presentation of his defense. We hold that the trial court erred when it denied defendant's renewed motion for the appointment of a psychiatrist.

III.

[4] Defendant next contends the hearing court erred in denying his pre-trial motion for a fingerprint expert. We agree.

In support of his motion defendant made the following verified allegations:

(1) The state's witness cannot identify the perpetrator of the crimes.

(2) What purports to be a palm print of the defendant was identified by an identification officer for the Gastonia City Police Department on an item found at the scene of the assault.

(3) The officers charged with responsibility for investigating this case are co-workers of the identification officer.

(4) The state's palm print evidence is critical to the state's case.

(5) Defense counsel lacks the ability to assess the accuracy of the palm print evidence.

Defendant's motion for the appointment of experts, both fingerprint and psychiatric, was heard at the 10 March 1986 Criminal Session of Superior Court, Gaston County, Judge Claude S. Sitton presiding. The court heard arguments concerning defendant's need for the appointment of a psychiatrist to assist in the preparation of defendant's motion to suppress. Defense counsel pointed out that defendant has limited capacity to understand and reason due to his mental retardation. After making this showing, defense counsel relied on the verified allegations in his motion to support his request for the appointment of a fingerprint expert. The state declined the opportunity to respond. The court denied the motion.

At trial, the state presented expert testimony from Gastonia police officer R. L. Williams that a "partial palm print" found on a can of dog food at the crime scene matched defendant's palm print. Defendant presented no expert witness to respond to Williams' conclusion.

The question of whether defendant should have been provided with the assistance of a fingerprint expert is controlled by *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed. 2d 53, and our cases decided under *Ake*. As noted already, *Ake* requires "an *ex parte* threshold showing" that the matter subject to expert testimony is "likely to be a significant factor" in the defense. *Id.* at 82, 84 L.Ed. 2d at 60. Our cases require that an indigent defendant prove that the assistance of an expert would materially assist him in the preparation of his defense, or that the denial of this assistance would deprive him of a fair trial. *State v. Penley*, 318 N.C. at 52, 347 S.E. 2d at 795; *State v. Johnson*, 317 N.C. at 199, 344 S.E. 2d at 778; *State v. Massey*, 316 N.C. at 566, 342 S.E. 2d at 816.

The showing demanded under *Ake* and our cases is a flexible one. It is designed to ensure that the indigent defendant "has access to the raw materials integral to the building of an effective defense." *Ake*, 470 U.S. at 77, 84 L.Ed. 2d at 62. The showing is necessarily flexible because the court's determination of whether a defendant has met his burden of demonstrating a specific need for such a "raw material" must be resolved on a case-by-case basis, according to the circumstances known to the trial court at the time the request is made. *State v. Gambrell*, 318 N.C. at 256, 347 S.E. 2d at 394.

We conclude defendant made the requisite threshold showing of specific necessity for a fingerprint expert. Defendant showed that absent a fingerprint expert he would be unable to assess adequately the state's expert's conclusion that defendant's palm print was found at the scene of the attack. Defendant also demonstrated that, because the victim could not identify her assailant, this testimony by the state's expert was crucial to the state's ability to identify defendant as the perpetrator of the crimes charged against him. Moreover, at the hearing on defendant's motion before Judge Sitton, defendant showed that, due to his mental retardation, he had extremely limited communication and

reasoning abilities, and thus could provide defense counsel with little assistance in making a defense. All of these circumstances taken together demonstrate that defendant would have been "materially assisted in the preparation of his defense" had the trial court granted his motion. *State v. Penley*, 318 N.C. at 52, 347 S.E. 2d at 796.

The state argues that defendant's showing did not rise to the level of specificity demanded by *Ake*, and our cases decided under *Ake*. It asserts that the presence of technical scientific evidence in the state's case does not necessarily mandate the appointment of a defense expert. We have no quarrel with this general assertion. The state goes on, however, and suggests that in order to show a "particularized need" for the assistance of a fingerprint expert defendant was required to present a specific basis for questioning the accuracy of the state's determination that the print found at the scene of the offense matched a print taken from defendant.

The showing suggested by the state is not required. To require as a condition precedent to acquiring an appointed fingerprint expert that the defendant discredit the state's expert testimony stands at odds with the general "threshold" showing of need required under our cases. The state's proposed test would demand that the defendant possess already the expertise of the witness sought. A review of our cases in which defendants requested the assistance of technical experts reveals that while the threshold showing of specific necessity for the appointment of such an expert is not a light burden, it is not so severe as to require that a defendant affirmatively discredit the state's expert witness before gaining access to his own.

In *Penley* we held the trial court did not err when it denied defendant's motion for the appointment of a pathologist to assist him in his defense. *State v. Penley*, 318 N.C. at 51-52, 347 S.E. 2d at 796. We did not require the defendant, in some fashion, to discredit already existing pathological reports. Instead, we required only what our post-*Ake* cases consistently call for: a threshold showing of specific necessity. *Id.* We found that "the defendant arguably made a threshold showing of a specific necessity" but went on to hold that this need was met through the autopsy reports already provided by independent experts. *Id.*

The present case differs from *Penley* in a number of significant ways. In *Penley* the report in question was prepared by an independent party. *Id.* at 52, 347 S.E. 2d at 796. Here, the assessment of the fingerprints was made solely by witnesses for the state. In *Penley* the defendant's guilt or innocence did not stand or fall with the testimony of the pathologist. Here, the only physical evidence placing defendant at the scene of the crime was a palm print which the state's expert declared matched defendant's.[4]

In *State v. Johnson* the defendant requested the assistance of a "medical expert" to assist in the preparation of his defense. 317 N.C. at 199, 344 S.E. 2d at 778. In his motion requesting a "medical expert" defendant merely asserted that an expert was needed to analyze all available information and, possibly, to testify on his behalf. We held that the defendant failed to set out sufficient facts evidencing a specific need for the requested expert. Similarly, in *State v. Hickey*, 317 N.C. at 467, 346 S.E. 2d at 653, the defendant requested the appointment of an investigator to investigate the state's key witness. Defendant did not declare why she needed to investigate the state's witness, but we assumed it was for the purpose of discovering facts that could be used to impeach the witness' testimony. *Id.* at 469, 346 S.E. 2d at 654. We held that the mere general desire to discover evidence which might be used for impeachment purposes did not satisfy the requirement that a defendant demonstrate a threshold showing of need. *Id.*

The differences between *Johnson*, *Hickey*, and the instant case are manifest. In both *Johnson* and *Hickey*, the defendants offered only "undeveloped assertions that the requested assistance

4. In *Ake* the Supreme Court expressed special concern for defendants whose guilt or innocence hinges on the testimony of the state's experts and who, because of their poverty, cannot afford experts of their own. The Court noted " '[t]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have little effect.' " *Ake*, 470 U.S. at 81, n.7, 84 L.Ed. 2d at 65, n.7 (quoting F. Bailey & H. Rothblatt, *Investigation and Preparation of Criminal Cases* § 175 (1970)). The Court went on to note that when, because of lack of funds, a defendant is unable to rebut expert testimony with expert assistance of his own, the defendant's chances of persuading the jury to reject the expert's conclusions are "devastated." *Id.* at 83, 84 L.Ed. 2d at 66. *See also Moore v. Kemp*, 809 F. 2d 702, 744 (11th Cir. 1987) (Johnson, J., dissenting).

would be helpful." *Caldwell v. Mississippi*, 472 U.S. 320, 323, n.1, 86 L.Ed. 2d 231, 236, n.1 (1985). In the present case, defendant demonstrated that the determination of his guilt or innocence would hinge largely on the unrebutted testimony of the state's fingerprint expert. Defendant requested a fingerprint expert not to engage in some amorphous fishing expedition, as in *Johnson* and *Hickey*, but to enable him, and ultimately perhaps the jury, to assess more accurately the one item of hard evidence implicating him in the crimes charged. Under these circumstances, denying defendant the assistance of a fingerprint expert denied him "an adequate opportunity to present his claims fairly within the adversary system." *Ross v. Moffitt*, 417 U.S. 600, 612, 41 L.Ed. 2d 341, 352 (1974).

Finally, we note this case also differs from *Penley*, *Johnson*, and *Hickey* in that, unlike the defendants in those cases, defendant showed his mental retardation diminished his capacity to assist his counsel in his own defense.

We reaffirm the holdings of our post-*Ake* decisions which require that indigent defendants meet the flexible requirement of a threshold showing of specific need for the expert sought. For the reasons herein stated, we hold defendant made such a showing in this case.

In summary, we hold that the hearing courts erred in denying defendant's renewed pretrial motion for the appointment of a psychiatrist and his pretrial motion for the appointment of a fingerprint expert. The result is a

New trial.

Justice MITCHELL concurring in result.

I concur in the view that the trial court erred in denying the defendant's motion for psychiatric assistance in the preparation of his defense. Therefore, I also concur in the holding that the defendant is entitled to a new trial.

I disagree, however, with the view that the trial court erred by denying the defendant's motion for the appointment of a fingerprint expert to assist him in the preparation of his defense. I believe the Court's decision on that issue will require appoint-

ment of fingerprint experts to assist defendants in almost all cases in which fingerprint evidence is introduced by the State. Certainly, it will require the appointment of fingerprint experts in all cases where the State relies upon fingerprint evidence and there were no eyewitnesses to the crime charged.

It is rather clear in this case that the defendant failed to carry his burden under N.C.G.S. § 7A-454 to show a reasonable likelihood that the appointment of a fingerprint expert would materially assist him in the preparation of his defense or that without such help he would not receive a fair trial. *See generally State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982). As a result, the Court rightly focuses its attention on the issue of whether the appointment of a fingerprint expert was required in this case under the holding of *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed. 2d 53 (1985). *Ake* dealt with the requirement that a defendant be provided psychiatric assistance when his sanity was likely to be a significant factor in his defense. 470 U.S. at 82, 84 L.Ed. 2d at 60. Indeed, Ake's entire defense was insanity. The issue of sanity is one about which experts can and frequently do disagree, even though all experts in the field have received years of intensive and highly specialized and demanding training. It was easy in *Ake* for the Supreme Court to conclude that Ake could not properly prepare his defense without the assistance of an expert in the field of psychiatry.

The type of "expertise" involved in taking and analyzing fingerprints is a far cry from that employed by psychiatrists or many of the other expert witnesses who appear before courts. Indeed, this Court has held that fingerprints taken or "lifted" by a *non-expert* from the scene of a crime or from the defendant are admissible in evidence. *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975).

The taking and analysis of fingerprints is largely a mechanical function, although admittedly one which requires some training and experience. Basically, the analysis of fingerprints involves comparing the latent print taken from the scene of the crime with a known print of the defendant to determine whether there are points of similarity. Once a given number of points of similarity are observed, the expert draws the conclusion that the two prints were made by the same person.

It has been my experience that all of the steps involved in fingerprint analysis can be readily demonstrated to a jury in such a manner that the jurors are able to determine for themselves whether the points of similarity are in fact similar. Likewise, the jurors are as capable as the expert of counting the number of points of similarity. There simply is nothing so mysterious or difficult about fingerprint analysis and comparison as to prevent the ordinary lay juror from determining whether the procedure has been performed correctly and the expert has reached the right conclusion, once the technique is explained and pointed out to the juror. For this reason, a defendant can properly defend himself against such evidence—if in fact he will ever be able to defend himself—by the simple expedient of thorough cross-examination of the State's fingerprint witness. *See State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553.

In the present case, the victim was unable to identify the defendant. However, several neighbors saw the defendant near the victim's house at about the time the crime was committed. Also, the defendant confessed to the crime, and this confession was admitted at trial. Although it is possible that the confession might be rejected at the new trial to which we today decide the defendant is entitled, that fact situation is not before us in considering the trial court's ruling on the motion for a fingerprint expert. Given the facts of this case as it appeared before the trial court, I simply do not believe that the defendant presented any reason to believe that the veracity of the State's fingerprint evidence was "likely to be a significant factor" in his defense within the meaning of that phrase as used in *Ake*. *Cf. Caldwell v. Mississippi*, 472 U.S. 320, 323, n.1, 86 L.Ed. 2d 231, 236, n.1 (1985) (denial of fingerprint and ballistics experts not deprivation of due process where the defendant "offered little more than undeveloped assertions that the requested assistance would be beneficial . . . .")

With the foregoing exception, I concur in the reasoning of the Court. I concur in the result reached.

Justice MEYER joins in this concurring opinion.

ROSEMARY HUDSON ROBERTS, WIDOW; ROSEMARY HUDSON ROBERTS, GUARDIAN AD LITEM OF JESSICA GAY ROBERTS, MINOR DAUGHTER OF TIMOTHY LEE ROBERTS, DECEASED, EMPLOYEE/PLAINTIFFS v. BURLINGTON INDUSTRIES, INC., EMPLOYER, AND LUMBERMEN'S MUTUAL CASUALTY CO., CARRIER, DEFENDANTS

No. 387PA87

(Filed 3 February 1988)

Master and Servant § 55.5— workers' compensation—death during emergency assistance to stranger—injury not arising out of employment

The death of a furniture designer who was struck by a vehicle as he assisted an injured pedestrian who had no connection to the employee's duties or his employer's business while returning home from a business trip did not arise out of his employment since the designer's acts did not benefit the employer to an appreciable extent, and the designer's employment did not increase the risk that he would be struck by a car while assisting an injured stranger with no relation to the employment.

Justice MARTIN dissenting.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals reported at 86 N.C. App. 126, 356 S.E. 2d 794 (1987), which reversed an opinion and award of the North Carolina Industrial Commission that denied plaintiffs' claim for workers' compensation. Heard in the Supreme Court 8 December 1987.

McNairy, Clifford, Clendenin & Parks, by Harry H. Clendenin, III, for plaintiff-appellees.

Smith Helms Mulliss & Moore, by J. Donald Cowan, Jr., and Caroline H. Wyatt, for defendant-appellants.

WHICHARD, Justice.

Decedent employee, while returning home from a business trip, was struck by a car and killed as he assisted an injured pedestrian who had no connection to the employee's duties or his employer's business. The issue is whether his death arose out of the employment and thus was compensable under the Workers' Compensation Act, N.C.G.S. § 97-1 *et seq.* We hold that it did not.

Decedent, Timothy Lee Roberts, was employed by defendant Burlington Industries, Inc. (Burlington) as a furniture designer in

its Furniture Division in Lexington. Burlington sells furniture exclusively to retailers; decedent's duties thus did not include any contact with the general public. He did, however, make occasional visits to retail furniture stores to inspect displayed furniture.

On 18 November 1982, decedent drove his private car from his home in Thomasville to the Greensboro Regional Airport. He met four other Burlington employees there, and they made a business trip to Burlington's plant in Robbinsville, North Carolina. They returned to Greensboro at 5:30 p.m. and left the airport around 5:45 p.m. in separate cars.

The record contains no evidence of decedent's activities during the next hour and a half. The parties stipulated that Burlington sold furniture to two retail stores located near the scene of the accident. On the date in question both stores were open from 5:45 p.m. to 7:30 p.m., and both were displaying Burlington's furniture.

At approximately 7:30 p.m., decedent drove down the entrance ramp toward I-85 South at the Holden Road Exit in Greensboro. Moments before he arrived, a car had struck a pedestrian who was walking down the ramp. David Smith was the first person to arrive at the scene. Decedent also stopped and offered to assist by contacting the authorities. He left the scene, notified the Highway Patrol, and returned in five to eight minutes.

Decedent then suggested that Smith move up the ramp to warn oncoming traffic. Decedent positioned himself near the pedestrian's body in order to direct cars away from it. While standing near the pedestrian's body, he was struck by a car. He died at the scene from the injuries thereby sustained.

Decedent's benevolent acts received some attention from the media. At least six newspapers and an industry magazine reported his tragic death. Three of these publications mentioned that decedent was employed by Burlington.

Decedent's widow and daughter brought this action seeking workers' compensation death benefits. Deputy Commissioner Shuping found that decedent was returning home by his normal route from a business trip and that the accident thus occurred in the course of the employment. He concluded, however, that the ac-

cident did not arise out of the employment, and he thus denied compensation. He based this conclusion on the following "findings of fact":

> 2. Decedent's untimely death, however, did not arise out of the same employment; but rather, arose from the entirely voluntary—albeit undisputedly commendable, humanitarian act of a good citizen and [S]amaritan in stopping to render assistance to an apparent total stranger and had absolutely no rational relationship to his duties as a furniture designer for defendant-employer nor was said employer, which only sold its furniture directly to retail outlets rather than to individual members of the public, to any extent appreciably benefited thereby whether directly or indirectly.
>
> . . . .
>
> 3. As a furniture designer decedent was primarily involved in the production, rather than the sales, end of defendant-employer[']s business which obviously did not require that he attempt to develop and foster the same personal contacts with potential customers as would have members of its sales force and, even then, such customers were not individual members of the public at large; but rather, representatives of the retail outlets to whom it exclusively sold furniture who would themselves not ordinarily have any direct personal contact with decedent. In any regard there is no evidence that the particular individual that decedent attempted to aid, who was himself an apparent total stranger, was a customer of defendant-Burlington Industries and based not only upon the above-described nature of its ordinary customers, but that the same [individual] was financially destitute, it can be reasonably inferred that he was not then, had never been nor would likely . . . be a customer thereof. There was similarly absolutely no evidence of record that the defendant-employer either directed or encouraged its employees to assist members of the general public that they encountered in distress or to otherwise take any direct action towards members of the general public so as to foster good will and thereby its business interest. At the time of stopping to assist [the individual], decedent was driving his own vehicle, as opposed to one of the defendant-

> employer[']s which could be specifically identified as such and him as an employee thereof [who] ha[d] stopped to render aid at any accident scene by a member of the general public passing; but rather, unless someone had specifically asked him the nature of his employment or he had otherwise volunteered it, decedent's heroic act would have likely remained one of [an] [anonymous] stranger had he not been tragically killed, as a result of which he was identified in some, but not all, the stipulated newspaper article[s] as an employee of defendant-Burlington Industries; however, in the opinion of the undersigned, any resulting good will toward defendant-employer is too remote and immeasur[able] for his actions on this occasion to be considered of any appreciable, even indirect, benefit to said employer. Whether as a matter of public policy decedent should recover under the Workers' Compensation Act in order to foster similar acts of good [S]amarit[an]ism is beyond the Industrial Commission's authority to grant.

Plaintiffs appealed to the full Commission, which adopted as its own the Deputy Commissioner's opinion and award. The Commission majority summarized its position by stating:

> In our opinion, the activity in which the employee was engaged at the time of death was a risk to which members of the general public are equally exposed outside of the employment.
>
> . . . .
>
> The risk was not created by the employment or a natural part of his employment as a furniture designer.

Commissioner Clay dissented.

Plaintiffs then appealed to the Court of Appeals. The Court of Appeals held that the injury did arise out of the employment, and accordingly it reversed the Commission. *Roberts v. Burlington Industries*, 86 N.C. App. 126, 356 S.E. 2d 794 (1987). It acknowledged a long line of cases which hold that a compensable injury cannot result from a risk "to which the employee would have been equally exposed apart from the employment." *Roberts v. Burlington Industries*, 86 N.C. App. at 135, 356 S.E. 2d at 800. It "found," however, that the hazard encountered by decedent

was not one to which the general public was equally exposed. *Id.* at 136, 356 S.E. 2d at 800. The selfless nature of decedent's act, the court stated, made it "not something generally done by all." *Id.* By taking affirmative humanitarian action, decedent willingly exposed himself to "hazards to which the general public is [not] equally exposed." *Id.* Moreover, the publicity surrounding decedent's benevolent acts benefited his employer "by increasing the employer's good will." *Id.* at 133, 356 S.E. 2d at 798. The court also noted that its holding would encourage humanitarian acts and thus benefit employers. *Id.* at 136, 356 S.E. 2d at 800.

An opinion and award of the Industrial Commission will only be disturbed upon the basis of a patent legal error. *Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 505, 293 S.E. 2d 807, 809 (1982). The legal error asserted here relates to the requirement that for a death by injury to be compensable under the Workers' Compensation Act, it must arise out of and in the course of the employment. N.C.G.S. § 97-2(6), (10) (1985). "Whether an injury arose out of and in the course of employment is a mixed question of law and fact, and where there is evidence to support the Commissioner's findings in this regard, we are bound by those findings." *Hoffman v. Truck Lines, Inc.*, 306 N.C. at 506, 293 S.E. 2d at 809-10, *quoting Barham v. Food World*, 300 N.C. 329, 331, 266 S.E. 2d 676, 678 (1980).

As used in the Workers' Compensation Act, the phrase "arising out of the employment" refers to the origin or cause of the accidental injury, while the words "in the course of the employment" refer to the time, place, and circumstances under which an accidental injury occurs. *Bartlett v. Duke University*, 284 N.C. 230, 233, 200 S.E. 2d 193, 194-95 (1973); *Robbins v. Nicholson*, 281 N.C. 234, 238, 188 S.E. 2d 350, 353 (1972). While often interrelated, the concepts of "arising out of" and "in the course of" the employment are distinct requirements, and a claimant must establish both to receive compensation. *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 251, 293 S.E. 2d 196, 198 (1982).

The Deputy Commissioner concluded that decedent's death by injury arose in the course of his employment, and the full Commission adopted his conclusion. Burlington does not dispute this conclusion. Whether the "arising out of the employment" requirement has been met thus is the only issue presented.

To determine whether an injury or death by accident arose out of the employment, "it is necessary to examine the findings of specific crucial facts." *Perry v. Bakeries Co.*, 262 N.C. 272, 274, 136 S.E. 2d 643, 645 (1964). The basic question is whether the employment was a contributing cause of the injury. *See Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E. 2d 476, 479 (1960).

An injury to an employee while he is performing acts for the benefit of third persons does not arise out of the employment unless the acts benefit the employer to an appreciable extent. *Lewis v. Tobacco Co.*, 260 N.C. 410, 412, 132 S.E. 2d 877, 880 (1963). "Basically, whether [a] claim is compensable turns upon whether the employee acts for the benefit of his employer to any appreciable extent or whether the employee acts solely for his own benefit or purpose or that of a third person." *Guest v. Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E. 2d 596, 600 (1955).[1] However, "[i]f the ultimate effect of claimant's helping others is to advance his own employer's work, . . . it should not matter whether the immediate beneficiary of the helpful activity is a . . . complete stranger." *Id., quoting* 1A A. Larson, *The Law of Workmen's Compensation* § 27.21.

The record here contains no evidence that anyone other than decedent involved in the events surrounding his accidental death had any connection to Burlington. So far as this record reveals, decedent acted solely for the benefit of a third party. We thus hold that his death did not arise out of the employment. *See Lewis v. Tobacco Co.*, 260 N.C. at 412, 132 S.E. 2d at 880.

The Court of Appeals found a benefit to the employer in the fact that several newspapers and a trade magazine publicized decedent's benevolent acts and referred to his Burlington affiliation. It admitted, however, that "the record does not show any direct benefit to Burlington from [decedent's] action . . . ." *Roberts v. Burlington Industries*, 86 N.C. App. at 133, 356 S.E. 2d at 799. Its conclusion that "the good will of Burlington can only have been benefited by having [decedent] in its employment," *id.*, thus is purely speculative and cannot serve as the basis for a

1. The Court in *Guest* faced both the "arising out of" and the "in the course of" requirements. Since it upheld an award of compensation by applying the quoted test, it necessarily found that the injury arose out of the employment.

holding that the appreciable benefit to the employer test was met.

Plaintiffs' reliance upon *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596, is misplaced. In *Guest* we also addressed the compensability of an injury suffered by an employee while assisting a stranger. Pursuant to his employer's instructions, the employee in that case drove to the Greensboro Airport to fix a pair of flat tires on a truck. After replacing the inner tubes, he and a fellow employee located a filling station where they asked the operator for some "free air" to inflate the tires. The operator agreed, but while the employees were filling the first tire he asked them to help push a customer's stalled car. They complied with the request, and while they were pushing the car onto the highway an approaching car struck and severely injured the claimant-employee. *Guest*, 241 N.C. at 450, 85 S.E. 2d at 598. We upheld the Commission's award of compensation, explaining:

> Plaintiff and his co-employee were not customers. They asked for and received permission to get *free air*. The assistance extended by the filling station operator was for the benefit of their employer. In turn, the filling station operator requested plaintiff's aid in pushing off and starting his customer's car, then blocking access to his gas pumps. Reciprocal courtesies and assistance were requested and extended. . . . It is noteworthy that plaintiff, when he responded to the filling station operator's request for assistance, had not received the assistance needed to enable him to complete his service to his employer. Plaintiff had reasonable grounds to apprehend that his refusal to render the assistance requested of him might well have resulted in like refusal by the filling station operator.

Id. at 453, 85 S.E. 2d at 600.

The exchange of reciprocal assistance was the key to the holding in *Guest*. The injured employee there did not offer a gratuitous favor; rather, he had reason to believe that the continued use of the air hose to complete his mission for his employer was contingent upon an affirmative response to the station operator's request. Here, by contrast, defendant's offer of aid was prompted purely by humanitarian concern for an injured man's welfare. There was no conceivable *quid pro quo* of possible

benefit to the employer. Since decedent's sole purpose here was to assist a stranger in distress, *Guest* is clearly distinguishable, and the "reciprocal courtesies" analysis does not apply.[2]

The Court in *Guest* reserved for "an appropriate fact situation" the question of "whether an injury is compensable when an employee, a motorist, then in course of his employment, renders 'a courtesy of the road' to another motorist then in need of aid." *Guest*, 241 N.C. at 454, 85 S.E. 2d at 601. In dicta, it stated that "[t]he facts of [*Guest*] are distinguishable from cases where the act of the employee, characterized as 'chivalric,' or 'an errand of mercy,' or 'the act of a good Samaritan,' is wholly unrelated to the employment." *Id.* at 454-55, 85 S.E. 2d at 601. The implication from the dicta and the authority cited, *Sichterman v. Kent Storage Co.*, 217 Mich. 364, 186 N.W. 498 (1922), is that in such cases the injury is noncompensable.

The "appropriate fact situation" anticipated in *Guest* is presented here. Decedent's benevolent acts were a pure "courtesy of the road" and bore no relation to his employer's interests. We now hold that such purely altruistic actions, with no actual benefit to the employer, do not arise out of the employment. For supporting authority from other jurisdictions, see the following: *Comeau v. Maine Coastal Services*, 449 A. 2d 362 (Me. 1982); *Sichterman v. Kent Storage Co.*, 217 Mich. 364, 186 N.W. 498

2. A subsequent Court of Appeals decision relied on *Guest* and, like *Guest*, illustrates proper application of the employer benefit test. In *Lewis v. Insurance Co.*, 20 N.C. App. 247, 201 S.E. 2d 228 (1973), the employee insurance salesman stopped on the highway to help a policyholder who had run out of gas. While attempting to re-enter his car, he was struck by another car. *Lewis*, 20 N.C. App. at 248-50, 201 S.E. 2d at 229-30. The court relied upon the employer benefit rule as stated in *Guest* in affirming an award of compensation. *Id.* at 250, 201 S.E. 2d at 230. As an insurance salesman and collector, the employee was engaged in an "intensely personalized calling" which required frequent contact with his policyholders. "In a real sense, he was the insurance company as far as [the policyholders] were concerned, and any action on his part which built goodwill for him at the same time fostered goodwill for his employer." *Id.* at 250-51, 201 S.E. 2d at 230-31. Moreover, he had called on the policyholder the night before the accident, and during his visit he had begun negotiations to sell a policy to another family member. Thus, his actions also tended to promote the consummation of a specific sale. The court concluded that the employee acted for the benefit of his employer to a "substantial extent" and held that his accident was compensable. *Id.* at 250-51, 201 S.E. 2d at 230.

Unlike the employee there, decedent here encountered a situation which had absolutely no connection to his employment.

(1922); *Weidenbach v. Miller*, 237 Minn. 278, 55 N.W. 2d 289 (1952); *White v. Milk Producers, Inc.*, 496 P. 2d 1172 (Okla. 1972); *Marby Const. Co. v. Merritt*, 200 Okla. 560, 198 P. 2d 217 (1948); *Lennon Company v. Ridge*, 219 Tenn. 623, 412 S.W. 2d 638 (1967). *See also* 99 C.J.S., *Workmen's Compensation* § 224 (1958).

At times this Court has applied an "increased risk" analysis in determining whether the "arising out of the employment" requirement has been met. *See Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977); *Bartlett v. Duke University*, 284 N.C. 230, 200 S.E. 2d 193 (1973); *Robbins v. Nicholson*, 281 N.C. 234, 188 S.E. 2d 350 (1972); *Bell v. Dewey Bros.*, 236 N.C. 280, 72 S.E. 2d 680 (1952). Under this approach, the injury arises out of the employment if a risk to which the employee was exposed because of the nature of the employment was a contributing proximate cause of the injury, and one to which the employee would not have been equally exposed apart from the employment. "[The] causative danger must be peculiar to the work and not common to the neighborhood." *Gallimore v. Marilyn's Shoes*, 292 N.C. at 404, 233 S.E. 2d at 532, *quoting Harden v. Furniture Co.*, 199 N.C. 733, 735, 155 S.E. 728, 730 (1930); *see also Bartlett v. Duke University*, 284 N.C. at 233, 200 S.E. 2d at 195.

Application of the increased risk test here would not render decedent's demise compensable. Decedent's employment did not increase the risk that he would be struck by a car while shielding an injured stranger with no relation to the employment. The risk was common to the neighborhood, not peculiar to the work.

One ground for the Court of Appeals' opinion was application of the "positional risk" doctrine, which holds that "[a]n injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations of employment placed claimant in the position where he was injured." 1 A. Larson, *The Law of Workmen's Compensation* § 6.50 (1984). The court noted that "the conditions and obligations of [decedent's] employment put him in the position where he was killed." *Roberts v. Burlington Industries*, 86 N.C. App. at 134, 356 S.E. 2d at 799.

This Court, however, has never applied the "positional risk" doctrine to "benefit of third party" cases; rather, it has maintained the "employer benefit" approach. In *Bartlett v. Duke University*, we noted a Minnesota case in which the court held

that "an injury arises out of the employment if, after the event, it can be seen that the injury has its source in circumstances in which the employee's employment placed him." *Bartlett*, 284 N.C. at 235, 200 S.E. 2d at 196, *quoting Snyder v. General Paper Co.*, 277 Minn. 376, 383, 152 N.W. 2d 743, 748 (1967). We stated: "This broad generality is not the law in this jurisdiction." *Bartlett v. Duke University*, 284 N.C. at 235, 200 S.E. 2d at 196. Similarly, we have said that the employment may provide "a convenient opportunity" for the injury or death by accident without providing the cause. *Robbins v. Nicholson*, 281 N.C. at 240, 188 S.E. 2d at 354.

We have held that when an employee's duties require him to travel, the hazards of the journey are risks of the employment. *Hinkle v. Lexington*, 239 N.C. 105, 79 S.E. 2d 220 (1953). We have also stated that "an injury caused by a highway accident is compensable if the employee at the time of the accident is acting in the course of his employment and in the performance of some duty incident thereto." *Hardy v. Small*, 246 N.C. 581, 585, 99 S.E. 2d 862, 866 (1957). In *Bartlett*, however, we denied compensation for a choking death that occurred while the employee was eating out with a friend during a business trip. We explained that "eating is not peculiar to traveling" and that cases involving injuries sustained while "walking or riding from [a] hotel to a restaurant, while eating on the employer's premises, or which result from eating tainted food at a place where the employer required [an employee] to eat, are not pertinent . . . ." *Bartlett*, 284 N.C. at 234-35, 200 S.E. 2d at 196. Here, the required travel merely placed decedent in a position to seize the opportunity to rescue the injured pedestrian. His decision to render aid created the danger; the risk was not a hazard of the journey.

The Workers' Compensation Act "should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation"; however, "the rule of liberal construction cannot be employed to attribute to a provision of the act a meaning foreign to the plain and unmistakable words in which it is couched." *Guest v. Iron & Metal Co.*, 241 N.C. at 452, 85 S.E. 2d at 599, *quoting Johnson v. Hosiery Co.*, 199 N.C. 38, 40, 153 S.E. 591, 593 (1930) and *Henry v. Leather Co.*, 231 N.C. 477, 480, 57 S.E. 2d 760, 762-63 (1950). The Act was not intended to establish general insurance benefits. *Perry v.*

Bakeries Co., 262 N.C. at 276, 136 S.E. 2d at 647, *quoting Duncan v. Charlotte*, 234 N.C. 86, 91, 66 S.E. 2d 22, 25 (1951). To grant compensation here would effectively remove the "arising out of the employment" requirement from the Act. *See Bartlett v. Duke University*, 284 N.C. at 235, 200 S.E. 2d at 196, *citing Snyder v. General Paper Co.*, 277 Minn. at 393, 152 N.W. 2d at 754 (Peterson, J., dissenting).

Accordingly, the decision of the Court of Appeals is reversed. The cause is remanded to that court with directions that it remand to the Industrial Commission for reinstatement of its opinion and award denying compensation.

Reversed and remanded.

Justice MARTIN dissenting.

Believing as I do that the law of North Carolina requires a conclusion that the death of Timothy Roberts arose out of his employment with Burlington Industries, I dissent from the holding of the majority to the contrary.

In determining whether a death by accident arose out of the employment, the basic question is whether the employment was a contributing cause of the injury. In this case the decision of the Court of Appeals finding that the death did arise out of the employment can be supported upon two theories.

EMPLOYER BENEFIT THEORY

In *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596 (1955), this Court held that if the acts of the employee benefit his employer to any appreciable extent, then the injury or death is compensable. "Appreciable" means "noticeable." The American Heritage Dictionary 64 (1980). It is not necessary that the benefit be measured in dollars or cents or by other quantitative methods. In our case, the assistance of Timothy Roberts to Mr. Winters, the man previously struck by an automobile, was related to his employment because Burlington Industries was benefited to an appreciable extent. The actions of Mr. Roberts, in which he tried to save the life of a stranger injured on the highway, benefited Burlington Industries by increasing the employer's goodwill.

To me, it is indisputable that Burlington's goodwill was benefited by the tragic events in question. This is demonstrated by the local and regional newspapers that carried the story.

The Lexington Dispatch printed:

> A designer for Burlington Furniture in Lexington was killed on rain-slick Interstate 85 Thursday night after he stopped to direct traffic around the body of a pedestrian who had been fatally injured moments before.
>
> . . . .
>
> John Buckner, division personnel manager at Burlington, said this morning that Roberts had worked as a furniture designer for Burlington since July. "It is going to be a tragic loss for us. I just do not know the facts at this time . . . we are trying to gather facts at this time."

The Thomasville newspaper printed: "Roberts was a graduate of Fieldale-Collinsville High School and Kendall School of Design in Grand Rapids, Mich. He was employed as a furniture designer with Burlington Industries." Similar articles appeared in the Greensboro Daily News, the Greensboro Record, and the High Point Enterprise.

Also, in the December issue of *Furniture Today*, an article appeared concerning this accident which stated: "A 29-year-old staff designer for Burlington Furniture in Lexington, N.C., in the act of being a good Samaritan, was struck and killed as he attempted to aid a man lying on a busy interstate highway." The article was of three columns and contained a headline stating, BURLINGTON'S TIM ROBERTS [—] DESIGNER KILLED WHILE AIDING HURT MAN. *Furniture Today* is a trade publication generally circulated throughout the furniture industry. The majority's holding that these articles are too remote and too immeasurable to result in any benefit to Burlington is simply unsupported by this record. The goodwill of Burlington can only have been benefited by the publications presenting its employee in heroic proportions to the public and to the furniture industry.

EMPLOYEE AT RISK

Under this theory, where a claimant's employment places him in a position of risk, injuries arising therefrom are compensable.

This is sometimes referred to by the scholars in workers' compensation as the positional risk doctrine. 1 A. Larson, *The Law of Workmen's Compensation* § 6.50 (1985). The United States Supreme Court, in reviewing an award under the Longshoremen's and Harbor Workers' Compensation Act, adopted the view that where injuries are sustained during acts in emergency, they are compensable if the employment places the employee in the emergency. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 95 L.Ed. 483 (1951). The employee in *O'Leary* was waiting for his employer's bus to take him from the work area when he saw or heard two men standing on the reefs beyond a channel off the coast of Guam signaling for help. He plunged into the water in an effort to swim the channel to rescue the two men but was overcome by the current and drowned. The Court approved the awarding of benefits, holding that the death arose out of the employment. The Court stated that workers' compensation is not confined by common law concepts of the scope of employment. The Court further held that a reasonable rescue attempt may be one of the risks of the employment and so covered by the Act. I find *O'Leary* to be a very convincing case in support of the claimant's argument in our case.

The employee at risk theory is no stranger to the law of North Carolina on workers' compensation. It was relied upon by the Court of Appeals in *Felton v. Hospital Guild*, 57 N.C. App. 33, 291 S.E. 2d 158, *aff'd per curiam without precedential value*, 307 N.C. 121, 296 S.E. 2d 297 (1982). *See Powers v. Lady's Funeral Home*, 57 N.C. App. 25, 290 S.E. 2d 720 (Martin, J., dissenting), *rev'd & remanded*, 306 N.C. 728, 295 S.E. 2d 473 (1982). In *Pittman v. Twin City Laundry*, 61 N.C. App. 468, 300 S.E. 2d 899 (1983), the court held that for an accident to "arise out of" the employment, it is necessary that the conditions or obligations of the employment put the employee in the position or at the place where the accident occurs. *See* 1 A. Larson, *The Law of Workmen's Compensation* § 6.50. *See also White v. Battleground Veterinary Hosp.*, 62 N.C. App. 720, 303 S.E. 2d 547, *disc. rev. denied*, 309 N.C. 325, 307 S.E. 2d 170 (1983). This Court in *Robbins v. Nicholson*, 281 N.C. 234, 188 S.E. 2d 350 (1972), held that to be compensable the accident need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. *See also Harden v. Fur-*

niture Co., 199 N.C. 733, 155 S.E. 728 (1930). So, contrary to the majority's intimation, this theory has long been a part of workers' compensation law in North Carolina.

In applying the test to this case, it is clear that the conditions and obligations of Mr. Roberts' employment put him in the position where he was killed. He was required by his employment with Burlington to visit a furniture plant in Asheville, and to do so he had to fly from Greensboro to Asheville. He was required to drive himself to and from the airport. It was while he was on his way home that he encountered Mr. Winters, a stranger, in a dangerous position on the highway which required assistance from others. Mr. Roberts was killed in providing that assistance.

It is clear that an emergency existed and that Mr. Roberts perceived the situation to be an emergency.

Justice Cardozo made the famous pronouncement which is applicable to this case. "Danger invites rescue. The cry of distress is the summons to relief." *Wagner v. International Ry. Co.*, 232 N.Y. 176, 180, 133 N.E. 437, 437 (1921). Here the act of Tim Roberts in going to the rescue of Mr. Winters was the child of the occasion. Clearly Mr. Roberts' presence and actions were a result of his employment placing him in the position of risk. I have no quarrel with *Bartlett v. Duke University*, 284 N.C. 230, 200 S.E. 2d 193 (1973), relied upon by the majority, or cases of similar import. *Bartlett* and other such cases do not deal with situations where the claimant is injured by a risk not shared by the general public. Any member of the general public is likely to choke on a piece of meat or be bitten by a dog or injured by a criminal. These are all hazards common to the general public. However, Mr. Roberts' act was not a hazard common to the general public. His action was an affirmative act responding to the danger existing with respect to Mr. Winters. The very fact that the claimant's employment placed him at the place and under the conditions which caused him to respond to the emergency situation differentiates the case from those such as *Bartlett*. Here, Roberts' employment placed him at the scene of the dangerous emergency that invited rescue by him, which led to his death.

This Court has often held that when an employee's duties require him to travel, the hazards of the journey are risks of the employment. *E.g.*, *Hinkle v. Lexington*, 239 N.C. 105, 79 S.E. 2d

220 (1953). Such is the case here. The majority's aberrant statement that Mr. Roberts' decision to render aid created the danger is contrary not only to law but to the facts and to human nature. The facts are that Mr. Winters had previously been struck by an automobile and was lying on the highway. The danger was that another vehicle might strike Winters as he lay on the highway and further injure him or perhaps even cause injuries to the occupants of such other automobile. That is the dangerous situation which Mr. Roberts faced and which in the conduct of human affairs cried out to him for rescue. The law recognizes these reactions of the human mind in tracing conduct to its consequences. Mr. Roberts' reaction was a normal reaction; he did what was natural and probable. The risk that Mr. Roberts might be faced with such a danger on his return home while about his employer's business was a hazard of the journey and is compensable. *Id.*

Allowing recovery in cases such as this supports a sound public policy that encourages employees to undertake "good Samaritan" acts of humanitarianism desirable in any enlightened society. *Luke* 10:30-36. Such a holding is also in accord with the principle of liberal construction of the Workers' Compensation Act that benefits should not be denied upon technical, narrow, and strict interpretation, *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950), and with the following decisions: *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 95 L.Ed. 483; *Food Products Corp. v. Indus. Com'n*, 129 Ariz. 208, 630 P. 2d 31 (Ct. App. 1981); *D'Angeli's Case*, 369 Mass. 812, 343 N.E. 2d 368 (1976); *Big "2" Engine Rebuilders v. Freeman*, 379 So. 2d 888 (Miss. 1980). *See also* 1 A. Larson, *The Law of Workmen's Compensation* § 28.23 (1985). I vote to affirm the Court of Appeals.

STATE OF NORTH CAROLINA v. WILLIAM FRANK POWELL

No. 375A86

(Filed 3 February 1988)

1. Criminal Law § 66.14— impermissibly suggestive pretrial identification procedures—identification at trial of independent origin

The trial court in a prosecution for first degree rape, first degree sex offense, and crime against nature did not err by admitting the victim's in-court

identification of defendant even though the prosecuting witness first saw defendant at a one-man showup in a parking lot at 2:00 a.m.; a detective subsequently showed the prosecuting witness a photographic lineup which contained a year-old photograph of defendant; when the witness could not make a positive identification from that lineup, the detective put in a picture of defendant taken that day; and, when the victim still could not identify the defendant, the detective again arranged a one-man showup. The superior court found that the victim's in-court identification of defendant was of independent origin and untainted by illegal pretrial procedures based on evidence that the witness had ample opportunity to observe the person as he committed the crime, that she paid attention to him, and that she was able to describe him to officers.

2. Criminal Law § 181.2— motion for appropriate relief—newly-discovered evidence—lack of due diligence

The trial court in a prosecution for rape, first degree sex offense, and crime against nature did not err by denying defendant's motion for appropriate relief based on newly-discovered evidence where the evidence showed that the defendant knew of the new evidence during the trial and the superior court concluded that defendant did not act with due diligence in seeking that witness. N.C.G.S. § 15A-1415(b)(6).

3. Constitutional Law § 34— mistrial—no double jeopardy

The trial court in a prosecution for rape, first degree sex offense, and crime against nature, did not err by denying defendant's motion to dismiss on a plea of former jeopardy where the defendant had made the motion for a mistrial in his former trial.

Justice FRYE dissenting.

Chief Justice EXUM joins in the dissenting opinion.

APPEAL by defendant from a life sentence imposed by *Tillery, J.*, at the 13 January 1986 Criminal Session of Superior Court, DARE County. Heard in the Supreme Court 11 December 1986.

The defendant was charged with first degree rape, first degree sex offense, and a crime against nature. He was tried on these charges in September 1985 in a trial which ended in a mistrial. He was tried a second time in January 1986. At the end of the State's evidence the court allowed a motion to dismiss the charge of crime against nature. The jury found the defendant guilty of first degree rape and not guilty of first degree sex offense. The defendant appealed from the imposition of a life sentence.

Lacy H. Thornburg, Attorney General, by Francis W. Crawley, Assistant Attorney General, for the State.

G. Irvin Aldridge for defendant appellant.

WEBB, Justice.

The defendant has brought forward three assignments of error pursuant to Rule 28(b)(5), Rules of Appellate Procedure and supported them by reason and authority. We shall consider these three assignments of error.

[1] The defendant's first assignment of error deals with the identification testimony of the prosecuting witness. The defendant objected to this testimony and a voir dire hearing out of the presence of the jury was held. The prosecuting witness testified that on 17 August 1982 she was staying at a cottage in Kitty Hawk, North Carolina. She arose early that morning and went to the beach at approximately 5:10 a.m. to watch the sun rise. She sat on the beach for five to ten minutes at which time she saw a man approaching. The man came to her and asked if she had a cigarette. She told him she did not. After some conversation he drew a knife and forced her to a dune, at which time he raped her and performed cunnilingus on her. She escaped from him some time later and returned to the cottage in which she was staying with her fiance and her fiance's parents. She testified she was with her assailant for approximately forty minutes, during which time there was sufficient light that she had no trouble identifying him.

The prosecuting witness reported the incident to the Dare County Sheriff's Department and she was interviewed that day by several deputy sheriffs and by W. A. Hoggard, III, a special agent with the State Bureau of Investigation. Mr. Hoggard exhibited to her a photographic lineup which did not contain the defendant's picture. She was not able to identify her assailant in the lineup although she said one photograph appeared to be similar to the defendant. Later that day Mr. Hoggard carried the prosecuting witness to a commercial artist who drew a picture of the assailant from the prosecuting witness' description. The prosecuting witness testified the picture was similar to her assailant but did not "really resemble him."

At approximately 2:00 a.m. the next morning Mr. Hoggard called the prosecuting witness and asked her to come to a bar and look at a man. The prosecuting witness was driven to the bar by her fiance where the defendant was standing in the parking lot under a light. The prosecuting witness stayed in the automobile and observed the defendant from a distance of approximately twenty feet. She testified "I remember pulling up in the parking lot and I began to shake uncontrollably when I started observing him, and he was wearing those same green pants and he had on the same muscletype t-shirt, but I didn't get to look at his face." Mr. Hoggard testified that he went to the prosecuting witness who was seated in the automobile. He said "[She] stated the individual she had seen me talking to had the same basic build and size as her assailant on the beach, but, due to the distance and the lighting, she was not able to get a close-up view of his facial features and could not make a positive identification."

On 21 August 1982 Mr. Hoggard showed another photographic lineup to the prosecuting witness. It contained a year old picture of the defendant. The prosecuting witness selected the defendant's picture and said it "appeared to be him, but the hair—appeared to be her attacker, but the hair and moustache were quite a bit different from the person she observed on the beach on August 17, 1982." Mr. Hoggard had a photograph made of the defendant that day and placed it in the second photographic lineup he had shown the prosecuting witness. The prosecuting witness told Mr. Hoggard that this picture looked like her attacker, but she could not be positive and she would like to see the individual in person.

As a result of the prosecuting witness' request, Mr. Hoggard called the defendant who agreed to meet Mr. Hoggard and the prosecuting witness to determine whether he was the assailant. They met in the parking lot of a supermarket. It was daylight. The defendant was wearing a three piece suit and a necktie. The prosecuting witness told Mr. Hoggard the defendant looked very similar to her assailant but she still could not make a positive identification. This occurred on 22 August 1982 and the prosecuting witness left that day for her home in Virginia.

The prosecuting witness talked to Mr. Hoggard several times by telephone and wrote him letters in September 1982 and March

1983. In late May 1985 she called Mr. Hoggard and told him she could identify her assailant. She met Mr. Hoggard in the district attorney's office in Elizabeth City at which time she was shown the two photographic lineups she had been shown in the summer of 1982. She identified the photograph of the defendant as a picture of the man who assaulted her in 1982. The prosecuting witness testified that she could identify the defendant as the man who had assaulted her because she had several nightmares and the face of her assailant kept appearing in them. This was the face of the defendant.

The court made findings of fact consistent with this evidence and held:

> From the foregoing findings of fact, the Court concludes as a matter of law: After having considered the opportunity of the witness to view the person at the scene, the degree of attention which the witness described in her viewing of him, as well as her description of him physically and of his clothing and jewelry, after having considered the accuracy of the witness' description as she gave it to Agent Hoggard, the level of certainty demonstrated by the witness that the in-court confrontation yesterday in which she stated that she was absolutely certain of the defendant as being her attacker and after having considered the length of time between the crime and the confrontation, the Court has come to the conclusion that all of the circumstances do not reveal pretrial procedure so unecessarily [sic] suggestive and conducive to irreparable mistake in identification as to offend fundamental standards of decency, fairness and justice. The Court has further concluded as a matter of law that the in-court identification of the defendant is of independent origin and untainted by illegal pretrial identification procedures.

The court denied the motion to suppress the prosecuting witness' in-court identification of the defendant.

Identification evidence must be suppressed on due process grounds where the facts show that the pretrial identification procedure was so suggestive as to create a very substantial likelihood of irreparable misidentification. *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985). The first inquiry when a motion is made to suppress identification testimony is whether the pretrial

identification procedure is impermissibly suggestive. If it is determined that the pretrial identification procedure is impermissibly suggestive the court must then determine whether the suggestive procedure gives rise to a substantial likelihood of irreparable misidentification. Factors to be considered in making this determination are (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 of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and confrontation. *State v. Hannah*, 312 N.C. 286, 322 S.E. 2d 148 (1984) and *State v. Headen*, 295 N.C. 437, 245 S.E. 2d 706 (1978).

In this case the superior court concluded "that all of the circumstances do not reveal pretrial procedure so unecessarily [sic] suggestive and conducive to irreparable mistake in identification as to offend fundamental standards of decency, fairness and justice." This may be construed as a finding that the pretrial procedure was not impermissibly suggestive. The evidence showed that the prosecuting witness first saw the defendant at a one man showup in a parking lot at 2:00 a.m. After this, Mr. Hoggard showed the prosecuting witness a photographic lineup which contained a year old photograph of the defendant. When the prosecuting witness could not make a positive identification from this lineup, Mr. Hoggard put a picture of the defendant taken that day in the same photographic lineup and showed it to the prosecuting witness. When she could not identify the defendant on this occasion, he again arranged a one man showup. It may certainly be argued from this that the pretrial procedures were impermissibly suggestive.

It is not necessary for us to determine whether the pretrial procedures were impermissibly suggestive. In *State v. Bundridge*, 294 N.C. 45, 239 S.E. 2d 811 (1978), this Court held that although the trial court may have erred in finding a pretrial procedure was not impermissibly suggestive it was not error to allow an in-court identification when the trial court found, based on sufficient competent evidence, that the witness' identification was independent of the pretrial procedure. In this case, the superior court found that the in-court identification of the defendant was of independent origin and untainted by illegal pretrial procedures. The superior court relied on the evidence that the witness had ample

opportunity to observe the person as he committed the crime and that she paid attention to him and was able to describe him to the officers. These are three of the five factors which we have said may be used to determine whether an identification is of independent origin. The court also relied on the positive in-court identification by the witness. There are two factors, the level of certainty demonstrated at the pretrial confrontations and the time between the crime and the confrontation which did not support this finding. In light of the three factors which the court considered, we cannot hold that the court erred in finding the identification was of independent origin. This assignment of error is overruled.

[2] The defendant next assigns error to the denial of his motion for appropriate relief based on newly discovered evidence. While the trial was in progress the defendant's attorney inspected notes Mr. Hoggard had made during his investigation. These notes showed Mr. Hoggard had interviewed a Mr. and Mrs. William Deem of New Kensington, Pennsylvania. The Deems were staying in a cottage across the street from the place at which the rape occurred. Mrs. Deem told Mr. Hoggard that at approximately 6:15 a.m. she and her husband had observed through binoculars a black male and a white female in the dunes. The couple stayed in the dunes approximately twenty minutes and then walked hand in hand toward the beach.

After a hearing on the defendant's motion for appropriate relief the court made findings of fact to which no exceptions were made. The court found as facts that the defendant examined Mr. Hoggard's notes during the trial, at which time he learned of Mrs. Deem's statement and that he did not ask for a recess for the purpose of procuring Mrs. Deem as a witness. The court concluded that the defendant did not act with due diligence to procure this witness and her testimony would not be newly discovered evidence.

N.C.G.S. § 15A-1415 provides in part:

> (a) At any time after verdict, the defendant by motion may seek appropriate relief upon any of the grounds enumerated in this section.

> (b) The following are the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment:
>
> . . . .
>
> (6) Evidence is available which was unknown or unavailable to the defendant at the time of 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.

This section of the statute codifies substantially the rule previously developed by case law for the granting of a new trial for newly discovered evidence. *See State v. Beaver*, 291 N.C. 137, 229 S.E. 2d 179 (1976). The evidence showed that the defendant knew of the statement of Mrs. Deem during the trial. The superior court concluded the defendant did not act with due diligence in seeking this witness. We cannot hold the court abused its discretion in doing so. *See State v. Person*, 298 N.C. 765, 259 S.E. 2d 867 (1979). If the defendant did not act with due diligence in seeking this witness he is not under N.C.G.S. § 15A-1415(b)(6) entitled to a new trial.

[3] The defendant next assigns error to the denial of his motion to dismiss on a plea of former jeopardy. At the first trial there was testimony identifying the defendant as the perpetrator of the crime before the court knew the defendant's principal defense was lack of identity. The defendant made a motion for mistrial at this point. The court made findings of fact that this identification testimony had been allowed before a voir dire hearing was held to determine its admissibility. It found in part:

> If the Court finds the victim's in-court identification is tainted by viewing the defendant and photographs of him between the time of the attack and the trial, then the Court would have to reverse its earlier ruling and such proceeding would result in substantial and irreparable prejudice to the defendant's case. If the Court rules the in-court identification is not tainted, then the ruling of the Court is suspect because of the natural tendency to sustain one's prior conduct.

The court allowed the motion for mistrial.

The defendant argues that he has been twice put in jeopardy for the same offense by being tried a second time. The defendant made a motion for mistrial. It was not error to overrule his plea of former jeopardy. *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977).

No error.

Justice FRYE dissenting.

In my opinion, the dispositive issue in this case is whether the trial judge erred in allowing into evidence the victim's positive identification of the defendant as her assailant. Believing that the admission of this evidence was prejudicial error, I vote for a new trial.

The State's evidence at trial showed that the victim was sexually assaulted during the early morning hours of 17 August 1982. Defendant was not arrested or charged with any offense relating to this incident until the summer of 1985. On 22 July 1985, he was charged in a single indictment with first-degree rape, first-degree sexual offense, and crime against nature. The State's evidence at his trial beginning 13 January 1986 (a previous trial ended in a mistrial) identified defendant as the perpetrator of the offenses. Defendant testified in his own behalf and denied being the victim's assailant. He also offered alibi evidence. The trial court allowed defendant's motion to dismiss the charge of crime against nature at the close of the State's evidence. The jury acquitted defendant of first-degree sexual offense but found him guilty of first-degree rape. The judge accordingly imposed the mandatory life sentence, and defendant appealed from that judgment to this Court.

Defendant argues that the trial judge erred in denying his motion to suppress the victim's identification of him as her assailant on the grounds that it was tainted by pretrial identification procedures that violated defendant's constitutional right to due process. In considering a similar challenge in a recent case, we said:

> The test for determining whether pretrial identification procedures were impermissibly suggestive 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). As defendant correctly notes, determination of this question involves a two-step process. First, the Court must determine whether the pretrial identification procedures were unnecessarily suggestive. If the answer to this question is affirmative, the court then must determine whether the unnecessarily suggestive procedures were so impermissibly suggestive that they resulted in a substantial likelihood of irreparable misidentification. *Manson v. Brathwaite*, 432 U.S. 98, 53 L.Ed. 2d 140 (1977); *State v. Flowers*, 318 N.C. 208, 347 S.E. 2d 773 (1986); *State v. Headen*, 295 N.C. 437, 245 S.E. 2d 706 (1978). Whether a substantial likelihood exists depends on the totality of the circumstances.

> The factors to be considered . . . include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Manson, 432 U.S. at 114, 53 L.Ed. 2d at 154. *State v. Fisher*, 321 N.C. 19, 23, 361 S.E. 2d 551, 553 (1987).

I turn now to consider the out-of-court and pretrial identification procedures used in the instant case.[1]

On 19 August 1982, the victim went to the police station and was shown a photographic lineup containing six pictures (Lineup 1). The lineup represents black men of differing heights, ages, and general appearances. There was no photograph of defendant in this lineup. The victim selected one of the photos as being "similar" to her assailant but was unable to make an identification. She

1. Defendant's written motion to suppress refers only to the victim's in-court identification, but in denying this motion at the close of the *voir dire*, the trial judge stated in effect that he would regard the defendant as having a continuing objection to the victim's testimony on the entire issue of identification.

was then given the police department's "mug book" and allowed to leaf through it. She selected no one from the mug book. Next, she was taken to a commercial artist who prepared a sketch with the victim's assistance. The victim said that the resulting drawing did not really look like her assailant but had some similarities. The police posted a description of the assailant and copies of the sketch at various places in the community.

In the early morning hours of 21 August 1982 (Friday night-Saturday morning), the SBI agent conducting the investigation received a call from a local bar in response to a copy of the sketch. He went to the bar and interviewed defendant. Defendant denied any involvement in the rape. He lived on the mainland, in Grandy, and denied coming to the beach at all during that week. The SBI officer testified that defendant was quite cooperative. He agreed to stand outside the bar, under the streetlight, so that the victim could drive past and see him, which she did at about 2 a.m. The victim said at the time that the defendant's build and clothes were similar to her attacker's but that she had not been able to see defendant's face clearly under the streetlight. She was unable to make an identification.

The SBI officer made up a second photographic lineup (Lineup 2) and took it later on that day (Saturday, 21 August 1982) to the cottage where the victim was staying. This lineup contained a photograph of defendant taken the previous year. The victim selected defendant's photograph as being similar to her attacker, but she was unable to make an identification.

The SBI officer obtained a search warrant to photograph defendant and seize his watch, pocketknife, and ring. He added this new photograph to lineup 2 and took the augmented lineup (Lineup 2a) back to the victim. On this occasion, she selected the new photograph of defendant as being someone similar to her attacker, but she was again unable to make a positive identification.

The SBI agent arranged another opportunity for the victim to view defendant in person, with defendant's cooperation, at about noon on the next day (Sunday, 22 August 1982) in the parking lot of a shopping center. The victim, who was on her way back to her home in Virginia, stopped in the parking lot. On this occasion, defendant was dressed for church in a suit, with his hair

combed. The victim was unable to make an identification. She said she was not sure and mentioned the difference in hair and dress.

In May 1985, nearly three years after the rape, the victim contacted the police and indicated that she had become seriously interested in having defendant prosecuted. She returned to Kitty Hawk on 7 June 1985, where she was again shown Lineup 1 and Lineup 2a in their original condition. She selected defendant's second photograph without hesitation. I believe that under the circumstances surrounding this identification procedure, the procedure was unduly suggestive.

During the initial investigation in 1982, the victim told the police, including the SBI agent who was also present at the 7 June 1985 meeting, that she would have difficulty in the identification of a black male because of her prejudiced attitude toward blacks and her fear of them and her inability to communicate with them. She was subsequently unable to identify defendant as her assailant on four separate occasions, twice in photographs and twice in person. She was similarly unable to identify defendant's watch and ring as being those of her assailant.[2] She wrote the SBI agent a letter in September 1982, in which she inquired about the progress of his investigation and remarked, "There are so many black men in that area. I'm sure it would be hard to locate him. Needless to say, the few I looked at were *very* similar in facial and physical features." (Emphasis in original.) The letter continued, "Every now and then I'll see a black man and of course my mind will flash back, but ever so slowly the whole episode is fading." In March of the following year, however, she wrote the agent that she "realized" by that time that "the man at the bar, wearing: [sic] loose-fitting green pants, and a white T-shirt" was her assailant. She referred to him as being "fully disguised" at the Sunday showup in the parking lot. The victim was never told about any possible suspects other than defendant, although at least one other man was questioned.

Despite the March 1983 letter, no further steps were taken until the victim herself contacted the police again in May 1985, saying that she could not put the episode behind her until she

2. She said they were "similar." The watch and ring appear to have been commonly-found types.

"took action." At this point, almost three years had passed since the rape, and considering the easily-remembered position of defendant's second photograph in Lineup 2a, I believe that presenting the victim with the two identical lineups she had seen before, not changed in any way, was not so much a test of her ability to identify her assailant as of her memory of the defendant's photograph and its position.

Having concluded that the 7 June 1985 identification procedure was unduly suggestive, it must now be determined whether this procedure created a substantial likelihood of irreparable misidentification. In making this determination, the test is whether, under the totality of the circumstances, the victim's out-of-court identification on 7 June 1985 was reliable. At the pretrial identification procedure in question, on 7 June 1985, and at the trial itself, the victim quite emphatically identified defendant as her attacker. However, three points undercut this factor in this case as a guide to the reliability of the identification. First, despite the fact that the victim announced in her letter of 10 March 1983 that she knew she could pick defendant out of a "lot of different faces"—"probably in a split second," she never realized that there were two photographs of defendant in Lineup 2a. Second, the victim herself originally expressed considerable doubt about her ability to identify her assailant accurately because of his race. Third, the victim was initially unable to identify defendant as her attacker at a point when the crime was fresh in her mind. She said at that time that she did not want to identify anyone incorrectly and hence would not do so unless she was sure. However, she never offered any explanation for her original uncertainty, and when asked what had made her sure three years later, she replied that there were two things. One was thinking about the rape as time passed. The other was a recurring portion of a nightmare. Neither add to the assurances of reliability. The passage of so much time raises a very real possibility that the victim's memory of the crime had blurred. Indeed, the victim herself wrote in her letter to the SBI agent only a month after the rape that "the whole episode is fading." Furthermore, her testimony abundantly shows that her memory for some of the details of the crime and the surrounding events had in fact faded.

When the corrupting effect of the unduly suggestive pretrial identification procedure is weighed against the *Manson* factors to

determine the reliability of the victim's identification of defendant, these factors provide insufficient indicia of reliability to overbalance the suggestiveness in the 7 June 1985 presentation of the photographic lineups. The potential for tainting the victim's identification in this case was enormous. The victim was initially doubtful of her ability to recognize her attacker, and she failed to identify defendant on four separate occasions when her memory of her attacker was fresh in her mind. As her memory faded with the passage of time, the potential danger of suggestive pretrial identification procedures grew, especially for procedures that harkened back to suggestiveness in the earlier procedures. The risk involved was aptly described by the First Circuit in *United States v. Eatherton*, 519 F. 2d 603, 608 (1st Cir.), *cert. denied*, 423 U.S. 987, 46 L.Ed. 2d 304 (1975),

> If a witness' initial selection of a photograph is somewhat equivocal or may have been influenced by suggestive procedures—albeit not one of a magnitude which, standing alone, would require the suppression of an in-court identification—subsequent repetitive exercises which do little more than test the witness' ability to again select that photo are likely to have the effect of fixing that image in the witness' mind with a corresponding blurring of the image actually perceived at the crime.

(Citations omitted.)[3]

The totality of the circumstances in the instant case reveal a very substantial likelihood of irreparable misidentification. First, the very speed with which the victim selected defendant's photograph on the occasion in question, while at the same time utterly failing to perceive that another photograph of defendant appeared in the same lineup, indicates that it was indeed her recollection of the photograph that was being exercised, rather than her recollection of her attacker. Second, when events were fresh in the victim's memory, she was unsure about defendant, even after four viewings, and could only say that he was similar, a statement she also made about a photograph of a different person in Lineup 1.

3. In *Eatherton*, the First Circuit eventually concluded that given the positiveness of the witness' initial identification, the subsequent exposures to the same photograph had probably not affected her subsequent identifications.

The victim testified that she had become positive about her identification of defendant because of the passage of time, which in this case is a factor strongly pointing away from reliability, and because of her recurring nightmare. According to the victim's testimony, she had been having this nightmare before she wrote her September 1982 letter to the SBI agent. Yet, in this letter, she inquired about the progress of his investigation, said that her memories were fading, and made no mention of identifying defendant as her attacker. Although in a letter written seven months after the rape, she said that she had come to realize that the man she saw at the showups was her attacker, she did not in fact make a positive identification of defendant until nearly three years later. At that time, she did not perceive that defendant appeared twice in Lineup 2a, despite her statement in the second letter that she knew she could pick out his face in a split second. Third, she added at least one identifying detail to her description of her assailant only after seeing defendant. She also "explained" or altered those portions of her initial description that did not fit defendant. She spoke of defendant as being "totally disguised" at the only showup where she had a good view of his face, when all he had done was don a suit and brush his hair. I also note that defendant was initially picked up as a result of a sketch that the victim herself said did not look like her assailant. Finally, the victim's testimony shows that her memory of associated events and of certain details of the rape itself have blurred with the passage of time. Accordingly, the victim's out-of-court identification of defendant on 7 June 1985 should have been suppressed. *See Foster v. California*, 394 U.S. 440, 22 L.Ed. 2d 402 (1969) (where repetitive, suggestive lineups changed an uncertain identification to a certain identification, admission was error).

The same test of reliability must now be applied to the victim's in-court identification. However, except to the extent that the in-court identification may have been buttressed by viewing defendant at the preliminary hearing and at the first trial (which resulted in a mistrial), there are no new factors to be considered in evaluating the reliability of the victim's in-court identification. Because under the facts of this case analysis is the same for the in-court identification as for the out-of-court identification, I would

hold that the victim's in-court identification should also have been suppressed.[4]

In so concluding, I intend no criticism of the able and experienced trial judge who heard this matter. Before ruling on the defendant's suppression motion, the judge remarked, "As far as I'm concerned this thing is right on the razor's edge." This case reflects a highly unusual situation, whose peculiar facts appear to be unique. Only in light of all of the factors present do I conclude that the victim's 7 June 1985 out-of-court identification and her in-court identification should have been suppressed.

Finally, having concluded that it was error to admit the victim's 7 June 1985 out-of-court identification and her in-court identification, it must be decided whether the error was prejudicial. Because a constitutional right is involved, the standard of review on appeal is whether the error was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (1983); *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705 (1967). Since the victim's positive identification was the only strong evidence tending to show that defendant was the perpetrator of the rape, I cannot say that its erroneous admission was harmless beyond a reasonable doubt. Thus, I would hold the error prejudicial and award defendant a new trial.

Chief Justice EXUM joins in this dissenting opinion.

4. Defendant also contends that an identification by the victim that occurred when defendant was in court for his preliminary hearing was impermissibly suggestive. There is no clear account of this identification, but apparently, before the preliminary hearing began, the SBI agent told the victim to go into the courtroom to see whether she could identify defendant. She did so. There was at least one other black man present; there may have been more. Based on the record before us, I cannot say that this procedure was unduly suggestive.

CHARLES YOUNGBLOOD v. NORTH STATE FORD TRUCK SALES AND LIBERTY MUTUAL INSURANCE COMPANY

No. 517A87

(Filed 3 February 1988)

Master and Servant § 49— workers' compensation—employee rather than independent contractor

An employment relationship existed between plaintiff and North State at the time of plaintiff's injury where, although plaintiff possessed specialized skill in the use of Kansas Jack equipment, North State retained the right to control the details of plaintiff's work by paying him on a time basis, providing all materials and assistance which he needed, setting his hours of work, and retaining the right to discharge him at any time.

Chief Justice EXUM dissenting.

Justices MEYER and WHICHARD join in this dissenting opinion.

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 87 N.C. App. 35, 359 S.E. 2d 256 (1987), which affirmed the opinion and award of the Industrial Commission filed 11 August 1986 allowing plaintiff's claim for compensation and medical benefits. Heard in the Supreme Court 9 December 1987.

Teague, Campbell, Dennis & Gorham, by George W. Dennis III and Linda Stephens, for plaintiff-appellee.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert W. Sumner, for defendant-appellants.

MARTIN, Justice.

The sole issue for review is whether, with respect to the work in which he was engaged at the time of his injury, plaintiff was an "employee" of defendant North State Ford Truck Sales (North State) within the meaning of the Workers' Compensation Act. We conclude that he was North State's employee and accordingly affirm the Court of Appeals.

Plaintiff was seriously injured and permanently disabled on 23 July 1984 while instructing defendant North State's employees in the use of Kansas Jack equipment to repair the frames of heavy vehicles. The compensation hearing was limited by stipula-

tion to a determination of plaintiff's employment status. The deputy commissioner received the following essentially uncontroverted evidence:

At the time of the injury, plaintiff was a self-proclaimed "specialist" in the use of Kansas Jack frame-straightening equipment and one of only three or four persons in the region qualified to teach others how to use it. Plaintiff had developed this skill and knowledge while operating his own tractor-trailer repair shop from 1973 to 1983. He used Kansas Jack equipment for frame-straightening jobs and on occasion helped a Kansas Jack field representative to demonstrate the equipment to prospective buyers. In late 1983 plaintiff closed the repair shop and became an independent sales agent for Interstate Marketing Corporation (IMC). Under the arrangement with IMC, plaintiff sold Kansas Jack frame and measuring equipment in a sixteen-county sales territory encompassing parts of Georgia and Tennessee.

For each of his sales, plaintiff was responsible for installing the equipment at the purchaser's place of business and training the purchaser's employees in the use of the equipment. Over the course of his relationship with IMC, plaintiff conducted ten to twelve such training sessions in connection with Kansas Jack sales. He received no salary or benefits from IMC and was paid on a strictly commission basis. On one occasion, IMC hired plaintiff as an "employee" to conduct a Kansas Jack workshop for which he was paid $250 per day. This was the only occasion on which plaintiff conducted a training session that was unconnected to a personal sale.

In July of 1984, defendant North State purchased some secondhand Kansas Jack frame-straightening equipment. Because its employees were not familiar with the equipment, North State contacted the Kansas Jack representative for the North Carolina sales territory and requested the name of a qualified instructor for on-site training. The representative recommended plaintiff for the job. Alan Chapman, North State's body shop manager, then negotiated with plaintiff by telephone. Plaintiff agreed to travel to Raleigh to train North State's employees on the equipment during the week of 23 July 1984. Under the agreement, plaintiff was to receive $250 per day plus expenses, "for as many or as few days as it would take." The instruction could last up to five days,

depending on the trainees' progress. Mr. Chapman advised plaintiff that he was to follow the normal work schedule, instructing the trainees between the hours of 7:30 a.m. and 4:30 p.m., with a lunch break from noon until 1:00 p.m. He rejected plaintiff's suggestion that the training continue at night because he did not want to pay plaintiff and the trainees overtime. He assured plaintiff that North State would supply any necessary equipment or assistance.

Plaintiff arrived at North State on the morning of 23 July 1984 in a Kansas Jack panel truck which IMC had made available for his personal use. Plaintiff was not asked to sign an employment application, and no arrangements were made for standard employee benefits or the withholding of taxes. Mr. Chapman had the body shop employees lay the Kansas Jack equipment out on the floor. He told plaintiff he wanted the workers to have "hands-on" training that day and showed plaintiff which trucks to repair during the instruction process.

The evidence diverged somewhat as to the degree of supervision exercised by Mr. Chapman. Plaintiff testified that Mr. Chapman gave him instructions as to how the trainees should be taught. He was present during most of the morning instructional session, and during the lunch break he discussed with plaintiff what had gone on that morning and what he wanted plaintiff to do that afternoon. He then participated to some extent in the afternoon hands-on training by telling the trainees "what to do." Plaintiff further testified that he left it up to Mr. Chapman to determine when his employees were comfortable enough with the equipment to terminate the training. He was prepared to leave early in the week if Mr. Chapman determined that he was no longer needed.

Mr. Chapman testified to the contrary that although he had checked on the trainees' progress several times, he did not attempt to supervise the training in any way. He himself had no knowledge of the equipment and left the methods of instruction entirely to plaintiff's discretion.

Plaintiff's injury occurred during the afternoon hands-on training session when a chain snapped and struck him in the neck. Plaintiff suffered fractured vertebrae, resulting in quadriplegia, and amassed medical bills of approximately $300,000. Defendant

North State paid plaintiff $375.56 for one day's work plus travelling expenses. Defendant insurance carrier refused to pay medical expenses or disability compensation.

Based on the foregoing, the deputy commissioner found that plaintiff had an "independent calling" to teach the use of Kansas Jack equipment and that defendant North State had no right of control over plaintiff's teaching methods. He concluded that plaintiff was an independent contractor not subject to the provisions of the Workers' Compensation Act at the time of the injury and dismissed the claim for lack of jurisdiction. The full Commission, with one member dissenting, reversed this determination, finding that North State had retained the right to control the details of plaintiff's work and concluding that plaintiff was North State's employee. A divided panel of the Court of Appeals affirmed. Defendant appealed to this Court pursuant to N.C.G.S. § 7A-30(2).

To be entitled to maintain a proceeding for workers' compensation, the claimant must be, in fact and in law, an employee of the party from whom compensation is claimed. *Hicks v. Guilford County*, 267 N.C. 364, 148 S.E. 2d 240 (1966); *Hart v. Motors*, 244 N.C. 84, 92 S.E. 2d 673 (1956). The issue of whether the employer-employee relationship exists is a jurisdictional one. *Lucas v. Stores*, 289 N.C. 212, 221 S.E. 2d 257 (1976); *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965). An independent contractor is not a person included within the terms of the Workers' Compensation Act, and the Industrial Commission has no jurisdiction to apply the Act to a person who is not subject to its provisions. *Richards v. Nationwide Homes*, 263 N.C. 295, 139 S.E. 2d 645 (1965).

Findings of jurisdictional fact made by the Industrial Commission are not conclusive, even when supported by competent evidence. It is incumbent upon this Court to review the evidence of record and make independent findings of fact with regard to plaintiff's employment status. *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 350 S.E. 2d 83 (1986); *Lucas v. Stores*, 289 N.C. 212, 221 S.E. 2d 257; *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280.

Whether one employed to perform specified work for another is to be regarded as an independent contractor or as an employee within the meaning of the Act is determined by the application of ordinary common law tests. *Richards v. Nationwide Homes*, 263

N.C. 295, 139 S.E. 2d 645; *Scott v. Lumber Co.*, 232 N.C. 162, 59 S.E. 2d 425 (1950). An independent contractor is defined at common law as one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work. *Cooper v. Publishing Co.*, 258 N.C. 578, 129 S.E. 2d 107 (1963); *McCraw v. Mills, Inc.*, 233 N.C. 524, 64 S.E. 2d 658 (1951). Where the party for whom the work is being done retains the right to control and direct the manner in which the details of the work are to be executed, however, it is universally held that the relationship of employer and employee is created. *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137 (1944); 1C A. Larson, *The Law of Workmen's Compensation* § 44.00 (1986).

We have on innumerable occasions discussed this distinction, and over the course of the years we have identified the specific factors which are ordinarily indicative of whether or not such control has been retained. *See, e.g., Pearson v. Flooring Co.*, 247 N.C. 434, 101 S.E. 2d 301 (1958); *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137.

Having carefully reviewed the testimony and exhibits in this case, we find that the following pertinent factors have been established by the greater weight of the evidence. Each of these factors tends to show that North State retained the right to control the details of plaintiff's work, incident to an employment relationship.

1. North State agreed to pay plaintiff $250 per day plus expenses. Payment of a fixed contract price or lump sum ordinarily indicates that the worker is an independent contractor, *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137, while payment by a unit of time, such as an hour, day, or week, is strong evidence that he is an employee, 1C A. Larson, *The Law of Workmen's Compensation* § 44.33(a); *Pearson v. Flooring Co.*, 247 N.C. 434, 101 S.E. 2d 301; *Smith v. Paper Co.*, 226 N.C. 47, 36 S.E. 2d 730 (1946).

2. North State assured plaintiff that it would provide all necessary tools, equipment, and assistance for the job. The freedom to employ such assistants as the claimant may think proper indicates contractorship. *McCraw v. Mills, Inc.*, 233 N.C. 524, 64 S.E. 2d 658 (painting contractor free to use as

many or as few workers as he saw fit, with full control over them as to hiring, firing, wages, hours, times and places); *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137. A lack of this freedom indicates employment. *Pearson v. Flooring Co.*, 247 N.C. 434, 101 S.E. 2d 301; *Lloyd v. Jenkins Context Co.*, 46 N.C. App. 817, 266 S.E. 2d 35 (1980). Furthermore, when valuable equipment is furnished to the worker, the relationship is almost invariably that of employer and employee. 1C A. Larson, *The Law of Workmen's Compensation* § 44.34(a).

3. North State required plaintiff to perform his work between the hours of 7:30 a.m. and 4:30 p.m. with a lunch break at noon. This constituted a direct exercise of control. Where the worker himself selects the time of performance, contractorship is indicated. *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137. However, where the worker must conform to a particular schedule and perform his job only during hours when the defendant's employees are available, the relationship is normally one of employment. *Pearson v. Flooring Co.*, 247 N.C. 434, 101 S.E. 2d 301; *see also Morse v. Curtis*, 276 N.C. 371, 172 S.E. 2d 495 (1970) (claimant required to perform her supervisory duties during set hours).

4. North State retained the right to discharge plaintiff for any reason. The right to fire is one of the most effective means of control. *Lassiter v. Cline*, 222 N.C. 271, 22 S.E. 2d 558 (1942). An independent contractor is subject to discharge only for cause and not because he adopts one method of work over another. *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137; *Lassiter v. Cline*, 222 N.C. 271, 22 S.E. 2d 558. An employee, on the other hand, may be discharged without cause at any time. *See Scott v. Lumber Co.*, 232 N.C. 162, 59 S.E. 2d 425. Where a worker is to be paid by a unit of time, it may be fairly inferred that he has no legal right to remain on the job until it is completed. The employer may discharge him with no obligation other than to pay wages for the units of time already worked. *Pearson v. Flooring Co.*, 247 N.C. 434, 101 S.E. 2d 301.

No particular one of these factors is decisive in itself. Each is but a sign which must be considered with all other indicia and circumstances to determine the true status of the parties. *Askew v.*

Tire Co., 264 N.C. 168, 141 S.E. 2d 280; *Pressley v. Turner*, 249 N.C. 102, 105 S.E. 2d 289 (1958); *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137. We look to our previous decisions for guidance in the weighing of these factors.

Although there are no two cases which are factually identical in this area of the law, *Pearson v. Flooring Co.*, liberally cited herein, is strikingly similar to the case at bar in many key respects. In that case, defendant Peerless Flooring Company purchased equipment from Moore Dry Kiln Company. Moore recommended claimant Pearson as an experienced mechanic who could supervise the equipment's installation on Peerless's premises. An agreement was reached whereby Peerless would provide workers and equipment and Pearson would supervise the installation. Pearson was to receive $2.25 per hour plus expenses. During the installation, Pearson worked only when Peerless's employees were available, according to Peerless's regular schedule.

In holding that Pearson was Peerless's employee, we found each of the factors that we have enumerated in this case. We conclude that the peculiar combination of factors here weigh just as heavily on the side of employment as in the closely analogous *Pearson*. Furthermore, we note that the four factors found in this case correspond to the four principal factors generally recognized as demonstrating the right to control details of the work: (1) method of payment; (2) the furnishing of equipment; (3) direct evidence of exercise of control; and (4) the right to fire. *See* 1C A. Larson, *The Law of Workmen's Compensation* § 44.00.

Defendants argue that *Pearson* analogy notwithstanding, plaintiff must be categorized an independent contractor because his experience and expertise with Kansas Jack equipment (1) established an independent calling, business, or occupation as a Kansas Jack instructor, and (2) prevented North State from exercising meaningful supervision over his work. We disagree.

The evidence clearly shows that plaintiff made his living as a *salesman* of Kansas Jack equipment, not as an instructor. Although he often conducted training sessions incident to a sale, he did not seek work as a "free-lance" instructor, nor did he advertise or hold himself out as such. On only one other occasion had he conducted a training session independent of a personal sale. We find this evidence insufficient to establish an independent call-

ing in this case. *See Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (claimant, a painter of long experience, did not hold himself out as painting contractor and had only once done painting for lump sum); *Durham v. McLamb*, 59 N.C. App. 165, 296 S.E. 2d 3 (1982) (claimant did not advertise his services as a carpenter and did not have a business as a contractor in that trade); *Lloyd v. Jenkins Context Co.*, 46 N.C. App. 817, 266 S.E. 2d 35 (although claimant was skilled at his work, he did not have an independent business as a carpenter).

Moreover, the fact that a claimant is skilled in his job and requires very little supervision is not in itself determinative. *Durham v. McLamb*, 59 N.C. App. 165, 296 S.E. 2d 3; *Lloyd v. Jenkins Context Co.*, 46 N.C. App. 817, 266 S.E. 2d 35. If the employer has the right of control, it is immaterial whether he actually exercises it. *Hinkle v. Lexington*, 239 N.C. 105, 79 S.E. 2d 220 (1953); *Scott v. Lumber Co.*, 232 N.C. 162, 59 S.E. 2d 425. Nonexercise can often be explained by the lack of occasion for supervision of the particular employee, because of his competence and experience. 1C A. Larson, *The Law of Workmen's Compensation* § 44.32. The fact that plaintiff was a specialist in the use of Kansas Jack equipment and had extensive experience in training others how to use it does not imply that North State lost its right to control plaintiff's conduct and to intervene if his instruction interfered with North State's other operations. *Pearson v. Flooring Co.*, 247 N.C. 434, 101 S.E. 2d 301.

We conclude that although plaintiff possessed specialized skill in the use of Kansas Jack equipment, North State retained the right to control the details of plaintiff's work by paying him on a time basis, providing all materials and assistance which he needed, setting his hours of work, and retaining the right to discharge him at any time. An employment relationship therefore existed between plaintiff and North State at the time of plaintiff's injury. The decision of the Court of Appeals is

Affirmed.

Chief Justice EXUM dissenting.

I respectfully dissent. My review of the evidence, when viewed in light of the controlling authorities, leads me to conclude

that plaintiff was an independent contractor at the time of the injury.

The evidence as recited by the majority is, for the most part, fair and complete. I would emphasize the following facts. (1) In the plaintiff's capacity as a seller of Kansas Jack equipment he trained the buyers' employees in the equipment's use. He had done this on at least ten occasions before being injured at North State Ford. (2) Because of his expertise with the equipment he gained a reputation as one of only three or four individuals in the southeast competent to instruct buyers of Kansas Jack truck frame straightening equipment. (3) Plaintiff specified the amount he wanted to be paid per day, and defendant, although believing the figure high, agreed to his terms. (4) Plaintiff specified the time usually necessary to complete the training course and then confined defendant to selecting a period suitable for plaintiff's schedule.

I disagree with the majority's discussion of the evidence with regard to two issues. (1) The majority states that plaintiff retained "the right to discharge [defendant] at any time." I find the evidence unclear on this issue because the record is entirely silent with regard to the right to fire. Thus, the majority simply assumes that this right was retained, while I find such an assumption does not necessarily follow. (2) The majority indicates that plaintiff lacked the freedom to employ assistants he thought necessary to conduct the training course. Once again, the evidence is silent regarding whether plaintiff had such freedom. The evidence merely indicates that whatever materials plaintiff deemed necessary defendant would provide. Defendant thus gave plaintiff wide latitude to steer whatever course necessary to accomplish the ultimate objective of instructing North State employees regarding the proper method of using Kansas Jack equipment.

The majority correctly notes that the test for distinguishing an independent contractor from an employee centers on whether the party for whom the work is being done retains the right to control and direct the manner in which the details of the work are to be executed. When this right is retained the relationship of employer and employee is created. When it is not, the party performing the task is characterized as an independent contractor. Certain factors are normally assessed to facilitate the application

of this test. We enumerated these factors in *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137 (1944). According to *Hayes*, a person is an independent contractor when:

> The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Hayes, 224 N.C. at 16, 29 S.E. 2d at 140. As the majority acknowledges, no factor is determinative in itself; rather they cumulatively shed light on the court's ultimate task of determining the extent to which the party for whom the work was performed retained the right to control the details by which it was done.

My review of the factors enumerated in *Hayes* leads me to conclude that plaintiff was an independent contractor.

Concerning the first *Hayes* factor, it seems clear that plaintiff was engaged in an independent business. Although characterized as a "salesman," the evidence shows that his job description included training those who purchased equipment. It was plainly because of his reputation as a training specialist that North State contacted him in the first place. Thus, notwithstanding his official designation as a salesman, plaintiff had an independent calling which included instructing others in the use of Kansas Jack equipment.

Regarding whether plaintiff had the independent use of his special skill in conducting the training course, the evidence is somewhat conflicting. The more credible evidence, I believe, is the testimony of Mr. Chapman who stated that because of his lack of familiarity with the Kansas Jack equipment he left the methods of instruction entirely to plaintiff's discretion. This testimony is corroborated by the fact that Mr. Chapman turned over his men to plaintiff for the training course. Although Mr. Chapman instructed plaintiff to conduct "hands-on" training, this does not

amount to "control" by defendant, for such an instruction had no bearing on how plaintiff conducted the course in detail. As Professor Larson notes:

> An owner who wants to get the work done without becoming an employer is entitled to as much control of the details of the work as is necessary to ensure that he gets the end result from the contractor that he bargained for. In other words, there may be a control of the quality or description of the work itself, as distinguished from control of the person doing it, without going beyond the independent contractor relation.

1C Larson, *Workmen's Compensation Law*, § 44.20.

The third *Hayes* factor has two components: a specified piece of work, and the method of compensation. North State engaged plaintiff to perform a specific task; *viz.*, to instruct North State Ford employees how to use Kansas Jack equipment. Plaintiff himself established the method and amount of compensation, $250.00 a day, perhaps because he was unsure whether the course would last four or five days. While, as the majority points out, Professor Larson indicates in his treatise that payment by a unit of time, such as a day, may be indicative of an employment relationship, common experience reveals this is not always the case. Expert witnesses and consultants to businesses, for instance, are normally paid on a daily basis, yet no one, for this reason alone, would characterize them as the employees of the organization paying their daily fee. I believe, in the context of the instant case, plaintiff's decision to demand a specified fee per day evinces the kind of independence normally associated with independent contractors.

Regarding the conditions under which the plaintiff could have been discharged, I have already noted my disagreement with the majority. The record is simply silent on this point. I think that the manner in which plaintiff conducted the course before the accident indicates he would not have been subject to discharge had he selected a different method for conducting the training session. Indeed, the evidence indicates that Mr. Chapman turned the entire training course over to plaintiff, thus giving him complete rein to instruct the North State employees however he saw fit.

The final *Hayes* factors also tend to suggest that plaintiff was an independent contractor. North State did not employ him regularly. He was entirely free to utilize the resources available at North State. The fact that North State made such resources available, rather than requiring plaintiff to acquire his own, should not be understood as the kind of limitation on his freedom which might otherwise be indicative of an employment relationship.

Finally, plaintiff's duty to conduct the training course during the hours when the North State employees were at work is not, in the context of the task he contracted to perform, sufficient control by North State to justify the conclusion that he was an employee. North State, legitimately, did not want to pay its employees overtime to learn how to use Kansas Jack equipment. Its reasonable request that plaintiff train its employees during regular working hours should not be construed to alter his independent contractor status.

The decision upon which the majority relies most heavily, *Pearson v. Peerless Flooring Co.*, 247 N.C. 434, 101 S.E. 2d 301 (1957), differs from the instant case in several important respects. In *Pearson* the Court relied heavily on the fact that the defendant agreed in a contract with the manufacturer that the person installing the equipment would be defendant's employee. While the Court did not consider this contract dispositive of the issue, it constituted strong evidence that the defendant itself considered plaintiff as its employee. Another way in which *Pearson* differs from the present case is that the task involved required significantly less skill, and therefore permitted significantly more control, than the task in the instant case. In *Pearson* the defendant's control over the details of the dry kiln's installation is reflected in the constant supervision defendant exercised, as well as the occasion when the defendant made the plaintiff change the location of a pipeline in the kilns from the location which was called for in the plans and specifications. Finally, the method of payment in *Pearson* was an hourly wage rather than a *per diem* compensation. I consider this last difference meaningful because an hourly wage is the kind of compensation most frequently associated with an employment relationship. Payment by the day is not. Because of this, and the other differences noted, I do not believe *Pearson* controls this case.

It should be acknowledged that distinguishing between an independent contractor and an employee in a given case often gives rise to disagreements between reasonable minds. The opposing opinions at every appeal in the present case illustrate this. My judgment is that the deputy commissioner correctly concluded that plaintiff was an independent contractor, and that the Industrial Commission therefore lacked jurisdiction over his claim. The Court of Appeals should be reversed and the case remanded with instructions that the plaintiff's claim be dismissed.

Justices MEYER and WHICHARD join in this dissenting opinion.

STATE OF NORTH CAROLINA v. TIMOTHY CARNESS AUTRY

No. 468A86

(Filed 3 February 1988)

1. **Rape and Allied Offenses § 4.3— virginity of prosecutrix—cross-examination properly excluded**

Where a rape and sexual offense victim testified that defendant asked her if she were a virgin and she answered yes, the trial court properly denied defendant's motion to be allowed to cross-examine the victim concerning her statement that she was a virgin since (a) the victim did not in fact testify as to whether she was a virgin, and her testimony was offered only to lay a proper foundation for additional evidence of defendant's statement to the victim of his announced intent, and (2) defendant's requested cross-examination was barred by the rape shield provisions of N.C.G.S. § 8C-1, Rule 412(b).

2. **Searches and Seizures § 10— improper warrantless search of gym bag—admission of seized items—harmless error**

Assuming arguendo that an S.B.I. agent's warrantless search of a gym bag belonging to defendant which was seized from the office of defendant's employer violated defendant's constitutional rights and that evidence found in the bag was improperly admitted at defendant's trial for kidnapping, rape and sexual offenses, the erroneous admission of such evidence was harmless beyond a reasonable doubt where the evidence of defendant's guilt, without regard to any evidence or testimony concerning the gym bag or its contents, was overwhelming.

3. **Criminal Law § 111.1— defendant's decision whether to testify—improper instruction—harmless error**

The trial court misstated the law in its instruction to defendant concerning his decision as to whether to testify when the court stated that the prosecution "could, on good faith, ask you about prior misconduct, whether it

resulted in convictions in court if they had some good faith reason to ask those questions, and you would be under oath to answer the questions truthfully," since under Rule of Evidence 608(b) only those acts of misconduct probative of defendant's character for truthfulness or untruthfulness could be inquired into on cross-examination, and defendant would retain his right to assert his privilege against self-incrimination as to specific criminal misconduct that related only to his credibility. Assuming arguendo that the trial court's error constitutes a violation of defendant's constitutional right to take the stand in his own behalf, such error was rendered harmless beyond a reasonable doubt by the overwhelming evidence of defendant's guilt and by defendant's access to and actual conference with his attorney. N.C.G.S. § 15A-1443(b).

BEFORE *Watts, J.*, and a jury at the 17 March 1986 Criminal Session of Superior Court, SAMPSON County, defendant was convicted of three counts of first-degree sex offense, two counts of first-degree rape, one count of first-degree kidnapping, two counts of second-degree sexual offense, one count of second-degree rape, and one count of impersonating a law enforcement officer. Judge Watts sentenced defendant to life imprisonment on each of the first-degree sex offense and first-degree rape convictions, to forty years each on the first-degree kidnapping conviction and the first of the second-degree sex offense convictions, to twelve years each on the second of the second-degree sex offense convictions and the second-degree rape conviction, and, finally, to two years on the impersonating a law enforcement officer conviction. Defendant appeals his life sentences as of right pursuant to N.C.G.S. § 7A-27(a). His motion to bypass the Court of Appeals on his appeal of the remaining convictions and accompanying sentences was allowed by this Court on 25 July 1986. Heard in the Supreme Court 12 November 1987.

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

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

MEYER, Justice.

On his appeal to our Court, defendant brings forward three assignments of error relative to the guilt-innocence phase of his trial. Having considered the entire record and each of defendant's assignments in turn, we find no prejudicial error in defendant's trial. Accordingly, we leave undisturbed defendant's multiple convictions and accompanying sentences.

Each of defendant's multiple convictions arose from a single criminal episode which occurred on 13 and 14 November 1985. Because resolution of the issues presented in this case turns so substantially on the nature and the volume of the evidence against this defendant, a lengthy recitation of the facts is called for. Accordingly, the evidence presented at trial tended to show the following series of events. On 13 November 1985, the victim, a nineteen-year-old female, was working at the checkout counter in an Eckerd's drug store in Sampson County, North Carolina. Between 6:00 p.m. and 8:00 p.m. on that evening, defendant, whom the victim did not know, entered the store on three separate occasions. On two of these occasions, defendant spoke to the victim briefly, and on one of these occasions, defendant asked the victim if any photographs had been developed for a customer named "Autry." The victim later positively identified defendant as the man who was in the Eckerd's drug store on the evening of 13 November 1985.

At 9:00 p.m. on that same evening, the victim got off work, got into her car, and departed for home. Minutes later, as she turned onto the road leading to her home, she noticed a car following very closely behind her. When the driver of the car behind her subsequently turned on a blue flashing light and emergency flashing lights, believing it to be a police car, the victim pulled her car over to the side of the road. A man whom the victim recognized as the man she had seen in Eckerd's got out of the car and came up to the driver's side of her car. Defendant told the victim that he was an undercover police officer and that she had been driving too fast. After looking at her license, however, defendant told the victim that he would let her go this time, and both defendant and the victim departed.

A short time later, defendant, who was still following the victim, once again turned on his flashing lights. The victim pulled over once more. On this occasion, defendant told the victim that there was a problem with her insurance which would necessitate her following him "so they could go straighten everything out." Told that she would not be allowed to call her parents first, the victim followed defendant to an abandoned store. Once there, defendant told the victim that she would have to leave her car there and accompany him to meet other police officers. Believing defendant to be a police officer, she did as she was told. She later

described defendant's vehicle as a white car with a burgundy interior.

As the victim and defendant drove along, the victim repeatedly asked for and was denied the opportunity to call her parents. At one point, assuring her that it was just "procedure," defendant pulled off the road, handcuffed the victim behind her back, and fastened her seat belt. Eventually, saying that he knew some game wardens who would be down there, defendant turned onto a dirt path and proceeded deep into a wooded area. At that point, defendant got a gun out of the trunk of the car and showed it to the victim. Subsequently, when some hunters came upon defendant's car and shone a twelve-volt spotlight on and into it, defendant restarted his vehicle and drove the victim down another dirt path in the woods. Two of these hunters later clearly identified defendant as the driver of the vehicle they had seen that night.

Stopping once again, defendant tightened the victim's handcuffs and began touching her. He then removed all of her clothes. Defendant asked the victim if she was a virgin and she told him yes. Defendant then told her that he was going to "bust that cherry." Over a period of three to four hours, defendant forced the victim to perform oral sex on him, forced her to have vaginal and anal intercourse with him, and forcibly performed oral sex on her. After falling asleep on top of the victim for a period of time, defendant awoke and forced the victim to have vaginal intercourse with him once again.

Defendant then drove the victim to a nearby abandoned house. Defendant carried the victim inside the house and placed her on the floor in an upstairs room. There, defendant forced the victim to have anal, vaginal, and oral intercourse with defendant once more. Leaving the room momentarily, defendant returned with a needle and a syringe and proceeded to give her a shot in the hip. The victim fell asleep shortly thereafter, not to awake until around 8:30 a.m. or 9:00 a.m. on the morning of 14 November.

Upon awaking, the victim, still naked and handcuffed, discovered that defendant had tied her legs with a rope and put a handkerchief around her mouth. Nevertheless, she managed to get out of part of the rope and to escape out the back of the house. She made her way to a neighboring house where she received clothing and other assistance, apparently from a Mrs.

Starling. Mrs. Starling called two of her sons, Donald Starling and M. F. Starling, who came immediately to the house to help their mother render aid to the victim.

Joanne Starling, wife of M. F. Starling, testified that she accompanied her husband when he went to his mother's house in response to her call. She stated that the victim told her that defendant had been driving a white car. She stated further that, in response to the victim's description, she returned to the dirt road leading to the abandoned house. While there, she saw a white car pull off the side of the road by the abandoned house.

Mr. Somboon Kachaenchai, defendant's employer, testified at trial that he managed Vira Farms, a Sampson County hog farm. He saw defendant on the morning of 14 November and mentioned that defendant came in late to work that day. Also on that day, defendant asked if he could leave work for "some important business" and Mr. Kachaenchai agreed. Defendant later returned and left a black gym bag in the business office at Vira Farms. Mr. Kachaenchai, in the presence of Mr. Larry Melvin, another employee of Vira Farms, opened the gym bag and saw a bottle or two of pig tranquilizer, syringes, needles, a survival knife, and some nylon string. After opening and looking at the contents of the bag, Mr. Kachaenchai and Mr. Melvin reclosed the bag.

At trial, pursuant to evidence showing these and other highly incriminating facts, defendant was convicted by a jury of the aforementioned crimes. In his appeal to our Court, defendant assigns three specific errors concerning his multiple convictions: first, that the trial court committed reversible error in denying defendant's request to cross-examine the victim about her testimony that she was a virgin; second, that the trial court committed reversible error in denying defendant's motion to suppress evidence seized without a warrant from his gym bag; and third, that the trial court committed reversible error in instructing defendant on the legal consequences of his decisions as to whether to testify or offer other evidence in his own behalf. We deal with each assignment of error in turn.

I.

[1] In his first assignment of error, defendant asserts that the trial court committed reversible error in denying defendant's re-

quest to cross-examine the victim about her testimony that she was a virgin. At trial, during the direct examination of the victim by the prosecutor, the following exchange occurred:

> Q. [Name of the victim], did he ever make any statement or any inquiry as to whether you had ever engaged in sex previously?
>
> MR. BACON: Objection, motion to strike.
>
> COURT: Overruled, in my discretion I will permit Counsel to lead the witness.
>
> A. Yes sir.
>
> Q. What did he say to you or what did he say to you, [name of the victim]?
>
> A. He asked me if I was a virgin and I said yes.
>
> COURT: What was the answer?
>
> WITNESS: I said yes.
>
> MR. BACON: Objection, motion to strike.
>
> COURT: Motion to strike denied.
>
> Q. What did you say after he asked you if you were a virgin and you told him yes?
>
> A. He said that he was going to bust that cherry.

Later, when defendant moved to be allowed to cross-examine the victim concerning her statement that she was a virgin, the trial court, citing the rape shield provisions of Rule 412 of the North Carolina Rules of Evidence, denied the motion. Defendant contends that the trial court's application of the rape shield provisions in the case at bar prevented correction of false testimony by the victim and was therefore fundamentally unfair and violative of his constitutional right to confront his accuser. We do not agree.

The trial court acted properly in denying defendant's motion. First, a close review of the testimony in question reveals that the State did not ask, and the victim did not in fact testify, as to whether she was a virgin. On the contrary, the victim testified

only to what defendant asked her and to what she told defendant in response to his question on the night of the crime. The State clearly elicited this testimony, not to establish before the jury whether the victim was a virgin, but to lay a proper foundation for the additional evidence of defendant's statement of his announced intent, i.e., that defendant next told the victim that "he was going to bust that cherry."

Second, and perhaps more important, the trial court properly ruled that defendant's requested cross-examination is barred by Rule 412 of the North Carolina Rules of Evidence. In pertinent part, that rule provides as follows:

> (b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> (1) Was between the complainant and the defendant; or
>
> (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
>
> (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
>
> (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

N.C.G.S. § 8C-1, Rule 412(b) (1986). Here, the victim's virginity or lack thereof does not fall within any of the four exceptions and is therefore an area prohibited from cross-examination by Rule 412. Moreover, as for defendant's claim that the rule violates his sixth amendment right to confront the witnesses against him, we re-

jected a similar claim in *State v. Fortney*, 301 N.C. 31, 269 S.E. 2d 110 (1980), and do so again today. Defendant's first assignment of error is without merit.

II.

[2] In his second assignment of error, defendant asserts that the trial court committed reversible error in denying his motion to suppress evidence seized without a warrant by law enforcement officers from his gym bag. The search in question, says defendant, was in violation of the fourth and fourteenth amendments to the United States Constitution and of article I, section 20, of the North Carolina Constitution. In addition, continues defendant, the improper admission of this illegally acquired evidence at trial was sufficiently prejudicial to warrant a new trial. We need not address the question of whether the search was valid. Assuming *arguendo* that the search violated defendant's constitutional rights and that the evidence therefrom was improperly admitted at trial, we find any such error in its admission harmless beyond a reasonable doubt.

On 14 November 1985, Agent Joel Morris of the State Bureau of Investigation, acting without a warrant, seized a gym bag belonging to defendant from the business office of Vira Farms, a Sampson County hog farm where defendant was employed. Agent Morris subsequently conducted a warrantless search of the bag. Inside, he found pig tranquilizer, needles, syringes, flex handcuffs, rope, and two .22-calibre bullets. At trial, defendant objected to the admission of any of the items of evidence seized from his gym bag by Agent Morris. The trial judge ruled that defendant lacked standing to challenge the search because the bag had been left in an area of the business office which is generally open to the public and because defendant's employer, Mr. Somboon Kachaenchai, in the presence of another of his employees, had opened the bag and viewed its contents. Defendant claims, first, that this evidentiary ruling by the trial court constitutes error and, second, that his cause was sufficiently prejudiced to warrant our order of a new trial. As stated above, we do not address the first claim. We disagree with the second.

Under current statutory and case law, error committed at trial which infringes upon defendant's constitutional rights is presumed to be prejudicial and entitles him to a new trial unless

the error in question is harmless beyond a reasonable doubt. *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982); N.C.G.S. § 15A-1443(b) (1983). Significantly, this Court has held that the presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt. *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569. In the case at bar, the evidence of defendant's guilt, even without regard to *any* evidence or testimony concerning the gym bag or its contents, is indeed overwhelming.

First, defendant, who has several distinctive-looking moles on his face, was identified without hesitation as the perpetrator by the victim and by the hunters. The victim, who had more than ample opportunity to view defendant, positively identified him both as the man who had asked for pictures for "Autry" in the Eckerd's drug store and as the man who, while impersonating a law enforcement officer, had kidnapped and sexually assaulted her. Both hunters, who had shone a high intensity light on and into defendant's car upon coming on it in France Woods, were able to positively identify defendant as the man who was driving the car that night. One of the hunters testified to the presence of a second person in defendant's car that night.

Second, there was a great deal of incriminating evidence presented at trial concerning defendant's vehicle, a white AMC car with a burgundy interior. The victim, who spent a lengthy and horrible night primarily in defendant's car, testified that it was a white car with a burgundy interior. The hunters, who saw defendant's car clearly by virtue of their spotlight, also indicated that it was a white car with a burgundy interior. Defendant's car, in addition to being identified as the car used in the crime spree, was itself the source of other damning evidence. A search of the car by S.B.I. Agent Zawistowski yielded a .22-calibre bullet, a flex cuff, a needle, and a nylon cord—items of evidence completely consistent with the victim's account of the crime.

Third, various other items of evidence independent of the contents of the gym bag demonstrated overwhelmingly defendant's guilt of the crimes charged. Michael Smith, an acquaintance of defendant, testified that he had seen defendant with a pair of handcuffs and a blue light like those used by police officers. The same hunters who saw defendant deep in the woods on the night

in question also noticed a light on the dash of defendant's white car. Also, Mr. Melvin, one of defendant's co-employees at Vira Farms, testified that, on 14 November, defendant brought to the Vira Farms business office, along with the black gym bag, a brown sleeping bag. The victim testified that defendant had used a brown sleeping bag to cover her as he drove from the wooded area to the abandoned house. She testified further that it was this same brown sleeping bag on which defendant had forced her to lie at the abandoned house while he sexually assaulted her again. Clearly, even excluding any reference whatever to the gym bag in question or its contents, the evidence in the case at bar of this defendant's guilt is overwhelming.

Moreover, even if the trial court had declared the search in question illegal, the effect of such a ruling with respect to the jury's actual knowledge of the contents of the gym bag would have been negligible, if of any effect at all. Mr. Kachaenchai and Mr. Melvin, who opened and looked into defendant's bag before Agent Morris arrived, testified to the contents they in fact saw inside defendant's gym bag. Their testimony as to the presence of the highly incriminating items in the gym bag, irrespective of the trial court's decision as to the legality of the search by Agent Morris and his testimony with regard thereto, was to the same effect and makes even clearer that the evidence of defendant's guilt of these crimes is overwhelming. We hold that, assuming *arguendo* that the trial court erred in admitting the evidence in question, the error was harmless beyond a reasonable doubt. Accordingly, defendant's second assignment of error is without merit.

III.

[3] In his third and final assignment of error, defendant asserts that the trial court committed reversible error in its instructions to defendant on the legal consequences of his decisions as to whether to testify and as to whether to offer other evidence in his own behalf. Specifically, defendant argues here that the trial court's explanation of defendant's right to testify misstated the legal consequences of his testimony and resulted in a chilling of his free exercise of that right. Though we agree with defendant that the trial court's instruction to defendant here constitutes er-

ror, we find that the error is harmless and does not warrant our order of a new trial.

During the course of defendant's trial, the trial court instructed defendant at considerable length concerning his decisions as to whether to testify and as to whether to present evidence in his own behalf at trial. The trial court instructed defendant that he had essentially three choices: (1) to neither present any evidence nor testify himself, (2) to present other witnesses and evidence but not testify himself, and (3) to present other witnesses and evidence and also testify himself. The trial court explained that defendant was within his rights to choose any of the three options, and it attempted to explain the particular legal consequences of each. Eventually, defendant presented no evidence and chose not to testify.

During one particular section of his instruction to defendant, the trial court attempted to explain the legal consequences of a decision by defendant to take the stand and testify in his own behalf. In pertinent part, the trial court stated as follows:

> [The prosecutor] could, on good faith, ask you about prior misconduct, whether it resulted in convictions in court if they had some good faith reason to ask those questions, and you would be under oath to answer the questions truthfully.

Defendant argues that this warning misstates the law in two respects: first, only those acts of misconduct probative of defendant's character for truthfulness or untruthfulness could be inquired into on cross-examination; and second, defendant would retain his right to assert his privilege against self-incrimination as to specific criminal misconduct that related only to his credibility. We agree and we hold that the trial court's instruction to defendant in this instance was error.

Rule 608(b) of the North Carolina Rules of Evidence provides as follows:

> (b) *Specific instances of conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on

> cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
>
> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

N.C.G.S. § 8C-1, Rule 608(b) (1986). The trial court, though it made an admirable and lengthy effort to explain to defendant his various options, clearly, as to one part, gave instructions inconsistent with Rule 608(b) and therefore committed error.

However, despite defendant's spirited argument to the contrary, we hold that, though the trial court did err in its instruction, the error is harmless. Assuming that, as defendant suggests, the trial court's error constitutes a violation of a constitutional right in defendant to take the stand in his own defense, the applicable standard for determining the presence or absence of prejudice is stated in N.C.G.S. § 15A-1443(b). This statute, which we also apply in part II of this opinion above, reads as follows:

> (b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

N.C.G.S. § 15A-1443(b) (1983). As we stated above, this statute dictates that trial court error which infringes a defendant's constitutional rights is presumed to be prejudicial and entitles him to a new trial unless the error is harmless beyond a reasonable doubt. *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569.

As we stated in part II above, the evidence of defendant's guilt in the case at bar is simply overwhelming. Overwhelming evidence of defendant's guilt of the crimes charged may, and in this case does, render a constitutional error harmless. *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569. We incorporate here both our initial review of the facts of the case at the outset of this opinion and, in addition, our specific reference to some of those

facts in part II above. The overwhelming evidence of defendant's guilt of the crimes charged clearly renders the trial court's error harmless beyond a reasonable doubt.

Also, though the trial court did misstate the law in its instruction to defendant concerning his decision as to whether to testify, the trial court repeatedly made very clear to defendant that he should consult his attorney before making any decision on the matter. On three separate occasions during the instructions to defendant, the court urged defendant to confer with his attorney before making any decision. Moreover, it is also clear from the record that defendant did in fact confer with his attorney on at least one occasion before informing the court through his attorney that he had chosen to present no evidence. We hold that, here, where the trial court's error in its instructions to defendant was insulated by defendant's access to and actual conference with his attorney, the trial court's instructional error is harmless beyond a reasonable doubt. Defendant's final assignment of error is therefore without merit.

In conclusion, having reviewed the record and each of defendant's three assignments of error, we find that defendant had a fair trial, free of prejudicial error. Accordingly, we leave undisturbed defendant's multiple convictions and accompanying sentences.

No error.

STATE OF NORTH CAROLINA v. CHRISTOPHER BRIAN KIVETT

No. 328A87

(Filed 3 February 1988)

1. Criminal Law § 91.14— Speedy Trial Act—427 days from indictment to trial—continuances excluded—no error

There was no error in a prosecution for first degree sexual offense where 427 days elapsed from defendant's indictment until trial. Three hundred twenty days resulted from eleven written motions for continuances by the State, each of which contained a facially valid reason or reasons why the case could not be tried, and the orders granting the motions recited that they were entered for the reasons set forth in the motions and found that the ends of jus-

tice would be served by granting the continuances. Although defendant argued that 154 days should be rejected because there were no findings supporting the conclusion that the ends of justice would be served, the State carried its burden by producing orders for continuances entered for facially valid reasons and, absent evidence produced by defendant, the court would not assume that other cases were not in fact being tried, that the State was trying cases of more recent origin, or that the cases being tried were not sufficiently significant to merit being tried ahead of this one.

2. Criminal Law § 91.16— Speedy Trial Act—exclusion for period from date of indictment until beginning of next term—erroneous

The trial court erred in a prosecution for first degree sex offense by excluding from the speedy trial computation a twenty-one day period from the date of indictment until the date the next term of superior court commenced. N.C.G.S. § 15A-701(a1)(1) (1983) does not contain the option of commencing the 120-day period at the beginning of the first regularly scheduled criminal session of superior court following arrest, service of process, waiver of indictment, or indictment; however, this exclusion was not necessary to bring the commencement of this trial within the mandatory 120-day period.

3. Constitutional Law § 50— 427 day delay between indictment and trial—constitutional right to speedy trial—no violation

The defendant in a prosecution for first degree sexual offense was not deprived of his constitutional right to a speedy trial by a 427 day delay between indictment and trial where the length of the delay was not sufficient alone to constitute unreasonable or prejudicial delay; the reason for most of the delay was the trial of other cases, and included as well a death and a medical emergency in the family of defendant's attorney, defendant's late arrival, and a heavy snowfall; two of the continuances were granted on motions by defendant's attorney and defendant's motion to dismiss was based solely on the North Carolina Speedy Trial Act; and defendant's allegations of prejudice in that the passage of time obscured the victim's memory and provided opportunity for collusion were not supported by the record. Sixth and Fourteenth Amendments to the U.S. Constitution.

4. Witnesses § 1.2— four-year-old victim—competent to testify

The trial court did not abuse its discretion by finding that a four-year-old sex offense victim was competent to testify where the *voir dire* record reveals that the witness testified that he knew what it meant to tell the truth, that it was good to tell the truth and not good to tell a lie, that he knew that he was there to tell the truth, and that he was going to tell the truth. N.C.G.S. § 8C-1, Rule 601.

5. Rape and Allied Offenses § 5— first degree sex offense—four-year-old victim—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss at the end of the evidence in a prosecution for first degree sexual offense against a four-year-old victim where the testimony of the victim, corroborated by an examining physician, a social worker, and relatives of the victim provided substantial evidence as to the occurrence of a sexual act by force and against the

will of the victim, who was under the age of thirteen years, by this defendant, who was at least twelve years old and four years older than the victim. N.C.G.S. § 14-27.4 (1986).

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27 (a) (1986) from a conviction of first degree sexual offense before *Helms, J.*, and the imposition of a life sentence, at the 9 March 1987 Session of Superior Court, ROWAN County. Heard in the Supreme Court 8 December 1987.

Lacy H. Thornburg, Attorney General, by Elisha H. Bunting, Jr., Assistant Attorney General, for the State.

Thomas M. Brooke for defendant-appellant.

WHICHARD, Justice.

Defendant was charged in an indictment, proper in form, with engaging in a sex offense with his four-year-old nephew in violation of N.C.G.S. § 14-27.4. The jury returned a verdict of guilty, and the trial court imposed the mandatory life sentence. N.C.G.S. §§ 14-27.4, -1.1(2) (1986). We find no error.

Defendant was living with his sister, the mother of the victim. The victim testified that defendant came into the victim's room, cut the victim's pants, and "[p]ut his pee pee in [the victim's] butt." The victim told defendant three times to stop, but he did not. Instead, when the victim told him to stop, defendant continued to "put his pee pee in [the victim's] butt."

Several witnesses testified to corroborate the victim:

Dr. Amy Suttle, who was qualified as an expert in pediatric gastroenterology, testified that she examined the victim on 22 October 1985. She found a tear with scarring in the anal area that could have resulted only from a very severe injury caused by "force of penetration against [the victim's] will of the anal area." The witness could not say what object caused the tear, but she knew "that an object of large enough diameter not only stretched the tightened closed muscle but also [tore] it and it was forcefully applied." The victim, pointing to his rectum, told Dr. Suttle that defendant had hurt him with "[h]is pee pee." Dr. Suttle believed that the injury could have been caused by penetration by a male sex organ.

The victim's great-grandmother testified that the victim had complained to her of pain in his anal area. When she asked what had happened to him, he told her that defendant had cut his britches and put his "pee pee" in his anal area. The victim said that he had "screamed and hollered," but defendant would not stop when he asked him to. He also told her that when he went to the bathroom, his "butt" hurt him "so bad."

The victim's grandmother testified that the victim also had told her that defendant had "stuck his pee pee in [the victim's] butt." She further testified that defendant was approximately seventeen or eighteen years old at the time.

John Thomas, a social worker with the Rowan County Department of Social Services, testified that the victim had used anatomical dolls to demonstrate to him what had happened. He stated that the victim had "inserted the [defendant] doll['s] [sex organ] into the [victim] doll['s] rectum." The victim also told Thomas, as he had told the other witnesses, that defendant had cut his trousers, had "stuck his pee pee in [the victim's] butt, that it hurt, [and] that he [had] cried out in pain."

Defendant testified on his own behalf. He stated that he was twenty-one years old at the time of the trial, which occurred one and one-half years after the incident in question. He denied that this incident, or any such incident, had occurred. He presented other evidence tending to negate the likelihood that the incident had occurred. Because this evidence is not pertinent to resolution of the issues presented, we do not set it forth in detail.

[1] Defendant first contends that the trial court erred in denying his motion to dismiss for the State's failure to try him within the time limits set by the Speedy Trial Act, N.C.G.S. § 15A-701. This act requires the State to try a defendant charged with a felony within 120 days from the date the defendant is arrested, served with criminal process, waives indictment or is indicted, whichever occurs last, unless that time is extended by certain specified events. N.C.G.S. § 15A-701 (1983 & Cum. Supp. 1987); *State v. Sams*, 317 N.C. 230, 233, 345 S.E. 2d 179, 181-82 (1986). Here, the date from which the requisite time period must be measured is the date of defendant's indictment, 6 January 1986. The trial did not commence until 9 March 1987, 427 days later. Unless at least 307 of the days between defendant's indictment and his trial are

excludable from computation for one of the statutory reasons, the trial court should have granted defendant's motion. *State v. Sams*, 317 N.C. at 233, 345 S.E. 2d at 182.

While the burden of proof in supporting a motion to dismiss remains with the defendant, the State has the burden of going forward with evidence to show that periods of time should be excluded from the computation. N.C.G.S. § 15A-703 (1983); *State v. Sams*, 317 N.C. at 234, 345 S.E. 2d at 182. The act allows exclusion of a period of delay resulting from a continuance "if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interest of the public and the defendant in a speedy trial and sets forth in writing . . . the reasons for so finding." N.C.G.S. § 15A-701(b)(7) (Cum. Supp. 1987). The motion for a continuance must also be in writing. *Id.*

Here, the State produced eleven written motions for continuance, each of which contains a facially valid reason or reasons why the case could not be tried. The orders granting these motions recite that they were entered for the reasons set forth in the motions, *see State v. Heath*, 77 N.C. App. 264, 267-68, 335 S.E. 2d 350, 352-53 (1985), *rev'd on other grounds*, 316 N.C. 337, 334 S.E. 2d 250 (1986), and they contain the mandatory finding that the ends of justice served by granting the continuances outweigh the best interests of the public and the defendant in a speedy trial. On the basis of these written motions and orders, the trial court made the following finding:

That there are written continuances signed by the presiding judge excluding the following time periods:

February 3, 1986	through	March 2, 1986	28 days
March 10, 1986	through	April 13, 1986	35 days
June 23, 1986	through	July 20, 1986	28 days
July 22, 1986	through	August 11, 1986	21 days
August 11, 1986	through	September 2, 1986	22 days
September 2, 1986	through	October 6, 1986	34 days
October 7, 1986	through	November 10, 1986	35 days
November 10, 1986	through	December 15, 1986	35 days
December 16, 1986	through	January 5, 1987	21 days
January 6, 1987	through	January 25, 1987	20 days
January 27, 1987	through	March 8, 1987	41 days
			320 days

The court concluded as a matter of law that the time periods listed in the finding should be excluded.

Nothing else appearing, this exclusion was proper under the statute and sufficed to bring the trial within the requisite 120 day period. The sole reason stated for six of these continuances, which accounted for 154 of the 320 days excluded, was that "[t]he trial of other cases prevented the trial of this case during this session." Defendant argues that we should reject the exclusion of this 154 day period absent written findings, which are not present, supporting the conclusion that the ends of justice served by trying other cases before this one outweighed the best interests of the public and the defendant in a speedy trial of this case. We disagree. By producing the orders for continuance, all entered for facially valid reasons, the State carried its burden of going forward with evidence to show that the continuance periods should be excluded from the computation. N.C.G.S. § 15A-703 (1983). Absent evidence produced by defendant at trial and brought forward in the record on appeal, we cannot assume that other cases were not in fact being tried, that the State was trying cases of more recent origin while postponing this one, or that the cases being tried were not sufficiently significant that the ends of justice merited trying them ahead of this one. We thus hold that, on this record, the continuance periods were properly excluded and defendant was tried within the requisite 120 day period.

[2] Defendant also contends that the trial court erred in excluding the twenty-one day period from 6 January 1986, the date of the indictment, until 27 January 1986, the date the next term of superior court in Rowan County commenced. We agree. The act provides that the 120 day period begins to run on "the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last." N.C.G.S. § 15A-701(a1)(1) (1983). It does not contain the option of commencing the 120 day period at the beginning of the first regularly scheduled criminal session of superior court following arrest, service of criminal process, waiver of indictment, or indictment. The legislature established such a provision for appeals from district to superior court in misdemeanor cases. N.C.G.S. § 15A-701(a1)(2) (1983). This indicates legislative cognizance of such an option, and we thus must assume that the option was rejected except as specified. While we thus believe the trial court erred in excluding the

twenty-one days between the indictment and the next term of court, this exclusion was not necessary to bring the commencement of trial within the mandatory 120 day period.

[3] Defendant further contends that he was deprived of his constitutional right to a speedy trial pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. The United States Supreme Court has identified four factors "which courts should assess in determining whether a particular defendant has been deprived of his right" to a speedy trial under the federal constitution. *Barker v. Wingo*, 407 U.S. 514, 530, 33 L.Ed. 2d 101, 117 (1972). They are: (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. *Id. See State v. Jones*, 310 N.C. 716, 721, 314 S.E. 2d 529, 532-33 (1984); *State v. Hartman*, 49 N.C. App. 83, 86, 270 S.E. 2d 609, 612 (1980).

As to the first factor, "the delay's duration is not *per se* determinative of whether a violation has occurred." *State v. Jones*, 310 N.C. at 721, 314 S.E. 2d at 533. As stated in *Jones:* "This Court has held that a delay of twenty-two months is not of great significance but is merely the 'triggering mechanism' that precipitates the speedy trial issue." *Id., citing State v. Hill*, 287 N.C. 207, 214 S.E. 2d 67 (1975).

Here, 427 days elapsed from the date of indictment to the date of trial. We do not believe that this period—several months less than the twenty-two month period referred to in *Jones*—was sufficient, standing alone, to constitute unreasonable or prejudicial delay.

As to the second factor, most of the delay resulted from the granting of eleven motions to continue. The reason for seven of these continuances was the trial of other cases. As noted above, defendant has produced no evidence that other cases were not in fact being tried, that the State was trying cases of more recent origin while postponing this one, or that the cases being tried were not sufficiently significant that the ends of justice merited trying them ahead of this one. The reasons for the other four continuances were: (1) a death in the family of defendant's attorney; (2) a medical emergency in the family of defendant's attorney; (3) defendant arrived late, was called and failed to appear, and other matters were in progress when he appeared; and (4) a heavy

snowfall that wreaked havoc upon the court's docket. Delays occasioned by bereavement and a medical emergency in defense counsel's family, and by the defendant's own failure to appear, were presumably appropriate and in defendant's best interest. They thus can scarcely form the basis for his assertion of a denial of his constitutional right to a speedy trial. The additional delay occasioned by a heavy snowfall was clearly reasonable and without fault on the part of the State. So far as the record before us reveals, the reasons for the delay caused by the continuances here were reasonable and well within tolerable constitutional limits.

As to the third factor, it appears that two of the continuances were granted on motions by defendant's attorney. The record reveals no objection by defendant to any of the other continuances. Defendant's motion to dismiss, filed on 5 November 1986, was based solely on the North Carolina Speedy Trial Act and did not allege any violation of his federal constitutional right. *See State v. Jones*, 310 N.C. at 721, 314 S.E. 2d at 533. "Because the right to a speedy trial is a fundamental right under our State and Federal Constitutions, this Court has held that 'failure to demand a speedy trial does not constitute a waiver of that right, but it is a factor to be considered.' " *Id.* at 721-22, 314 S.E. 2d at 533, *citing State v. Hill*, 287 N.C. at 212, 214 S.E. 2d at 71. In considering the factor, we find that the record reveals no assertion by defendant of his federal constitutional right to a speedy trial prior to this appeal. The factor thus does not weigh heavily in defendant's favor. *See State v. Hartman*, 49 N.C. App. at 87, 270 S.E. 2d at 612.

As to the fourth factor, defendant argues that he was prejudiced in that the passage of time obscured the victim's memory and provided opportunity for collusion between the victim and his great-grandmother as to the victim's testimony. We disagree. The victim testified about the act in question with sufficient clarity to rebut any assertion that his memory was obscured, and several witnesses corroborated his testimony. The assertion regarding collusion between the victim and his great-grandmother is speculation unsupported by the record. We find nothing in the record that reveals any prejudicial results occasioned by the period of delay between the time of indictment and the time of trial.

In summary, we find no basis for concluding that defendant was deprived of his right to a speedy trial pursuant to the Sixth and Fourteenth Amendments to the United States Constitution.

[4] Defendant contends that the trial court abused its discretion in finding the four-year-old victim competent to testify, because the victim arguably did not understand the nature and obligation of an oath or the meaning and necessity of telling the truth. Defendant points to the following probing of the witness by the district attorney during the voir dire examination to determine competency:

Q [Victim's name], do you know what it means to tell the truth?

A Yes.

Q What does it mean to tell the truth, [victim's name]?

A (No response)

Q Does that mean to tell something that really happened?

A Yes.

Q Is it good to tell the truth?

A Yeah.

Q Is it good to tell a lie?

A No.

Q Why is it not good to tell a lie?

A (No response)

Q Because it's just bad?

A Yeah.

Defendant further points to the following probing by defense counsel on cross-examination:

Q Do you know why you're here today?

A (No response)

Q Why are you here?

A To tell the truth.

Q What does that mean?

A (No response)

Q What is the truth, [victim's name]?

A (No response)

Q What happens to you if you tell the truth?

A (No response)

Q Does anything happen to you if you tell the truth?

A (Nods head affirmative)

Q What happens?

A (No response)

Q You don't know? You don't know what happens if you tell the truth?

A Uh huh.

Q What happens if you lie?

A (No response)

Q You don't know what happens if you lie?

A (Nods head negatively)

Q You don't know?

A (No response)

We note the following additional testimony from the witness upon questioning by the court:

THE COURT: . . . . Are you going to tell us the truth today about what these people ask you about?

A Yes.

Q It's a good thing to tell the truth and wrong to tell things that are not true, is that right?

A Yeah.

Q You know that bad things happen to you if you don't tell the truth and it's wrong to tell a lie?

A Yes.

Q Are you going to tell us the truth today?

A Yeah.

We have stated:

> The competency of witnesses testifying in trials occurring after 1 July 1984 is determined by Rule 601 of the North Carolina Evidence Code, which provides in pertinent part that "[e]very person is competent to be a witness" except "when the court determines that he is . . . (2) incapable of understanding the duty of a witness to tell the truth." N.C.G.S. [§] 8C-1, Rule 601(a), (b) (1986); *State v. Gordon*, 316 N.C. 497, 502, 342 S.E. 2d 509, 512 (1986). This Court has defined competency under both the new rules and the case law prior to their adoption as "the capacity of the proposed witness to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth of the matters as to which it is called upon to decide." *State v. Fearing*, 315 N.C. 167, 173, 337 S.E. 2d 551, 554 (1985), *quoting State v. Turner*, 268 N.C. 225, 230, 150 S.E. 2d 406, 410 (1966).
>
> . . . .
>
> Further, the competency of a witness "is a matter which rests in the sound discretion of the trial judge in the light of *his examination and observation of the particular witness.*" *State v. Fearing*, 315 N.C. at 173, 337 S.E. 2d at 554-55, *quoting State v. Turner*, 268 N.C. at 230, 150 S.E. 2d at 410. Absent a showing that the ruling as to competency could not have been the result of a reasoned decision, the ruling must stand on appeal. *E.g., State v. McNeely*, 314 N.C. 451, 453, 333 S.E. 2d 738, 742 (1985); *State v. Lyszaj*, 314 N.C. 256, 263, 333 S.E. 2d 288, 293 (1985).

State v. Hicks, 319 N.C. 84, 88-89, 352 S.E. 2d 424, 426 (1987).

The voir dire record here reveals that the witness testified that he knew what it meant to tell the truth, that it was good to tell the truth and not good to tell a lie, that he knew that he was there to tell the truth, and that he was going to tell the truth. We are satisfied that the witness' testimony met the standards of Rule 601; we cannot say that the trial court's ruling could not

have been the result of a reasoned decision. We consequently hold that there was no abuse of discretion in admitting the victim's testimony.

[5] Defendant finally contends that the trial court erred in denying his motion to dismiss at the end of all the evidence. As stated in *State v. Hicks:*

> In ruling on a motion to dismiss, the trial court is to consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from that evidence. *State v. Bell,* 311 N.C. 131, 138, 316 S.E. 2d 611, 615 (1984). Whether the trial court erred under these circumstances depends upon whether substantial evidence was introduced of each essential element of the offense charged and of defendant's being the perpetrator. *See State v. Gardner,* 311 N.C. 489, 510-11, 319 S.E. 2d 591, 605 (1984).

319 N.C. at 89, 352 S.E. 2d at 427. The testimony of the victim—corroborated by an examining physician, a social worker, and relatives of the victim—provided substantial evidence as to the occurrence of the essential elements of first degree sexual offense, *viz.*, a sexual act by force and against the will of a victim under the age of thirteen years by a defendant at least twelve years old and at least four years older than the victim. N.C.G.S. § 14-27.4 (1986). This evidence also sufficed to implicate defendant as the perpetrator. We thus find no error in the refusal to dismiss the charge.

No error.

STATE OF NORTH CAROLINA v. EUGENE BRYANT MARLEY

No. 315A87

(Filed 3 February 1988)

1. Homicide § 24.1— instructions—inferences of malice and unlawfulness—burden of proving insanity—no unconstitutional mandatory presumption of unlawfulness

The trial court's instructions on the inferences of malice and unlawfulness arising from proof beyond a reasonable doubt of the intentional use of a deadly

weapon proximately causing death and on defendant's burden to prove insanity to the satisfaction of the jury did not together create a constitutionally impermissible mandatory rebuttable presumption on the element of unlawfulness, since the defense of insanity is unrelated to the existence or nonexistence of the element of unlawfulness, and placing the burden of persuasion on the insanity issue upon the defendant in a homicide case in no way lessens the State's burden to prove unlawfulness beyond a reasonable doubt and does not shift the burden of persuasion on this element to the defendant.

2. **Criminal Law § 138.21— second degree murder—especially heinous aggravating circumstance**

The evidence supported the trial court's finding of the especially heinous aggravating circumstance for a second degree murder where it showed that defendant shot the victim several times while the victim was fleeing for his life; as the victim fell to his knees, defendant shot him several more times; as the victim lay helpless and prone before him, defendant shot him a sixth time; as defendant continued to fire shot after shot into the victim's helpless body, he cruelly taunted him and indicated his intent to continue shooting until the victim was dead; five of the wounds, although painful, would not have been immediately fatal, and the victim could have remained conscious for some time even after receiving the sixth wound; and the victim was in fear for his life and was conscious that he was being repeatedly shot.

3. **Criminal Law § 138.29— trial for first degree murder—conviction of second degree murder—premeditation and deliberation not proper aggravating factor**

Where a defendant is tried for first degree murder upon the theory of premeditation and deliberation and is found by the jury to be guilty of second degree murder, due process and fundamental fairness preclude the trial court from finding as an aggravating factor for second degree murder that defendant acted with premeditation and deliberation.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a life sentence entered by *Brannon, J.*, at the 19 January 1987 Criminal Session of Superior Court, CHATHAM County, upon defendant's conviction by a jury of second degree murder. Heard in the Supreme Court 12 November 1987.

Lacy H. Thornburg, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the state.

J. Kirk Osborn, Public Defender, for defendant appellant.

EXUM, Chief Justice.

Defendant's assignments of error pertain to: (1) whether the trial court's instructions to the jury included a constitutionally impermissible presumption on an essential element of the offense; (2) whether the trial judge erred in finding in aggravation that

the offense was especially heinous, atrocious or cruel, N.C.G.S. § 15A-1340.4(a)(1)f; and (3) whether there was error in the trial court's finding in aggravation at the sentencing hearing that defendant acted with premeditation and deliberation, defendant having been acquitted by the jury of first degree murder. We find no error in the trial but conclude the trial court erred in finding premeditation and deliberation as an aggravating factor and remand for a new sentencing hearing.

The victim in this case, Wesley Walker, was the stepson of the defendant. At trial the state's evidence showed that on the morning of 3 December 1985, Walker went into a convenience store to purchase fuel for his truck. After Walker left, defendant entered the store, purchased some fuel for his truck and went outside. Shortly thereafter defendant took a .30 caliber M1 carbine gun from the front seat of his truck and walked toward Walker's truck.

As defendant approached Walker's truck, he fired a single shot through the window on the driver's side of the vehicle. Walker escaped through the door on the passenger side and ran away from defendant. Defendant stepped in front of the truck and fired two more shots, felling Walker. Defendant began walking toward Walker and said, "If you want some more, goddamn, I'll give you some more." Walker fell to his knees.

While Walker was on his knees, defendant shouted, "I'll kill you" and "Do you want some more?" Defendant then shot Walker several more times. As Walker lay face down on the ground, defendant shouted, "I'll shoot you in the head. You want one in the head?" Defendant then shot Walker in the back of the neck or head area.

After firing the last shot defendant turned, went back to his truck, placed his gun on the front seat and went inside the store. By that time bystanders had called the police and defendant was apprehended before leaving the vicinity of the store. Numerous people witnessed the incident and testified that defendant was the person who shot and killed Walker under the circumstances described above.

Robert Thompson, a forensic pathologist, testified that Wesley Walker had suffered six gunshot wounds. Five of the wounds,

although painful, would not have been immediately fatal. He testified that, although it was possible that Walker had fallen unconscious after receiving the sixth gunshot wound, it was also possible for a person to suffer such a wound and remain conscious for some time.

Defendant pleaded not guilty by reason of insanity. He presented evidence tending to show that he and his wife had operated a successful trucking business until two or three years before the incident. At that time defendant began exhibiting uncharacteristic behavior. He became lethargic, inattentive to matters of business and personal hygiene and showed a lessened ability to work. He gradually became more disoriented and was unable to keep up a normal work schedule.

Defendant's wife testified that her husband's condition deteriorated so much that she made the decision that he was no longer capable of driving his truck in commerce. She testified that she had notified a dispatcher that defendant was not to be dispatched with a load, but was to be instructed to return home. She also testified that her husband had told her that he had planned to kill Walker for a year and that he had dug a grave behind their home and concealed it.

Dr. Billy Royal, a psychiatrist, testified that defendant, because of a mental disease or deficiency of the mind, did not understand the nature and quality of the act he committed.

In rebuttal, state offered testimony from three expert witnesses. Generally, their testimony was that, while defendant had less than average intelligence and had exhibited symptoms consistent with various organic and mental problems, he had the ability to understand the nature and quality of his act.

I

[1] Defendant first assigns as error a portion of the trial judge's final instructions to the jury. In pertinent part, the jury instructions were as follows:

> If the State proves beyond a reasonable doubt that the defendant killed the victim with a deadly weapon or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused the victim's death, you, the jury,

> may infer first that the killing was unlawful, and secondly, that it was done with malice. But you are not compelled to do so. You may consider this along with all of the other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice.

The trial judge also submitted defendant's insanity defense to the jury. In that portion of his instructions the trial judge stated, "sanity or soundness of mind is the natural and normal condition of people. Therefore, everyone is presumed sane until the contrary is made to appear. . . ." The trial judge then instructed the jury that defendant had the burden to prove his insanity to the jury's "satisfaction," saying, "the evidence taken as a whole, must satisfy you not beyond a reasonable doubt but simply satisfy you that the defendant was insane at the time [of] the alleged offense. . . ."

Defendant argues that these instructions, taken together, could have created in the mind of a reasonable juror a constitutionally impermissible "mandatory rebuttable presumption" on the essential element of unlawfulness. This kind of presumption, found to be a violation of the Due Process Clause in *Francis v. Franklin*, 471 U.S. 307, 85 L.Ed. 2d 344 (1985), was described in that case as follows:

> A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of their affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. A mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective, but it is no less unconstitutional. Our cases make clear that [such] shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.

471 U.S. at 317, 85 L.Ed. 2d at 355.[1]

1. For a fuller discussion of the constitutional limits on presumptions and inferences in criminal prosecutions, see *State v. Reynolds*, 307 N.C. 184, 297 S.E. 2d 532 (1982), and *State v. White*, 300 N.C. 494, 268 S.E. 2d 481 (1980), and decisions of the United States Supreme Court therein cited and discussed.

Defendant argues that because there was no evidence tending to rebut the element of unlawfulness except the evidence of insanity and the jury was instructed that defendant had the burden of persuasion on the insanity issue, reasonable jurors could have construed the instructions, taken as a whole, to mean that they would find unlawfulness unless the defendant persuaded them that the element did not exist.

This argument is grounded on a misunderstanding of the nature of the insanity defense in a homicide case and a superficial reading of the trial court's instructions.

"In the absence of evidence of mitigating or justifying factors all killings accomplished through the intentional use of a deadly weapon are deemed to be malicious and unlawful." *State v. Hankerson*, 288 N.C. 632, 650, 220 S.E. 2d 575, 588 (1975), *rev'd on other grounds*, 432 U.S. 233, 53 L.Ed. 2d 306 (1977). "[A]ll intentional killings are deemed, in law, to be unlawful in the absence of some evidence showing that the killing was excused or justified." *Reynolds*, 307 N.C. at 192, 297 S.E. 2d at 537. In the presence of evidence of heat of passion or self-defense, a jury may be instructed that it is permitted, but not compelled, to infer malice and unlawfulness from the intentional use of a deadly weapon proximately resulting in death. *State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981). But, in the presence of evidence of heat of passion and self-defense, the jury must also be instructed that the state must prove beyond a reasonable doubt that defendant did not act in heat of passion and in self-defense in order to prove the existence of malice and unlawfulness, respectively. *Id.* In other words self-defense negates, in law, the element of unlawfulness; and heat of passion, the element of malice.

Insanity does not mitigate, justify, or excuse the commission of a crime. It does not, as a matter of law, negate the element of unlawfulness, or any other discrete element of a homicide. A finding of not guilty by reason of insanity is not the same as an acquittal, nor does it result in defendant's being found guilty of a lesser degree of homicide. It simply means that the defendant is absolved from criminal responsibility for his act and cannot be punished for it. *State v. Swink*, 229 N.C. 123, 47 S.E. 2d 852 (1948). Instead, defendant, upon appropriate findings by the trial court, may be involuntarily committed to a state mental health facility. *See* N.C.G.S. § 15A-1321 (1983).

The defense of insanity is, thus, unrelated to the existence or nonexistence of the element of unlawfulness. To place the burden of persuasion on the insanity issue upon the defendant in a homicide case in no way lessens the state's burden to prove unlawfulness beyond a reasonable doubt, nor does it shift the burden of persuasion on this element to the defendant. Neither could the jury in this case have reasonably understood the trial court's instructions to relieve in any way the state's burden of persuasion on the elements of homicide.

In keeping with the above propositions concerning the nature of the insanity defense, the jury here was instructed that it would not consider the issue of defendant's insanity unless it had first found beyond a reasonable doubt the existence of each element of the homicide. The trial court instructed:

> Now, when there is evidence which tends to show that the defendant was legally insane at the time of the alleged offense, you will consider this evidence only if you find that the State has proved beyond a reasonable doubt each of the things about which I have already instructed you. Even if the State does prove each of those things beyond a reasonable doubt, the defendant would nevertheless be not guilty if he was legally insane at the time of the alleged offense.

Considering the jury instructions as a whole, we conclude that the jury in this case could not have reasonably understood the trial court's instructions to relieve in any way the state's burden of persuasion on the elements of the homicide. Accordingly, we find no merit in this assignment of error.

II

Defendant's two remaining assignments of error relate to the findings of the trial court at the sentencing hearing. Murder in the second degree is a Class C felony; therefore, the judge sentencing a defendant who is adjudged guilty of this crime must impose a 15-year term of imprisonment unless aggravating or mitigating factors merit imposition of a longer or shorter term. *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983). Here, the trial court sentenced defendant to the maximum term of life imprisonment after finding two aggravating and several mitigating factors and after concluding that the aggravating factors outweighed the

mitigating factors. To the trial court's finding of the two aggravating factors defendant assigns error.

A.

[2] Defendant contends the trial court erred in finding as an aggravating factor that the crime was especially heinous, atrocious or cruel within the meaning of N.C.G.S. § 15A-1340.4(a)(1)f. Defendant maintains this finding is contrary to our precedents on the point. We disagree.

The trial court's finding that this murder is especially heinous is fully supported by our decision in *State v. Watson*, 311 N.C. 252, 316 S.E. 2d 293 (1984). The defendant in *Watson* was convicted of second degree murder of his wife, upon an indictment charging him with first degree murder, and sentenced to life imprisonment. In *Watson* the defendant shot his wife a total of ten times while she fled from room to room within her home. We stated:

> There is ample evidence that the victim was not killed by the first shots. She managed to move from room to room in the house leaving a trail of blood behind her, clearly undergoing fear and pain in the process. Death was not instantaneous.

Id. at 255, 316 S.E. 2d at 295. We concluded that the facts supported the trial court's finding of the especially heinous aggravating circumstance, saying:

> We also reject defendant's argument that there should be some relevance attached to his allegation that he did not intend his victim to suffer or intend that the murder be "vicious." Proof that a defendant intended to inflict unnecessary pain upon his victim is certainly appropriately considered in determining whether an offense is especially cruel. Such proof, however, is not necessary. G.S. § 15A-1340.4(a)(1)f is stated in the disjunctive—"The offense was especially heinous, atrocious, *or* cruel." Thus an equally appropriate focus in determining the existence of this factor is whether the victim suffered unusual physical pain or mental anguish. Here the evidence fully supports a finding that the victim suffered a degree of physical pain and psychological suffering not normally present in every murder. . . .

Id. at 255, 316 S.E. 2d at 295-96.

The facts now before us are even more compelling in support of this aggravating factor than they were in *Watson*. Here there is not only evidence that the victim actually suffered a degree of physical pain and mental anguish not normally present in every murder, but there is also evidence that the defendant intended that such suffering occur. The state's evidence shows that defendant shot Wesley Walker several times while Walker was fleeing for his life. Then, as Walker fell to his knees, defendant shot him several more times. Finally, as Walker lay helpless and prone before him, defendant shot him a sixth time. All the while, as defendant continued to fire shot after shot into Walker's helpless body, he cruelly taunted him and indicated his intent to continue shooting until Walker was dead. Five of the wounds, although painful, would not have been immediately fatal, and there is evidence that Wesley Walker could have remained conscious for some time even after receiving the sixth gunshot wound. Walker was in fear for his life and was conscious that he was being repeatedly shot.

This evidence clearly supports a finding that defendant suffered a degree of physical and mental pain not normally present in every murder. This assignment of error is overruled.

B.

[3] Defendant next contends that the trial court erred in finding as an aggravating factor that defendant acted with premeditation and deliberation. Defendant argues that the trial court was precluded by considerations of due process from finding this aggravating factor. We agree.

It is well settled that a trial judge can find as an aggravating factor that the killing was done with premeditation and deliberation when a defendant charged with first degree murder *pleads guilty* to second degree murder. *State v. Brewer*, 321 N.C. 284, 362 S.E. 2d 261 (1987); *State v. Daniels*, 319 N.C. 452, 355 S.E. 2d 136 (1987); *State v. Carter*, 318 N.C. 487, 349 S.E. 2d 580 (1986); *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983). However, as we noted in *Melton*, that situation is "fundamentally different from one in which a defendant *tried* for murder in the first degree is found guilty of murder in the second degree . . . ." 307

N.C. at 370, 298 S.E. 2d at 673 n.2 (1983) (emphasis in original).[2] The question then is whether, under that circumstance, a trial court can find by the *preponderance of the evidence* that the killing was after premeditation and deliberation and use this finding as an aggravating factor. We conclude not.

When a defendant is tried for first degree murder upon the theory of premeditation and deliberation and is found guilty of murder in the second degree the jury has decided that there is not sufficient evidence to conclude beyond a reasonable doubt that defendant premeditated and deliberated the killing. The conviction of the lesser included offense of second degree murder is an acquittal of the greater offense of first degree murder. *Green v. United States*, 355 U.S. 184, 2 L.Ed. 2d 199 (1957).[3]

An acquittal is the "legal and formal certification of the innocence of a person who has been charged with a crime." Black's Law Dictionary 23 (5th ed. 1979). Once a defendant has been acquitted of a crime he has been "set free or judicially discharged from an accusation; released from . . . a charge or *suspicion* of guilt." *People v. Lyman*, 53 A.D. 470, 473, 65 N.Y.S. 1062, 1065 (1900) (quoting 1 Am. & Eng. Enc. Law (2d ed. p. 573)) (emphasis added). A jury in a criminal case may acquit simply because the state has failed to prove a defendant's guilt beyond a reasonable doubt. However, we cannot enter the inner sanctum of the jury to determine whether it *might* have convicted a defendant had the burden of proof been lower. "The inescapable point is that . . . [the] law requires proof beyond a reasonable doubt in criminal cases as the standard of proof commensurate with the presumption of innocence; a presumption not to be forgotten after the ac-

2. We are aware that in *State v. Albert*, 312 N.C. 567, 324 S.E. 2d 233 (1985), the trial court found as an aggravating factor that the murder was premeditated and deliberated upon defendant's conviction of second degree murder. While that case was remanded for a new sentencing hearing on other grounds, the issue presented today was neither briefed nor argued.

3. In *Green* the United States Supreme Court held that a defendant, charged with first degree murder but convicted of second degree murder, received an implied acquittal of the charge of first degree murder. While a defendant's negotiated plea to second degree murder upon a charge of first degree murder may be *tantamount* to an acquittal of the greater offense, there has been no jury determination as to whether the elements of first degree murder have been proven beyond a reasonable doubt; consequently there has been no *actual* acquittal.

quitting jury has left and sentencing has begun." *State v. Cote*, 129 N.H. 358, 530 A. 2d 775 (1987).[4] It is well established that a defendant cannot be convicted of a crime unless the evidence adequately sustains every element of the offense charged. *State v. McCoy*, 303 N.C. 1, 24, 277 S.E. 2d 515, 532 (1981); *State v. Ferguson*, 191 N.C. 668, 670, 132 S.E. 664, 665 (1926).

Due process affords every defendant charged with a crime the presumption of innocence. This presumption

> is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn. . . .

Coffin v. United States, 156 U.S. 432, 459, 15 S.Ct. 394, 405 (1895).

To allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself.

We conclude that due process and fundamental fairness precluded the trial court from aggravating defendant's second degree murder sentence with the single element—premeditation and deliberation—which, in this case, distinguished first degree murder after the jury had acquitted defendant of first degree murder.

The result is that in defendant's trial we find no error; but the case is remanded for a new sentencing hearing.

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4. In *Cote* the defendant was tried on eight counts of sexually assaultive behavior. Five of the offenses allegedly occurred at one time and place and three of the offenses allegedly occurred at another time and place. Defendant was acquitted of the first five charges but found guilty of the second three. The trial court sentenced defendant to the maximum sentence for each offense. One of the factors which the trial court considered was the fact that defendant's conduct did not represent an isolated incident. The New Hampshire Supreme Court concluded that the trial court had abused its discretion in aggravating defendant's sentence by considering evidence of charges for which defendant had been acquitted.

No error in the trial.

Remanded for a new sentencing hearing.

CAROLINA TELEPHONE AND TELEGRAPH COMPANY v. ROSA D. McLEOD

No. 310PA87

(Filed 3 February 1988)

Telecommunications § 3; Eminent Domain § 3— private condemnation—telephone line for single customer—public use or benefit

The trial court erred in a private condemnation action by granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment on the grounds that plaintiff's desired use of the land in question is not for the use and benefit of the public where the condemnation was for the purpose of providing telephone service to a single customer. Under the public use test, it is the public's right to use rather than the actual use which is significant; here, every member of the public will have a common and identical right to use the telephone line. The public benefit test is satisfied in that provision of telephone service to a single customer to insure that an entire community is interconnected is a necessity required by the public and which cannot readily be provided without some government aid. N.C.G.S. § 40A-3.

ON plaintiff's petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous and unpublished decision of the Court of Appeals, 85 N.C. App. 538, 355 S.E. 2d 858 (1987), affirming orders entered by *Barnette, J.*, at the 9 September 1986 Civil Session of Superior Court, HARNETT County, granting defendant's motion, and denying plaintiff's motion, for summary judgment. Heard in the Supreme Court 12 November 1987.

Donald E. Harrop, Jr., for plaintiff-appellant.

Bryan, Jones, Johnson & Snow, by James M. Johnson, for defendant-appellee.

MEYER, Justice.

This is an action instituted by plaintiff pursuant to N.C.G.S. § 40A-19, our statutory provision for private condemnation of privately owned real property. Specifically, plaintiff seeks by its action an easement over defendant's land to enable it to provide telephone service to Mr. Dennis P. Turlington, one of its custom-

ers. The issue presented on this appeal is whether the trial court erred in granting defendant's motion, and in denying plaintiff's motion, for summary judgment on the grounds that the desired condemnation was not for "the public use or benefit" as required by N.C.G.S. § 40A-3. In an unpublished opinion, the Court of Appeals held that the trial court did not err and affirmed its orders accordingly. We reverse. We hold that the provision of telephone service, irrespective of the number of customers affected, is an action for "the public use or benefit" and that the trial court's orders granting summary judgment for defendant and denying summary judgment for plaintiff were therefore improper.

The forecast of evidence in this case tends to show the following facts and circumstances. Plaintiff is a North Carolina corporation and a public utility providing telephone services to the citizens of central North Carolina. Defendant is a private citizen who owns approximately twenty-five acres of land adjacent to North Carolina State Road 2009 in Harnett County, North Carolina. Dennis P. Turlington, one of plaintiff's customers, owns roughly twenty-one acres of land lying to the south and west of defendant's land. Defendant's land lies directly between Mr. Turlington's land and the state road.

Mr. Turlington, who lives in a mobile home on his property, is a self-employed carpenter and desires to operate his business from his property. Mr. Turlington has farmed his land, has cut wood from it, and holds recreational activities there. His inability to access his property from any state-maintained road has been the subject of several controversies involving defendant. Some of these controversies have been tried before the courts of this state, and one was pending at the time this cause was argued before this Court.

Sometime during 1979, plaintiff installed an underground telephone cable to Mr. Turlington's property across defendant's land. Plaintiff chose to install the line across defendant's land because this was the shortest route to a state-maintained road and a pre-existing telephone terminal. Plaintiff, apparently through inadvertence, failed to obtain defendant's permission to install the cable in question or to obtain an easement or any other legal right to go on defendant's land. Nevertheless, defendant made no objection about the line, nor about plaintiff's mainte-

nance of it, for nearly six years. However, on 5 July 1985, apparently in response to a cartway proceeding instituted against defendant by Mr. Turlington and in response to other difficulties between the two, defendant demanded that plaintiff remove the cable or face an action in trespass.

Plaintiff complied with defendant's request and dug up the line. Left without telephone service, Mr. Turlington filed a complaint with the North Carolina Utilities Commission in October 1985 seeking to have his telephone service reinstated. In December 1985, the Commission issued a "recommended order" instructing plaintiff to restore service to Mr. Turlington by obtaining a permissive way across defendant's property or, alternatively, by condemning a right-of-way pursuant to N.C.G.S. § 40A-19.

Accordingly, plaintiff then made numerous unsuccessful attempts to secure defendant's permission to gain an easement or a right-of-way for the telephone line across her land. Plaintiff met with a similar lack of success upon trying to secure similar permission from other adjacent landowners for less convenient routes. Having failed to secure the permissive use of either defendant's land or that of any other of Mr. Turlington's neighbors, plaintiff instituted the present action on 21 February 1986.

In her answer to plaintiff's complaint, defendant asserted that plaintiff is not entitled to condemn defendant's property because the desired condemnation is not for "the public use or benefit," as required by N.C.G.S. § 40A-3. Moreover, in an included counterclaim, defendant alleged that plaintiff is liable to her in trespass. Both plaintiff and defendant filed motions for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. The trial court denied plaintiff's motion for summary judgment on the condemnation claim and granted plaintiff's motion for summary judgment on defendant's counterclaim for trespass. The trial court granted defendant's motion for summary judgment on the condemnation claim, holding that, here, the desired condemnation was not for "the public use or benefit." The Court of Appeals affirmed the trial court's orders.

Pursuant to N.C.G.S. § 7A-31, we allowed plaintiff's petition for discretionary review of the Court of Appeals' decision affirming the trial court's order denying plaintiff's Petition to Acquire an Easement for telephone service. The propriety of the trial

court's disposition of defendant's counterclaim for trespass is not before us, and accordingly, we do not address it. The question plainly before us is this: Does provision of telephone service to a single customer constitute a "public use or benefit" for purposes of N.C.G.S. § 40A-3? The Court of Appeals answered "no." We believe the correct answer is "yes" and we reverse.

Eminent domain is the power of the nation or of a sovereign state to take, or to authorize the taking of, private property for a public use without the owner's consent and upon payment of just compensation. 26 Am. Jur. 2d *Eminent Domain* § 1 (1966). Any state legislature, and therefore the North Carolina General Assembly, has the right to determine what portion of this power it will delegate to public or private corporations to be used for the public's benefit. *Colonial Pipeline Co. v. Neill*, 296 N.C. 503, 251 S.E. 2d 457 (1979). In North Carolina, for example, it is clear that private corporations, "for the construction of . . . telephones," may condemn property through the power of eminent domain if such condemnation is for "the public use or benefit." N.C.G.S. § 40A-3 (1984). It is uncontested that plaintiff, as a provider of telephone service in central North Carolina, is such a corporation. The issue before us is simply whether the use intended by plaintiff—provision of telephone service to a single customer—is for "the public use or benefit."

While delegation of the power of eminent domain is for the legislature, the determination of whether the condemnor's intended use of the land is for "the public use or benefit" is a question of law for the courts. *Highway Commission v. Batts*, 265 N.C. 346, 144 S.E. 2d 126 (1965); *Charlotte v. Heath*, 226 N.C. 750, 40 S.E. 2d 600 (1946). This task has not proven easy. While it is clear that the power of eminent domain may not be employed to take private property for a purely private purpose, *Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E. 2d 248 (1967), it is far from clear just how "public" is public enough for purposes of N.C.G.S. § 40A-3. As we have stated on numerous occasions, the statutory phrase "the public use or benefit" is incapable of a precise definition applicable to all situations. *Highway Comm. v. School*, 276 N.C. 556, 173 S.E. 2d 909 (1970); *Highway Commission v. Batts*, 265 N.C. 346, 144 S.E. 2d 126. Rather, because of the progressive

demands of an ever-changing society and the perpetually fluid concept of governmental duty and function, the phrase is elastic and keeps pace with changing times. *Highway Commission v. Batts*, 265 N.C. 346, 144 S.E. 2d 126.

However, judicial determination of whether a condemnor's intended use is an action for "the public use or benefit" under N.C.G.S. § 40A-3 is not standardless. On the contrary, courts in this and other states have employed essentially two approaches to this problem. The first approach—the public *use* test—asks whether the public has a right to a definite use of the condemned property. 26 Am. Jur. 2d *Eminent Domain* § 27 (1966). The second approach—the public *benefit* test—asks whether some benefit accrues to the public as a result of the desired condemnation. *Id.* We find that both approaches, when applied to the specific facts of this case, yield the identical conclusion. Plaintiff's condemnation of defendant's property, albeit to provide telephone service to but a single customer, is an action for "the public use or benefit." Accordingly, the trial court's decision granting defendant's motion, and denying plaintiff's motion, for summary judgment on the condemnation claim was improper.

We look first at the public use test. Under this first approach, the principal and dispositive determination is whether the general public has a right to a definite use of the property sought to be condemned. 26 Am. Jur. 2d *Eminent Domain* § 27 (1966). Significantly, this Court has emphasized that it is the public's *right* to use, not the public's actual use, which is important to this first approach. *Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E. 2d 248; *Charlotte v. Heath*, 226 N.C. 750, 40 S.E. 2d 600. In *Thornton*, for example, wherein we held that a road ending in a cul-de-sac can constitute a public use, we stated that "if the public generally may use the road, as a matter of right, on an equal, common basis, the road is a public road irrespective of how many people actually use it." *Highway Commission v. Thornton*, 271 N.C. 227, 243, 156 S.E. 2d 248, 260. In *Heath*, a case involving the condemnation of private property for water and sewer services, we stated that the intended use " 'may be for the inhabitants of a small or restricted locality; but the use and benefit must be in common, not to particular individuals or estates.' " *Charlotte v. Heath*, 226 N.C. 750, 756, 40 S.E. 2d 600, 605 (quoting *Miller v. Pulaski*, 109 Va. 137, 143, 63 S.E. 880, 883 (1909)).

Our emphasis of the right to use, rather than actual use, is consistent with decisions from other jurisdictions. For example, the Virginia Supreme Court, in *Iron Company v. Pipeline Company*, 206 Va. 711, 146 S.E. 2d 169 (1966), stated as follows:

> "The character of the use, whether public or private, is determined by the extent of the right by the public to its use, and not by the extent to which that right is, or may be, exercised. If it is a public way in fact, it is not material that but few persons will enjoy it. * * *"

Id. at 715, 146 S.E. 2d at 172 (quoting *Dismal Swamp R. Co. v. Roper L. Co.*, 114 Va. 537, 546, 77 S.E. 598, 605 (1913)).

A Texas court followed a similar approach in *Dyer v. Texas Electric Service Co.*, 680 S.W. 2d 883 (Tex. App. 1984), a case in which electric service provided to a single corporate customer was determined to be a public use. The Texas court stated that it is "immaterial" if the use is limited to citizens of a certain location or that few people will in fact exercise the right to use. *Id.* at 885. The key point, stated the court, is that the use is "open to all who choose to avail themselves of it. The mere fact that the advantage of the use inures to a particular individual . . . will not deprive it of its public character." *Id.*

Under this first approach, the public use test, this plaintiff's intended use is clearly for "the public use or benefit" for purposes of N.C.G.S. § 40A-3, and accordingly, plaintiff is entitled to the desired condemnation. While it is true that, by its action, plaintiff wishes to provide telephone service to a single customer, once the telephone cable is laid, every member of the public will have a common and identical right to use that telephone line. Such is the nature of telephonic communication. Any member of the public who wishes to do so may pick up his own telephone and dial Mr. Turlington at the appropriate number. Likewise, Mr. Turlington may access any other phone in the surrounding community merely by dialing the proper number. Moreover, once installed, access to telephone service would be available at the location to Mr. Turlington's successors in title or possession. Because it is the right to use the line and not the actual use of the line which is dispositive here, *Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E. 2d 248, the degree to which any of these hypothetical uses in fact occurs is irrelevant. Like the road at issue in *Thorn-*

ton, because the public generally may use Mr. Turlington's telephone line as a matter of right on an equal and common basis, the line is a public line without regard to how many people actually use it. *Id.* Under the public use test, therefore, plaintiff's intended use constitutes an action for "the public use or benefit" for purposes of the statute in question.

However, use by the general public as a *universal* test of whether a desired condemnation constitutes an action for "the public use or benefit" has been recognized as inadequate. 26 Am. Jur. 2d *Eminent Domain* § 29 (1966). Accordingly, we turn now to another approach, the public benefit test. Generally, under the public benefit test, a given condemnor's desired use of the condemned property in question is for "the public use or benefit" if that use would contribute to the general welfare and prosperity of the public at large. 26 Am. Jur. 2d *Eminent Domain* § 27 (1966). However, judicial decisions in this and other states reveal that not just any benefit to the general public will suffice under this test. Rather, the taking must " 'furnish the public with some necessity or convenience which cannot readily be furnished without the aid of some governmental power, and which is required by the public as such.' " *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E. 2d 600, 604 (1946) (quoting 18 Am. Jur. *Eminent Domain* § 38 (1938)). In *Charlotte v. Heath*, 226 N.C. 750, 40 S.E. 2d 600, for example, in finding that the exercise of the power of eminent domain was proper, we held that provision of much-needed water and sewerage services to a small community of people by the City of Charlotte satisfied this public benefit test.

The facts of the case at bar satisfy the public benefit test. In this day and age, as we near the end of the twentieth century, the escalating importance of telephones and telephone systems cannot be gainsaid. As we stated above, plaintiff's provision of telephone service to Mr. Turlington will allow him and his successors to access other members of his community by merely dialing the correct numbers on his telephone. Moreover, it will ensure that members of the local community, should they so desire, may gain access to him or his successors by doing the same. In short, provision of telephone service to a single customer, to ensure that an entire community is interconnected is, like the water and sewerage service at issue in *Heath*, a necessity required by the public in this day and age. Also, like the service in *Heath*, telephone

service for the whole community is a necessity which cannot readily be provided without some governmental aid. The North Carolina General Assembly no doubt understood this when it passed N.C.G.S. § 40A-3 and thereby delegated to telecommunication companies the power of eminent domain. N.C.G.S. § 40A-3 (1984). We find that plaintiff's desired use of the property in question satisfies the public benefit test and therefore satisfies "the public use or benefit" requirement of our statutory provisions for private condemnation.

A final method of analysis has been employed by courts in several states in cases where, as here, the condemnor's desired use clearly includes both private and public traits. The general rule in such cases is that a taking can be for public use or benefit even when there is also a substantial private use so long as the private use in question is incidental to the paramount public use. *See* 26 Am. Jur. 2d *Eminent Domain* § 32 (1966).

This Court applied this general rule in *Highway Comm. v. School*, 276 N.C. 556, 173 S.E. 2d 909 (1970), and we find our analysis there to be instructive in the case at bar. In that case, the C. A. Mashburn family, by virtue of the construction of Interstate 40, was rendered landlocked by the new highway and defendant school's property. The Highway Commission (now the Department of Transportation) sought to condemn a portion of the school's property in order to allow the Mashburn family access to the Sand Hill Road. The school opposed the Highway Commission's effort. Speaking for a unanimous Court and holding that the Highway Commission was entitled to exercise eminent domain on those facts, Justice (later Chief Justice) Sharp stated:

> "[T]he exercise of eminent domain for a public purpose which is primary and paramount will not be defeated by the fact that incidentally a private use or benefit will result which will not of itself warrant the exercise of a power. . . . The controlling question is whether the paramount reason for the taking of the land to which objection is made is the public interest, to which benefits to private interests are merely incidental, or whether, on the other hand, the private interests are paramount and controlling and the public interests merely incidental."

Highway Comm. v. School, 276 N.C. 556, 562-63, 173 S.E. 2d 909, 914 (quoting 26 Am. Jur. 2d *Eminent Domain* §§ 32, 33 (1966)). Justice Sharp stated further that because the new access was "auxiliary to, and necessitated by, the construction of Interstate Highway No. 40" and "an incidental part of a comprehensive and complex highway project of national significance," the condemnation was primarily for public use or benefit. *Id.* at 562, 173 S.E. 2d at 914.

Application of Justice Sharp's reasoning to the case at bar yields yet again the conclusion that this plaintiff's desired use of the property in question—to provide telephone service to Mr. Turlington—was an action for "the public use or benefit" for purposes of N.C.G.S. § 40A-3. It is admitted that plaintiff's action will have as one of its effects the provision of telephone service to a single customer, Mr. Turlington. However, we find that, just as providing access to the Mashburn family was an incidental part of a large and very important highway project, the provision of telephone service to Mr. Turlington is a small part of a more important and more far-reaching effort—the effort to ensure that, in an era in which the telephone has truly become a necessity, whole communities, as well as members of individual communities, are interconnected by telephone systems. As we stated above in our analysis of this case under the public benefit test, the singular importance of telephones and of telephone systems in today's society simply cannot be overstated. It cannot seriously be argued that the public's best interests are served by denying telephone service to any member of our society. Accordingly, plaintiff's desired use of the property in question is, in our opinion, for "the public use or benefit" and its exercise of eminent domain should have been allowed here.

In conclusion, we hold that the provision of telephone service, irrespective of the number of customers directly affected, constitutes an action for "the public use or benefit" for purposes of N.C.G.S. § 40A-3 and is therefore a use for which plaintiff may properly exercise its statutory power of eminent domain. Therefore, in the case at bar, the trial court erred in granting defendant's motion for summary judgment and in denying plaintiff's motion for summary judgment on the grounds that plaintiff's desired use of the land in question is *not* for "the public use or benefit" as required by N.C.G.S. § 40A-3. Moreover, the Court of

Appeals erred in affirming the trial court's erroneous orders. Accordingly, we reverse and remand to the Court of Appeals with instructions to that court to remand to the Superior Court, Harnett County, for entry of summary judgment for plaintiff on the condemnation claim and for further proceedings consistent with this opinion.

Reversed and remanded.

PYCO SUPPLY COMPANY, INC. v. AMERICAN CENTENNIAL INSURANCE COMPANY v. CAROLINA ROAD BUILDERS, INC., H. KEITH DUNCAN, CURTIS L. CLARK, PATTY D. CLARK, LEONARD SIMMONS AND BETTY M. SIMMONS

No. 223A87

(Filed 3 February 1988)

1. **Rules of Civil Procedure § 15; Pleadings § 35.1— amended complaint—relation back—time restriction**

The determination of whether a claim asserted in an amended pleading relates back does not hinge on whether a time restriction is deemed a statute of limitation or repose; rather, the proper test is whether the original pleading gave notice of the transactions, occurrences, or series of transactions or occurrences which formed a basis of the amended pleading. N.C.G.S. § 1A-1, Rule 15(c).

2. **Pleadings § 33.2; Rules of Civil Procedure § 15— action on construction bond—amendment of complaint—proper**

In an action in which plaintiff furnished pipe for a water project and ultimately sought to collect the amount due from defendant under a construction bond, the original complaint gave notice of the amended claim where the project had been divided into four contracts, plaintiff had attached contract two to the original complaint, contract four covered the materials from which the dispute arose, and plaintiff later sought to amend the complaint to remove the bond and contract as exhibits, to delete a reference to the bond, and instead to generally allege that defendant had written bonds to secure those parties who had furnished materials in connection with the water line project. The amended complaint averred basically the same allegations as the original complaint except that it did not restrict itself to a specified contract number; furthermore, plaintiff asserted in the original complaint that it brought the action to recover the amount owed it pursuant to Chapter 44A, Art. 3 of the General Statutes of North Carolina, giving notice to defendant that plaintiff sought to recover all amounts owed to it by defendant surety notwithstanding

the numerical designation of the contract or payment bond on which the default was based. N.C.G.S. § 1A-1, Rule 15(c), N.C.G.S. § 1A-1, Rule 8(a)(1).

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals reversing summary judgment for plaintiff, entered by *Rousseau, J.*, on 11 March 1986 in Superior Court, SURRY County. Plaintiff's petition for discretionary review of additional issues was allowed 7 July 1987. Heard in the Supreme Court 14 October 1987.

Weinstein & Sturges, P.A., by Hugh B. Campbell, Jr., for plaintiff-appellant.

Nichols, Caffrey, Hill, Evans & Murrelle, by William L. Stocks and B. Danforth Morton, for defendant-appellee.

FRYE, Justice.

The issue presented on this appeal is whether the Court of Appeals erred when it reversed the decision of the trial court that allowed plaintiff to amend its complaint and have the amended complaint relate back to the filing of its original complaint. The underlying issue then is whether the original complaint in this action gave "notice of the transactions, occurrences, or series of transactions or occurrences" which formed the basis for the amended complaint within the meaning of Rules 8(a)(1) and 15(c) of the North Carolina Rules of Civil Procedure. We answer both questions in the affirmative, and therefore reverse the decision of the Court of Appeals.

I.

This dispute arises from a construction project wherein the Town of Pilot Mountain contracted with Carolina Road Builders, Inc. (CRB) to lay a new water line for the town. CRB purchased a large quantity of pipe from plaintiff to use in fulfilling its contracts with the town for the water line project. When CRB became financially unable to pay the balance owed to plaintiff in connection with the water line project, plaintiff instituted this suit against CRB's surety, American Centennial Insurance Company (American Centennial).

Prior to filing its complaint, plaintiff had written to the Town of Pilot Mountain concerning its water system improvement proj-

ect and the fact that plaintiff had not been paid in full for materials supplied to the town's general contractor, CRB. Plaintiff requested that the Town of Pilot Mountain "furnish to [it] a certified copy of the payment bond and construction contract covered by the bond" pursuant to N.C.G.S. § 44A-31. The town manager of Pilot Mountain responded by enclosing a certified copy of payment bond AB001871 and "the contract between the Town of Pilot Mountain and [CRB]." Plaintiff, believing this payment bond and contract covered the entire water line project, attached copies of both as Exhibit "A" to its complaint.

Because of the significance of the pleadings to this dispute, a thorough examination of the procedural posture is warranted. This action was instituted by a complaint filed 2 November 1984, as follows:

> 1. Plaintiff Pyco Supply Co., Inc., is a corporation duly incorporated under the laws of the State of South Carolina and duly authorized to do business in the State of North Carolina with an office in Mecklenburg County, North Carolina.
>
> 2. Defendant American Centennial Insurance Company is an insurance company which Plaintiff is informed and believes and so alleges is duly incorporated under the laws of the State of Delaware and duly authorized by the State of North Carolina to write insurance contracts in this State including performance and payment bonds.
>
> 3. Plaintiff is informed and believes and so alleges that American Centennial Insurance Company wrote a payment bond (Bond No. AB0018710A) wherein American Centennial bound itself as surety to assure payment of all material suppliers supplying material to Carolina Roadbuilders, Inc. in connection with a contract for construction and completion of water line improvements for the Town of Pilot Mountain, North Carolina. A copy of this payment bond together with the contract between the Town of Pilot Mountain and Carolina Roadbuilders, Inc. is attached hereto as Exhibit "A" and incorporated herein by reference.
>
> 4. Over a period of time running from approximately November 10, 1982, through approximately January 24, 1984, Plaintiff sold and delivered to Carolina Roadbuilders, Inc.,

certain pipe and other plumbing materials for use in connection with the aforesaid water line improvement project. After giving Carolina Roadbuilders, Inc., credit for all payments or authorized return of material, Plaintiff is still owed the sum of $14,305.77 for materials furnished in connection with this project. Despite Plaintiff's repeated demands for payment, Carolina Roadbuilders, Inc., has failed and refused to make the payment to Plaintiff for more than ninety days since the date of last delivery of materials.

5. Plaintiff brings this action to recover the amount owed to it pursuant to Chapter 44A, Article 3 of the General Statutes of North Carolina which chapter provides for the procedure to make recovery on payment bonds.

WHEREFORE, Plaintiff prays that it have and recover of the Defendant, the sum of $14,305.77; that it recover interest at the highest amount allowed by law; that it recover its costs in connection with this action; and that it have such other and further relief as to the Court may seem just and proper.

After filing an answer and third party complaint, American Centennial moved for summary judgment against plaintiff. Subsequently, plaintiff asserted that it learned from another suit pending against CRB in another jurisdiction that the water line project had been divided into four separate contracts, with CRB receiving contracts one, two and four, and that CRB had purchased a separate bond from American Centennial on each of the three contracts. Plaintiff also learned that the materials for which it had not been paid were used in connection with that part of the project covered by contract four, not contract two that had been attached to its complaint. Plaintiff then moved to amend its original complaint so as to remove as an exhibit the bond and contract attached to its complaint, to delete the parenthetical reference to the bond found in paragraph three, and instead to allege generally that American Centennial had written bonds to secure those parties who had furnished material in connection with the water line project. At the hearing on plaintiff's motion to amend, the trial court also heard American Centennial's motion for summary judgment based on an affidavit which showed that as to contract two, more than one year had passed since materials were last furnished.

The trial court granted plaintiff's motion to amend its original complaint to state a claim which would include contract four, finding that there was no prejudice to American Centennial since the original complaint had fully notified American Centennial that plaintiff had not been paid in full for the pipe plaintiff had furnished on the water line project over the period between November 1982 and January 1984. In its order, the trial judge noted that plaintiff's proposed amendment would be useless unless the court allowed it to relate back to the filing date of the original complaint so that the amended claim would escape the time bar of the statute. The trial judge also entered summary judgment for defendant on any claim relating to materials furnished on that portion of the water line project covered by contract two based on the agreement of all parties that this was appropriate. Defendant's answer to plaintiff's amended complaint included a plea that the action was barred by a one-year limitation included in the payment bonds executed by American Centennial as surety for CRB notwithstanding the amendment. Defendant in its third defense, alleged:

> To the extent that the plaintiff has commenced an action on any of the payment bonds which were executed by American Centennial as surety for Carolina Roadbuilders, Inc., other than the payment bond contract No. 2, such action was not commenced until the amended complaint by the plaintiff was allowed which was more than one year following the date on which the principal, Carolina Roadbuilders, Inc., ceased work on the contracts referred to in the payment bonds.

Defendant also pleaded the limitation contained in N.C.G.S. § 44A-28(b), alleging:

> Any action by the plaintiff with reference to the bonds issued on contracts 1 or 4 was commenced after the time permitted by the above-quoted statute which is hereby pleaded in bar of any recovery by the plaintiff in this action.

Through these allegations, defendant effectively challenged the trial court's decision to allow the amendment to relate back to the date the original complaint was filed. Both parties subsequently moved for summary judgment on the amended pleadings and supporting affidavits. The trial court granted summary judgment for plaintiff in the amount of $14,305.77 against defendant American

Centennial, and summary judgment in favor of defendant American Centennial against CRB in the same amount. Only American Centennial appealed to the Court of Appeals.

II.

The Court of Appeals reversed the summary judgment for plaintiff, holding that the time restriction of N.C.G.S. § 44A-28(b) was a statute of repose and not a statute of limitation and as such, relation back was inappropriate. The Court of Appeals reasoned that since the one year limitation in the statute was a substantive element of the claim that had gone unsatisfied, the amended complaint could not relate back to the date of the filing of the original complaint. Therefore, any action on contract four which appeared in the amended complaint was barred since it was added beyond the one year limitation. The Chief Judge dissented in a one paragraph opinion as follows:

> In my opinion, the trial court did not err in allowing plaintiff to amend its complaint to omit the specific reference to Bond No. AB0018710A, and I vote to affirm summary judgment for plaintiff. G.S. 1A-1, Rule 15(c) allows the matter pleaded in the amendment to relate back so as to affirmatively disclose that plaintiff's claim is not barred by any statute of limitations or repose. The record discloses there are no genuine issues of material fact and the record does not disclose any insurmountable bar to plaintiff's claim. I vote to affirm.

Pyco Supply Co., Inc. v. American Centennial Ins. Co., 85 N.C. App. 114, 122, 354 S.E. 2d 360, 365 (1987) (Hedrick, C. J., dissenting). We agree with the dissenting opinion.

[1] Essentially, the decision of the Court of Appeals makes Rule 15(c) inapplicable when an amended complaint is filed beyond a statutory period when that time restriction is deemed a statute of repose. We can discern from our Rules of Civil Procedure and the case law of this State no such exception intended for Rule 15(c). We hold that the determination of whether a claim asserted in an amended pleading relates back does not hinge on whether a time restriction is deemed a statute of limitation or repose. Rather, the proper test is whether the original pleading gave notice of the transactions, occurrences, or series of transactions or occurrences

which formed the basis of the amended pleading. If the original pleading gave such notice, the claim survives by relating back in time without regard to whether the time restraint attempting to cut its life short is a statute of repose or limitation.

III.

[2] In all cases of public construction for which a payment bond is required under N.C.G.S. § 44A-26, the provisions of the Model Payment and Performance Bond Act, N.C.G.S. § 44A-25 to -34, are conclusively presumed to have been written into the payment bond. N.C.G.S. § 44A-30(b) (1984). The subsection at issue provides:

> No action on a payment bond shall be commenced after the expiration of the longer period of one year from the day on which the last of the labor was performed or material was furnished by the claimant, or one year from the day on which final settlement was made with the contractor.

N.C.G.S. § 44A-28(b) (1984).

Although this Court has had the opportunity to distinguish between statutes of repose and limitations, *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 328 S.E. 2d 274 (1985), and *Black v. Littlejohn*, 312 N.C. 626, 325 S.E. 2d 469 (1985), our research discloses no cases where we have decided this issue as it relates to N.C.G.S. § 44A-28(b) payment bonds. The question of whether similar statutes are statutes of repose or limitation has troubled the federal courts.[1] Inasmuch as we can dispose of this case without deciding this issue, we find it unnecessary to address it at this time.

Defendant, on appeal, contends that because the statute is one of repose, commencing suit on contract four within the one year period provided in N.C.G.S. § 44A-28(b) is an absolute condition precedent to its alleged liability to plaintiff. Because plain-

1. An analogous federal statute, 40 U.S.C. § 270(b) has been construed both ways by the federal courts of appeal. *See U.S. ex rel. Harvey Gulf Int. Marine, Inc. v. Maryland Casualty Co.*, 573 F. 2d 245 (5th Cir. 1978) and *Security Insurance Co. v. United States for use of Haydis*, 338 F. 2d 444 (9th Cir. 1964). *But see, United States for the Use and Benefit of Celanese Coatings Co. v. Gullard*, 504 F. 2d 466 (9th Cir. 1974).

tiff's amended complaint was not filed until 8 November 1985, more than a year after the last materials were furnished to CRB and final settlement, defendant argues its liability on contract four had expired and could not be revived by plaintiff's procedural amendment.

Rule 15(c) of the North Carolina Rules of Civil Procedure provides:

> (c) Relation back of amendments.—A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleadings was interposed, unless the original pleading does not give *notice of the transactions, occurrences, or series of transactions or occurrences,* to be proved pursuant to the amended pleading.

N.C.R. Civ. P. 15(c) (1983) (emphasis added). Whether an amended complaint will relate back to the original complaint does not depend upon whether it states a new cause of action but instead upon whether the original pleading gave defendants sufficient notice of the proposed amended claim. *See Mauney v. Morris*, 316 N.C. 67, 340 S.E. 2d 397 (1986); *Henry v. Deen*, 310 N.C. 75, 310 S.E. 2d 326 (1984); *Burcl v. Hospital*, 306 N.C. 214, 293 S.E. 2d 85 (1982).

Under Rule 8(a)(1) of the North Carolina Rules of Civil Procedure, the original complaint similarly must contain:

> [a] short and plain statement of the claim sufficiently particular to give the court and the parties *notice of the transactions, occurrences, or series of transactions or occurrences,* intended to be proved showing that the pleader is entitled to relief.

N.C.R. Civ. P. 8(a)(1) (1983) (emphasis added). Through this enactment, the General Assembly of North Carolina adopted the concept of notice pleading. *See Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

Under the notice theory of pleading, a statement of a claim is adequate if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand its nature and basis and to file a responsive pleading. *Id.* at 104, 176 S.E. 2d at 167. Such simplified notice pleading is made

possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161.

In applying the above rules to the instant case, if the original complaint of plaintiff gave notice under Rule 8(a)(1) of a claim based on the payment bond given for contract four, then the amended complaint under Rule 15(c) is absorbed into the original and "is deemed to have been interposed at the time the claim in the original pleading was interposed." N.C.R. Civ. P. 15(c). Defendant, however, asserts that because plaintiff attached contract number two to its original complaint, that complaint should be interpreted as a suit on the payment bond for contract two only. We disagree.

The original complaint and the amended complaint, viewed together, evidence the intention of the plaintiff to collect all outstanding sums owed by CRB to plaintiff for material supplied in connection with any bonded contract on which defendant was liable pursuant to the water line improvement project for the Town of Pilot Mountain. The amended complaint, as found by the trial judge, averred basically the same allegations as the original complaint except that it did not restrict itself to a specified contract number. Though the amended complaint is more precise and represents a *preferred* method of alleging a claim of this type when a plaintiff is uncertain as to the identity of the underlying contract or contracts, to *require* the amended form would elevate form over substance and deny plaintiff its day in court simply for its imprecision with the pen. This would be contrary to the purpose and intent of notice pleading and the modern rules of civil procedure. We, therefore, hold that plaintiff's original complaint gave notice of the amended claim.

Furthermore, in paragraph 5 of the original complaint, plaintiff asserts that it "brings this action to recover the amount owed to it pursuant to Chapter 44A, Article 3 of the General Statutes of North Carolina which chapter provides for the procedures to make recovery on payment bonds." This averment further evidences the intention of the plaintiff and gives notice to defendant that plaintiff seeks to recover all amounts owed to it by the de-

fendant surety notwithstanding the numerical designation of the contract or payment bond on which such default was based. Since Article 3 of Chapter 44A relates specifically to public construction payment bonds, defendant was here put on notice that plaintiff was instituting an action to recover money owed to it for materials furnished to CRB for work secured by such payment bonds, on the specific project, and for the dates indicated. That included not only contract two, but also contracts one and four.

Under this State's theory of notice pleading, we hold that the allegations in plaintiff's original complaint were sufficient to put defendant on notice of all claims by plaintiff arising from any of defendant's unsatisfied payment bond contracts for materials supplied by plaintiff to CRB on the Pilot Mountain water line improvement project; that the allegations of plaintiff's original complaint were sufficient to give defendant "notice of the transactions, occurrences, or series of transactions or occurrences" to be proved pursuant to the amended complaint as those terms are used in Rules 8(a)(1) and 15(c) of the North Carolina Rules of Civil Procedure.

As we have previously held, the primary function of pleadings is to give sufficient notice of the events or transactions which produced the claim with sufficient precision to enable the adverse party to understand the nature and basis of it and allow the opponent to prepare. *See Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161. That function is served by the pleadings in this case.

Since the original complaint was filed 2 November 1984, the last material furnished on 24 January 1984, and the last payment received on 19 March 1984, plaintiff's claim on contract four is well within the one year requirement of N.C.G.S. § 44A-28(b) without regard to whether that statute is one of limitation or repose. Under this State's concept of notice pleading, plaintiff's original complaint was sufficient, *see Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972); *Comm. v. Grimes*, 277 N.C. 94, 178 S.E. 2d 345 (1971); *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161, and the amended complaint related back to the original complaint. *See Mauney v. Morris*, 316 N.C. 67, 340 S.E. 2d 379; *Burcl v. Hospital*, 306 N.C. 214, 293 S.E. 2d 85.

For the foregoing reasons, the Court of Appeals erred in reversing the plaintiff's summary judgment. The decision of the

Court of Appeals is reversed and the cause remanded to the Court of Appeals for further remand to the trial court to reinstate its summary judgment for plaintiff.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JAMES BYRD MILLER

No. 289A87

(Filed 3 February 1988)

1. **Criminal Law § 91.12— Speedy Trial Act—time excluded for discovery—no violation**

Defendant's speedy trial rights were not violated by the passage of 224 days between indictment and trial where all but 14 days were excludable due to defendant's request for discovery. N.C.G.S. § 15A-701.

2. **Criminal Law § 26.3— prior voluntary dismissal by State—finding that no dismissal taken—no error**

The trial court did not err in a prosecution for first degree sexual offense by finding that no prior dismissal had been taken where the evidence, although somewhat ambiguous, did not fail to support the trial court's finding that, although the Clerk of Court originally noted voluntary dismissal in her minutes, the District Attorney had told the Clerk he would file a written dismissal later in the week and had not done so. N.C.G.S. § 15A-931.

3. **Criminal Law § 89.8— first degree sex offense—cross-examination of victim's mother—questions not allowed**

The trial court did not err in a prosecution for first degree sex offense by not permitting defendant to cross-examine the victim's mother about her motivation for testifying where nothing in the record supported the contention that the witness was even subtly coerced into testifying under the threat of removal of her children by the Department of Social Services; moreover, defendant neglected to preserve the proffered evidence for the record. N.C.G.S. § 8C-1, Rule 103(a)(2) (1986), N.C.G.S. § 15A-1446(a) (1983).

4. **Criminal Law § 89.1— cross-examination—specific instance of conduct to show character for untruthfulness—not allowed**

There was no error in a prosecution for first degree sex offense from the trial court's refusal to allow defendant to cross-examine the victim's mother about whether she was deliberately not reporting income in order to receive more government assistance where defendant failed to have the witness answer for the record. N.C.G.S. § 8C-1, Rule 608(b).

5. Criminal Law § 34.7— first degree sex offense—subsequent offense—admissible

The trial court did not err in a prosecution for first degree sexual offense by admitting evidence of a separate offense committed by defendant against the same victim on the day after he committed the offense for which he stood trial. Evidence of other crimes, wrongs or acts is admissible under N.C.G.S. § 8C-1, Rule 404(b) to show motive, opportunity, intent, plan or identity; moreover, the witness sufficiently demonstrated personal knowledge of the incident in that she testified that she saw defendant lie on the couch with the child, saw him cover them both up with a sheet, saw the sheet moving up and down, immediately took the child away from defendant, and the boy complained shortly afterwards that defendant had hurt him.

BEFORE *Rousseau, J.*, and a jury at the 1 December 1986 Criminal Session of Superior Court, FORSYTH County, defendant was convicted of first-degree sexual offense, and judgment sentencing him to life imprisonment was entered on 3 December 1986. Defendant appeals pursuant to N.C.G.S. § 7A-27(a). Heard in the Supreme Court 9 December 1987.

Lacy H. Thornburg, Attorney General, by Laura E. Crumpler, Assistant Attorney General, for the State.

R. Douglas Lemmerman for defendant-appellant.

MEYER, Justice.

Defendant was convicted of first-degree sexual offense with a child under the age of thirteen. On appeal, he argues that the trial court erred in (1) excluding certain time periods under the Speedy Trial Act; (2) failing to find that defendant's case had previously been dismissed; (3) refusing to allow cross-examination of the State's material witness to show (a) her bias, interest or motivation for testifying and (b) a specific instance of conduct to show her character for untruthfulness; and (4) failing to exclude specific character evidence in defendant's cross-examination. We find no error in defendant's trial.

The State's evidence tended to show the following sequence of events. On 1 February 1986 defendant, who has only one leg, was living with Rosetta Harrison in her apartment. He was the father of Ms. Harrison's two-year-old son. Ms. Harrison and defendant had lived together spasmodically for about four years, during which they had both taken out various warrants against

each other. On this day, Ms. Harrison was standing at the kitchen counter peeling potatoes when she heard her son whining from the back bedroom. By stepping back from the counter, Ms. Harrison could see into the bedroom, and when she looked, she saw defendant "pushing [her] baby's mouth down on his penis." Defendant was naked, his penis was erect and he was "leaning back on the bed with the baby across his lap."

Ms. Harrison went into the bedroom, grabbed the child and ordered defendant to leave her home. Defendant did not leave. Ms. Harrison testified, over defendant's objection, that the next day, while defendant and the child were on the couch under a sheet watching television, she saw the sheet moving up and down, a motion she took to be defendant masturbating the child's penis. She ordered defendant out of her home, and drove him to his aunt's house where she dropped him off. The child subsequently complained that defendant had hurt him. A day or so later, Ms. Harrison told her mother and sister about the first incident. She reported the incident to the Department of Social Services about twelve days later. At trial, she testified that she had delayed calling the authorities because she was scared that her children might be taken into protective custody as a result of this and prior difficulties. This did not in fact happen.

Officer Barker of the Winston-Salem Police Department and Ms. Broyles of the Department of Social Services both testified to the effect that the statements Ms. Harrison made to them were consistent with her trial testimony as to the first incident. In addition, Ms. Harrison's ten-year-old daughter testified that on 1 February 1986 her baby brother was in the bedroom with defendant and at that time she heard the child screaming and saw her mother run into the bedroom. Ms. Harrison's sister testified that subsequent to the incident, the child complained to her that defendant had hurt his "ding-dong."

Defendant testified on his own behalf, denying that he had committed any sexual act against the child. He testified that he was trying to toilet train his son and that his attempts to do so were being misconstrued as sexual acts.

I

[1] Defendant first argues that the trial court erred in excluding certain time periods from computation for purposes of determin-

ing whether he was brought to trial within the 120-day time period mandated by N.C.G.S. § 15A-701. Defendant was indicted on 21 April 1986 but was not tried until 1 December 1986, a total of 224 days. On 15 October 1986 defendant filed a Motion to Dismiss based on speedy trial grounds. On that same date, upon motion of the State, the trial court entered an Order to Continue the case through 28 October 1986, because of the trial of other cases. In determining defendant's motion to dismiss for failure to comply with the Speedy Trial Act, the trial court excluded the time from 30 July 1986, on which date defendant requested a continuance so that his attorney could take a vacation, to 19 November 1986, when defendant filed a motion withdrawing all previous motions. Defendant now argues that the trial court had no grounds to exclude the time period from 11 August 1986, the end of his attorney's vacation, to 13 October 1986, the date of the calendaring of his case for trial, or to exclude the time period from 15 October 1986, the date of his filing of the Motion to Dismiss, to 19 November 1986, the date of his withdrawal of all motions except for his demand for a speedy trial.

Both of these time periods about which defendant complains occurred during the time frame which was otherwise excludable because of the pendency of defendant's discovery request.

The Speedy Trial Act's rule of exclusion, specifically section 701(b), includes the period of delay resulting from a defendant's discovery request. In *State v. Marlow*, 310 N.C. 507, 313 S.E. 2d 532 (1984), we held that a defendant's discovery request would toll the running of the Speedy Trial time limits

> until the occurrence of the earlier of the following events: (1) the completion of the requested discovery; (2) the filing by the defendant of a confirmation of voluntary compliance with the discovery request; or (3) the date upon which the court, pursuant to N.C. Gen. Stat. § 15A-909, has determined that discovery would be completed.

Id. at 515, 313 S.E. 2d at 538. "This excludable discovery period shall commence upon the service of defendant's motion for request for discovery upon counsel for the State, and shall encompass only such time which occurred after the speedy trial period has been triggered." *Id.* at 515, 313 S.E. 2d at 537. In defendant's case, the 21 April 1986 indictment triggered the mandatory 120-

day time period under the Act. On 23 April 1986, two days later, defendant made a Request for Discovery. From that date on, the running of the 120-day time period was tolled until one of the above three events set forth in *Marlow* occurred, which in this case was defendant's filing of his Notice of withdrawal of all motions except speedy trial on 19 November 1986. The reason for excluding the discovery time is sound: "Without possession of all the vital information to which he is entitled, the defendant could possibly be deprived of the benefit of necessary evidence. Presumably, a defendant would not be ready for trial until the needed material was received." *Marlow*, 310 N.C. at 516-17, 313 S.E. 2d at 538. Under *Marlow*, therefore, the trial judge could properly have excluded the time period between 23 April 1986 and 19 November 1986, a total of 210 days. The nonexcludable days (two days between the date of indictment and the filing of the Request for Discovery and twelve days between the filing of the Notice of withdrawal of all motions [except his speedy trial motion] and the trial date) amount to a total of fourteen days, clearly within the 120-day time period of N.C.G.S. § 15A-701. Defendant's speedy trial rights were not violated.

II

[2] Defendant next contends that, upon his oral motion to dismiss, the trial court erred in failing to find that his case had already been dismissed pursuant to N.C.G.S. § 15A-931. He argues that the district attorney took a voluntary dismissal of the case in open court on 19 November 1986 and was therefore required to reindict defendant before prosecuting him. We find no error.

After defendant had brought the matter to the trial court's attention, he called the Deputy Clerk of Forsyth County Criminal Superior Court to the stand. The clerk testified that she had been working in the courtroom on 19 November 1986 when the calendar was called and had taken minutes of the proceedings. She gave the following somewhat contradictory testimony:

> A. . . . On the court minutes I have when the case was called, he stated at that time that a voluntary dismissal *was to be filed.* Later in the week—he never signed a written dismissal. And later in the week came back—the case would be continued to 12/1/86 for trial.

Q. Who told you that?

A. Either Mr. Lyle or Miss Biggs, I'm not sure. I don't have it noted down in the minutes, *but do have it wasn't voluntarily dismissed. I have written, try out.*

Q. When you got notice it was continued, that was sometime subsequent to the 19th?

A. Sometime later. But the voluntary dismissal was never filed.

Q. What did Mr. Lyle say in particular regarding that particular case?

A. The only thing he said at the time when he called the calendar that it would be a voluntary dismissal. And when I checked, I was told that the dismissal had been filed; that it was Miss Biggs' case and he should not have dismissed it at calendar call.[1]

(Emphasis added.) The trial court denied defendant's motion, stating that he understood the testimony to mean that the district attorney would file a written dismissal later in the week but that he had not done so. Defendant argues that since the clerk of court originally noted "Voluntary Dism." in her minutes, the case could not be, as he puts it, "undismissed," and the State should have reindicted him before trying him. We are not so persuaded.

On a pretrial motion, the burden is upon defendant to place competent and convincing evidence before the court in support of his motion. *See State v. Searles*, 304 N.C. 149, 282 S.E. 2d 430 (1981). The trial court was in the best position to consider and weigh the evidence defendant presented to it. The trial court determined that the evidence failed to show that the prosecutor had in fact taken a voluntary dismissal of defendant's case at the 19 November 1986 calendar call. Findings of fact made by the trial court, upon hearing evidence without a jury, are conclusive on ap-

1. No ambiguity would be present in this testimony had the first clause of the last sentence above read, "And when I checked, I was told that the dismissal had [*not*] been filed . . . ." We are inclined to believe that the word "not" was omitted because of a transcription error, particularly since the second clause of the sentence is couched in the negative. However, we address defendant's argument based on the record as it appears before us.

peal if supported by that evidence. *See State v. McKoy*, 303 N.C. 1, 277 S.E. 2d 515 (1981); *State v. Willard*, 292 N.C. 567, 234 S.E. 2d 587 (1977). We cannot say that the evidence, although somewhat ambiguous, fails to support the trial court's decision.

III

[3] Defendant's next contention is that the trial court committed error by refusing to allow cross-examination of Ms. Harrison, the victim's mother, who was a material witness for the State, regarding (a) her bias, interest or motivation for testifying and (b) a specific instance of conduct to show her character for untruthfulness. Defendant first argues that he should have been allowed to cross-examine Ms. Harrison about her fear of losing custody of her children. He maintains that Ms. Harrison's testimony indicated that she testified as she did because she feared that the Protective Services officials were expecting testimony from her incriminating the defendant and that if she failed to give it they would take the children from her. Defendant contends that because of the witness' fear, her testimony falls into the category of "testimony which would clearly show bias, interest, the promise or hope of reward." *State v. Carey*, 285 N.C. 497, 508, 206 S.E. 2d 213, 221 (1974). In addition, defendant argues that the witness herself "opened the door" for his cross-examination on the subject of her interest or motivation in testifying. Defendant bases his arguments on the following questions to which the prosecutor's objections were sustained.

> Q. The—you said you were afraid the—they were going to take your children away?
>
> A. Yes, I was.
>
> Q. Why would they want to take your children away?
>
> MRS. BIGGS: Objection.
>
> THE COURT: Sustained.
>
> Q. Had you been warned in the past they were going to take your children away?
>
> MRS. BIGGS: Objection.
>
> THE COURT: Sustained.

Q. Did the Department of Social Services ask you to participate in this trial?

MRS. BIGGS: Objection.

THE COURT: Sustained.

Defendant insists that his case was prejudiced by his inability to cross-examine the victim's mother about her motivation for testifying. We disagree. Nothing in the record before us supports the contention that Ms. Harrison was even subtly coerced into testifying under the threat of removal of her children by the Department of Social Services. More importantly, defendant neglected to preserve the proffered evidence for the record, in that he failed to insert the witness' answers to his questions into the record. *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980). *See* 1 Brandis on North Carolina Evidence § 26 (1982). "When evidence is excluded, the record must sufficiently show what the purport of the evidence would have been, or the propriety of the exclusion will not be reviewed on appeal." *Id.* By failing to preserve the evidence for our review, defendant has deprived us of the necessary record from which to ascertain if the alleged error was prejudicial. *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983); N.C.G.S. § 8C-1, Rule 103(a)(2) (1986); N.C.G.S. § 15A-1446(a) (1983). Proper consideration of defendant's argument is therefore precluded.

[4] Defendant does not stop here however. He goes on to argue that the trial court committed reversible error by refusing to allow him to cross-examine Ms. Harrison about a specific instance of conduct to show her "character for untruthfulness." N.C.G.S. § 8C-1, Rule 608(b) (1986). During cross-examination, Ms. Harrison testified that she was paying rent on her apartment partially with governmental assistance. She stated that defendant did not pay rent, nor did he buy groceries, but that he did help to pay the light bill. Defendant then asked the witness the following questions:

Q. You get assistance from [the government] based on your income, is that what you are—

MRS. BIGGS: Objection, Your Honor.

THE COURT: Sustained.

. . . .

Q. . . . Has he [defendant] paid child support for the boy?

MRS. BIGGS: Objection.

THE COURT: Well, sustained.

. . . .

Q. Were you reporting Mr. Miller's income to the Department of Social Services?

MRS. BIGGS: Objection.

. . . .

THE COURT: Sustained.

Defendant contends that this line of questioning would have shown that Ms. Harrison was deliberately not reporting the defendant's income to the government in order to receive more government assistance than she was entitled to. His questions, he argues, were permissible under Rule 608(b) of the North Carolina Rules of Evidence, since they would have disclosed the witness' character for lack of truthfulness. Once again, defendant failed to have the witness answer for the record. On the record before it, this Court is not in a position to determine what the witness' answers would have been and whether the omission of the evidence was prejudicial to defendant. *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510; 1 Brandis on North Carolina Evidence § 26 (1982).

IV

[5] Finally, defendant contends that the trial court erred in admitting evidence of a separate sex offense committed by him against the same victim, his son, on the day after he committed the offense for which he stood trial. On direct examination, Ms. Harrison testified as follows:

> Well, he [defendant] hopped into the room. I thought he was going out again to smoke. He went in the room and got a sheet this time and laid down on the couch and put the baby in his left arm and—
>
> MR. LEMMERMAN: Objection, Your Honor.
>
> THE COURT: Overruled.

A. And laid down and covered up with the baby on the couch with him. And we were looking at TV, and you could see the cover going up and down. He was jacking him off.

Defendant argues that this testimony was not admissible under Rule 404(b) of the North Carolina Rules of Evidence. We disagree. Under Rule 404(b), evidence of other crimes, wrongs or acts is admissible to show motive, opportunity, intent, plan or identity. *State v. Gordon*, 316 N.C. 497, 342 S.E. 2d 509 (1986); N.C.G.S. § 8C-1, Rule 404(b) (1986). North Carolina is quite liberal in admitting evidence of other sex offenses when those offenses involve the same victim as the victim in the crime for which the defendant is on trial. *Id.*; *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983). The evidence that defendant had committed another sex offense against the same child, his young son, on the day after the offense for which he was being tried was admissible under Rule 404(b). Defendant further argues that Ms. Harrison did not actually see the incident and could not testify as to what occurred. Defendant's contention is not borne out by the evidence. Ms. Harrison testified that she saw defendant lie on the couch with the child, saw him cover them both up with a sheet and saw the sheet moving up and down. She in fact immediately took the child away from defendant because of what she observed. Shortly afterwards, the boy complained that defendant had hurt him. This evidence sufficiently demonstrates Ms. Harrison's personal knowledge of the incident. Defendant's argument in this regard is without merit.

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

No error.

STATE OF NORTH CAROLINA v. JERRY CARL MANESS

No. 481A86

(Filed 3 February 1988)

1. Criminal Law § 92.4— burglary and robbery—consolidated for trial—no error

The trial court did not err by granting the State's motion to consolidate charges of first degree burglary and armed robbery for trial where the

evidence showed a common scheme whereby defendant and his accomplice broke and entered an occupied dwelling house at night, armed with a dangerous weapon, intending to steal property therein, and upon entering used the weapon to threaten the occupant of the house for purposes of taking his personal property. N.C.G.S. § 15A-926(a).

2. Criminal Law § 73.1— defendant's exculpatory statements—not present sense impressions or excited utterances—not admissible

The trial court did not err in a prosecution for first degree burglary and armed robbery by granting the State's motion *in limine* prohibiting defendant from eliciting evidence of certain out-of-court exculpatory statements made by defendant until he himself testified where the statements were not present sense impressions or excited utterances because they were made nine days after defendant was arrested. N.C.G.S. § 8C-1, Rules 803(1) and (2).

3. Criminal Law § 73.1— defendant's exculpatory statements—hearsay—not admitted as public record

The trial court in a prosecution for first degree burglary and armed robbery did not err by granting the State's motion *in limine* prohibiting defendant from eliciting evidence of certain out-of-court exculpatory statements made by defendant until he testified where these statements were hearsay and could not be admitted under the public records and reports exception of N.C.G.S. § 8C-1, Rule 803(8) because that rule excludes in criminal cases matters observed by police officers.

4. Criminal Law § 84— fruit of the poisonous tree—testimony not tied to illegal seizure—properly admitted

The trial court in a prosecution for first degree burglary and armed robbery properly refused to exclude testimony regarding property seized from defendant's accomplice, testimony by the accomplice regarding the property, and testimony by a witness who had seen the property in defendant's apartment, despite granting defendant's motion to suppress the testimony of the arresting officers as to those two items, because none of the testimony at issue here could be traced to that seizure.

5. Burglary § 5; Robbery § 4.3— burglary and armed robbery—evidence sufficient

There was substantial evidence of each essential element of first degree burglary and robbery with a dangerous weapon and substantial evidence that defendant committed those crimes where the evidence tended to show that defendant entered the victim's house through a window at 11:00 p.m., put a gun to the victim's head and led him into the kitchen; defendant unlocked the back door so that his accomplice could enter; defendant and the accomplice searched and ransacked the bedroom; the accomplice put a pillowcase over the victim's head and defendant tied him up; defendant and the accomplice then searched and ransacked the house, taking property from the house and loading it into the accomplice's truck; and, before leaving, defendant threatened to kill the victim if he did not tell him whether there was any more money.

6. **Criminal Law § 115— armed robbery and burglary—instruction on lesser included offenses not required**

The trial court did not err in a prosecution for burglary and armed robbery by not submitting to the jury lesser included offenses where defendant's defense was that he committed no crime at all and defendant presented no evidence of any lesser included offense.

7. **Criminal Law § 113— burglary and armed robbery—no instruction on lack of evidence of prior criminal activity—no error**

The trial judge did not err in a prosecution for first degree burglary and armed robbery by not instructing the jury on the lack of evidence of defendant's prior criminal activity or convictions. A trial judge is required to declare and explain the law arising on the evidence but is not required to instruct on the nonexistence of evidence.

8. **Criminal Law § 106— denial of motion to set aside verdict—no error**

The trial court did not abuse its discretion in a prosecution for first degree burglary and armed robbery by denying defendant's motion to set aside the jury verdict as not supported by the evidence.

9. **Criminal Law § 138.41— burglary and robbery—failure to find good character or reputation as mitigating factor—no error**

The trial court did not err in a prosecution for first degree burglary and armed robbery by failing to find as a mitigating factor that defendant had been a person of good character or had a good reputation in the community in which he lived where defendant argued that such a finding was compelled by testimony that a witness had never seen him do anything. Good character as used in the Fair Sentencing Act means something more than the absence of bad character; furthermore, the trial judge specifically found that the witness's testimony was inherently incredible.

10. **Criminal Law § 140.3— armed robbery and first degree burglary—consecutive sentences—no error**

The trial court did not abuse its discretion in a prosecution for armed robbery and first degree burglary by imposing consecutive sentences.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a life sentence imposed by *Watts, Judge*, at the 14 July 1986 Session of Superior Court, NEW HANOVER County. This Court allowed defendant's motion to bypass the Court of Appeals for an appeal of a sentence of less than life. Heard in the Supreme Court 14 October 1987.

The defendant was tried for first degree burglary and robbery with a dangerous weapon. Evidence presented at trial tended to show the following: On 18 March 1986, 72-year-old Jesse Millis went to bed at 9:00 p.m., with all the doors locked and all the windows closed. At 11:00 p.m., the defendant entered Mr.

Millis' house through a window. Mr. Millis woke up and began to raise himself up. The defendant put his gun to Mr. Millis' head and said "You see it, don't you?" The defendant then told Mr. Millis to get up, grabbed him by the arm, led him at gunpoint into the kitchen and set him down on the floor. The defendant then unlocked the back door and his accomplice Arnold Douglas Smith entered. The defendant and Mr. Smith went into the bedroom and searched and ransacked it. Mr. Smith put a pillowcase over Mr. Millis' head and the defendant tied him up with a dog collar and masking tape. The defendant and Mr. Smith searched and ransacked the house. They took property from the house and loaded it into Mr. Smith's truck. This property included a telephone, three kerosene heaters, an oak cabinet, a color television, and $25.00. Before leaving, the defendant asked Mr. Millis, "Old man, have you got any more money stashed around here? You better tell me the truth and tell me the truth now, because if you don't I'll kill you laying right there." After they drove away, Mr. Millis managed to free himself and go to a neighbor for help.

Jasper Hall testified for the defendant that while he and Mr. Smith were incarcerated at the Wilmington Law Enforcement Center, Mr. Smith told him that the defendant "didn't have a God damn thing to do with" the offense.

The defendant was convicted as charged and received consecutive sentences of life imprisonment for the first degree burglary and 25 years imprisonment for the robbery with a dangerous weapon. Defendant appealed.

Lacy H. Thornburg, Attorney General, by George W. Boylan, Special Deputy Attorney General, for the State.

R. Theodore Davis, Jr., for defendant appellant.

WEBB, Justice.

[1] In his first assignment of error, the defendant contends the trial court erred in granting the State's motion to consolidate the two offenses for trial. The defendant argues that trying both charges in front of the same jury overwhelmed the jury with evidence against him and prejudiced the jury against him.

N.C.G.S. § 15A-926(a) provides, in pertinent part, "Two or more offenses may be joined . . . for trial when the offenses . . . are based on the same act or transaction or on a series of acts or

transactions connected together or constituting parts of a single scheme or plan." A trial court's ruling on joining cases for trial is discretionary and will not be disturbed absent a showing of abuse of discretion. *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985). Public policy strongly favors joinder because it expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve on juries and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once. *State v. Boykin*, 307 N.C. 87, 296 S.E. 2d 258 (1982).

In the present case, the evidence shows a common scheme whereby defendant and his accomplice broke and entered an occupied dwelling house at night, armed with a dangerous weapon, intending to steal property therein, and upon entering, used the weapon to threaten the occupant of the house for purposes of taking his personal property. It was clearly no abuse of discretion to hold that this series of acts constituted a single scheme or plan and that the requirements for joinder in N.C.G.S. § 15A-926(a) were satisfied. This assignment of error is overruled.

[2] The defendant next contends the trial court erred in granting the State's motion in limine prohibiting the defendant from eliciting evidence of certain out-of-court exculpatory statements made by the defendant, until he himself testified. The State and the defendant stipulated that if allowed to testify, Officer Hayes of the New Hanover Sheriff's Department would have testified that "the defendant did state that the items in question in the case were not his, were brought there by Doug Smith and that he did not participate in the crime." The court granted the State's motion in limine on the ground that these statements were, among other things, hearsay not covered by any exception to the hearsay rule.

The defendant argues that these statements constituted "present sense impressions," "excited utterances," and "public records and reports," i.e., the police report, and were thus admissible under any of these exceptions to the hearsay rule. We disagree.

In order to constitute a "present sense impression," a statement must have been made "while the declarant was perceiving

the event or condition, or immediately thereafter." N.C.G.S. § 8C-1, Rule 803(1). While the record does not make clear exactly when the defendant made his statement to Officer Hayes, it is clear that he made it after Hayes arrested him nine days after the crime. Nine days later cannot be considered "immediately thereafter" and thus the statement was not a present sense impression.

Neither was it an "excited utterance," which is a "statement relating to a startling event or condition made while the defendant was under the stress of excitement caused by the event or condition." N.C.G.S. § 8C-1, Rule 803(2). For this statement to qualify as an excited utterance, "there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C. 76, 86, 337 S.E. 2d 833 (1985). The nine-day interval between the event and the statement precludes the statement from being "a spontaneous reaction, not one resulting from reflection or fabrication."

[3] The statement cannot be admitted under the "Public Records and Reports" exception of N.C.G.S. § 8C-1, Rule 803(8), since that rule specifically excludes "in criminal cases matters observed by police officers and other law-enforcement personnel." The defendant's assignment of error has no merit.

[4] The defendant next contends the trial court erred in admitting the testimony of three witnesses concerning property taken from Mr. Millis. At the time the defendant was arrested on 27 March, the arresting officers conducted a search of his apartment and seized a kerosene heater and an oak cabinet which had been stolen from Mr. Millis. Prior to trial, the defendant moved to suppress testimony of the arresting officers as to these two items. During trial, the court conducted a voir dire, and granted the defendant's motion, holding that the items were seized in violation of the defendant's constitutional rights.

The defendant now argues that the court erred in admitting the testimony of three other witnesses. The defendant argues that this testimony must be excluded under the "fruit of the poisonous tree doctrine" because it can be traced back to the illegal seizure on 27 March. We disagree; none of the testimony of these three witnesses can be traced to the 27 March seizure.

Deputy Hayes testified regarding some property seized from the defendant's accomplice Arnold Douglas Smith on 20 March. This property was not the same property that was illegally seized from the defendant seven days later; testimony regarding it cannot be "traced back" to the illegal seizure.

Mr. Smith testified that he and the defendant had loaded the property they took from Mr. Millis onto a pickup truck and had taken it to Mr. Smith's home in Winnabow. Then, the defendant asked for the heater and oak cabinet, and they brought them to his house that night. These were the same heater and oak cabinet that were illegally seized from the defendant on 27 March. However, Mr. Smith's testimony regarding these items was based upon his own participation in the crime and the subsequent distribution of the stolen property, and cannot be "traced back" to the illegal seizure.

Vivian Thomason testified that she had seen kerosene heaters in the defendant's apartment on or after 19 March, when she was paying him a visit as a friend. This testimony cannot be "traced back" to the illegal seizure on 27 March. The defendant's assignment of error has no merit.

[5] The defendant next assigns error to the trial court's denial of his motion to dismiss at the close of all the evidence. The defendant argues that there was insufficient evidence to convict him of the crimes charged.

> When a defendant moves for dismissal, a trial court must determine, for each charge, whether there is substantial evidence of each essential element of the offense charged, and of defendant's being the one who committed the crime. If that evidence is present, the motion to dismiss should be denied. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* In ruling on a motion to dismiss, the court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. *Id.* Contradictions and discrepancies must be resolved in favor of the State. *Id.*

State v. Holden, 321 N.C. 125, 147, 362 S.E. 2d 513, 528 (1987).

The defendant in the present case was convicted of first degree burglary and robbery with a dangerous weapon. The essential elements of first degree burglary are: (1) the breaking, (2) and entering, (3) in the nighttime, (4) into a dwelling house or a room used as a sleeping apartment, (5) of another, (6) which is actually occupied at the time of the offense, and (7) with the intent to commit a felony therein. *State v. Ledford*, 315 N.C. 599, 340 S.E. 2d 309 (1986). The essential elements of robbery with a dangerous weapon are (1) the unlawful taking or attempt to take personal property from the person of or in the presence of another, (2) by the use or threatened use of a dangerous weapon, and (3) whereby the life of a person is endangered or threatened. *State v. Fields*, 315 N.C. 191, 337 S.E. 2d 518 (1985).

We conclude that the evidence, as set forth at the beginning of this opinion, is substantial evidence of each essential element of both first degree burglary and robbery with a dangerous weapon, and is substantial evidence that the defendant committed these crimes. The defendant's motion to dismiss was properly denied.

[6] The defendant next contends the trial court erred in failing to submit to the jury the lesser included offenses of the crimes charged. We disagree. A trial court must submit to the jury a lesser included offense when and only when there is evidence from which the jury could find that the defendant committed the lesser included offense. *State v. Hall*, 305 N.C. 77, 286 S.E. 2d 552 (1982). When the State's evidence is positive as to each element of the crime charged and there is no conflicting evidence relating to any element, submission of a lesser included offense is not required. *Id.* Mere possibility of the jury's piecemeal acceptance of the State's evidence will not support the submission of a lesser included offense. *State v. Williams*, 315 N.C. 310, 338 S.E. 2d 75 (1986). Thus, mere denial of the charges by the defendant does not require submission of a lesser included offense. *State v. Horner*, 310 N.C. 274, 311 S.E. 2d 281 (1984).

In the present case, the defendant presented no evidence of any lesser included offense. The State's evidence was positive as to each element of the crimes charged. The defendant's defense was that he committed no crime at all. Therefore, the trial court

properly refused to submit to the jury any lesser included offenses.

[7] The defendant next contends the trial court erred in refusing to instruct the jury on the lack of evidence of prior criminal activity or convictions on the part of the defendant. We disagree. A trial judge is required to declare and explain the law arising on the evidence and to instruct according to the evidence. *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983). He is not required to instruct on the nonexistence of evidence. The defendant's assignment of error is without merit.

[8] The defendant next assigns error to the trial court's denial of his motion to set aside the jury's verdict as not supported by the evidence. The decision whether to grant or deny a motion to set aside a verdict is within the sound discretion of the trial judge and is not reviewable absent a showing of abuse of discretion. *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985). Since we have held that the evidence in the present case was sufficient to support the jury's verdict, we can find no abuse of discretion in the trial court's denial of the defendant's motion to set aside the verdict.

[9] The defendant next assigns error to the trial court's failure to find as a mitigating factor that the defendant had been a person of good character or had a good reputation in the community in which he lived. The defendant argues that such a finding was compelled by the testimony of the defendant's friend and neighbor Vivian Thomason. We disagree.

A trial judge's failure to find a statutory mitigating factor is error only where evidence supporting the factor is uncontradicted, substantial, and manifestly credible. *State v. Spears*, 314 N.C. 319, 333 S.E. 2d 242 (1985). Ms. Thomason's testimony on this matter is as follows:

> Q. Since you have known Mr. Maness for the time that you testified to, have you had occasion to hear others talk about him?
>
> A. Yes, I have.
>
> Q. Do you have an opinion satisfactory to yourself as to his character and reputation in the community?

A. Yes, I do.

Q. What is your opinion?

A. It's a good opinion.

THE COURT: Pardon me?

A. Good opinion.

Q. Why do you say it's a good opinion?

A. Because I never did see the man do nothing.

We cannot find that this is substantial evidence of defendant's good character or good reputation. Whether Ms. Thomason had ever seen him do anything is irrelevant to his reputation, and "[g]ood character, as the term is used in the Fair Sentencing Act, means something more than the mere absence of bad character." *State v. Freeman*, 313 N.C. 539, 551, 330 S.E. 2d 465, 475 (1985).

Furthermore, the trial judge specifically found that Ms. Thomason's testimony was "inherently incredible," citing her testimony on cross-examination that she knew nothing about his background, where he had lived, or where he worked. The trial judge stated that he had "seldom seen a witness that impressed [him] . . . more with their lack of veracity." It was the trial judge's duty to assess Ms. Thomason's testimony and it was his prerogative to believe or disbelieve it. *See State v. Taylor*, 309 N.C. 570, 308 S.E. 2d 302 (1983). The defendant's assignment of error has no merit.

[10] In his final assignment of error, the defendant contends the trial court erred in imposing consecutive sentences. Whether sentences for separate offenses are to run concurrently or consecutively is within the sound discretion of the trial judge. *State v. Tolley*, 290 N.C. 349, 226 S.E. 2d 353 (1976). The defendant has not shown, nor can we find, any abuse of discretion by the trial judge in imposing consecutive sentences in the present case.

No error.

STATE OF NORTH CAROLINA v. DAVID MARTIN MANCUSO

No. 591A86

(Filed 3 February 1988)

1. **Criminal Law § 138.21— second degree murder—especially heinous aggravating factor**

The evidence showed excessive brutality and psychological suffering not normally present in second degree murders so as to support the trial court's finding that a murder was especially heinous, atrocious or cruel where it showed that defendant had been tormenting the victim for months and attempted to break into her house; the victim was genuinely afraid of defendant and began to carry a knife to protect herself; just before the shooting, defendant picked up the victim and put her in her car through the window while she kicked her legs; witnesses heard the victim yell "No, David. No," and heard her scream just before she was shot; at some point after defendant put the victim in the car and before he shot her, she started the car engine; defendant shot the victim seven times; and the victim did not die immediately and her heart was still beating when the rescue squad arrived.

2. **Criminal Law § 138.21— especially heinous aggravating factor—pretrial order rejecting as basis for death penalty—not binding at sentencing hearing for second degree murder**

A pretrial order rejecting the especially heinous, atrocious or cruel aggravating factor as a basis for imposing the death penalty for a murder was not binding upon the trial judge in a sentencing hearing after defendant was convicted of second degree murder, and the trial judge thus could find as an aggravating factor that the second degree murder was especially heinous, atrocious or cruel.

3. **Weapons and Firearms § 3— discharging firearm into occupied property—firearm itself inside property**

A firearm is discharged "into" occupied property within the meaning of N.C.G.S. § 14-34.1 although the firearm itself is inside the property so long as the person discharging it is not inside the property.

4. **Homicide § 15.2— murder case—involuntary commitment procedures irrelevant**

The trial court in a murder case properly excluded expert testimony on involuntary commitment procedures because such testimony was irrelevant. Even if the State had asked several questions of another witness in the same subject area without objection, the trial court was not required to admit additional evidence of the same fact if it was irrelevant.

5. **Criminal Law § 5— test of insanity—M'Naghten Rule**

The Supreme Court refused to abandon the M'Naghten Rule as the test of insanity as a defense to a criminal charge.

6. Criminal Law § 5.1; Homicide § 7— order of insanity issue

It is not error for the trial court to submit the issue of guilt before the issue of insanity in a murder case.

7. Criminal Law § 138.7— denial of presentence diagnostic study

The trial court did not abuse its discretion in denying defendant's request for a presentence diagnostic study pursuant to N.C.G.S. § 15A-1332 before sentencing him for second degree murder where the court heard extensive testimony during the trial concerning defendant's mental condition and performance on various psychological tests.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a life sentence imposed by *Hobgood (Robert), Judge*, at the 4 August 1986 Session of Superior Court, DURHAM County. This Court allowed the defendant's motion to bypass the Court of Appeals for an appeal of a sentence of less than life. Heard in the Supreme Court 7 December 1987.

The defendant was tried for first degree murder and discharging a firearm into occupied property. Evidence presented at trial tended to show the following: On 9 January 1986 at 4:30 p.m., Norma Russell, a senior at Northern High School in Durham County, was walking to her car after cheerleading practice. As she reached her car, the defendant, also a senior at Northern, approached her. They spoke for a few minutes and the defendant picked her up and put her in her car. He then shot her in the chest seven times with a .22 revolver. Norma Russell became unconscious and died shortly thereafter on the way to Durham General Hospital.

The evidence also tended to show that the defendant had been infatuated with Ms. Russell since the eighth grade. He had often asked her out during their high school years, and she had repeatedly rebuffed him. She had, however, always liked him and been kind to him.

By the fall of their senior year, the defendant's infatuation with Ms. Russell had become an obsession. He continued to ask her out, and left her notes and presents. On one occasion he went to her house when she was there alone and tried to break in. These things frightened Ms. Russell considerably. He drew tombstones reading "Norma Jean Russell" and "R.I.P." He wrote a note reading "call home, go to McDonald's, go to gameroom, go to Northern, kill Norma, go home." Prior to killing the victim, the

defendant made a tape in which he explained why he "did willfully and joyfully murder and kill Norma Russell."

Extensive psychiatric testimony revealed that the defendant was suffering from an atypical psychosis with an encapsulated delusion focusing on Norma Russell. The defendant's childhood was traumatic, marked by severe illnesses and family troubles.

The defendant was convicted of second degree murder and firing into an occupied vehicle. He was sentenced to life imprisonment for murder and three years to be served consecutively for the conviction of firing into an occupied vehicle. The defendant appealed.

Lacy H. Thornburg, Attorney General, by Joan Byers, Special Deputy Attorney General, and Steven F. Bryant, Assistant Attorney General, for the State.

Hall, Hill, O'Donnell, Taylor, Manning & Shearon, by Thomas C. Manning and John B. O'Donnell, Jr., for defendant appellant.

WEBB, Justice.

[1] In his first assignment of error, the defendant contends the trial court erred during the sentencing phase of the trial in finding as an aggravating factor that the offense was especially heinous, atrocious or cruel. The defendant argues that the evidence does not support a finding of this factor.

In determining this question, "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). We find the following facts significant: The defendant had been tormenting the victim for months, to the point of attempting to break into her house. She was genuinely afraid of him; she began to carry a knife to protect herself. Just before the shooting, Brian Agner saw the defendant pick up the victim and put her in her car through the window, while she kicked her legs. Agner heard the victim yell "No, David. No." Coach Inskip heard her screams just before she was shot. At some point after the defendant put her in the car and before he shot her, she started the car engine. It can certainly be inferred

that throughout this ordeal, the victim was aware of the danger she faced and experienced tremendous emotional suffering. The defendant shot the victim seven times. "Where proof of one act constituting an offense is sufficient to sustain a defendant's conviction, multiple acts of the same offense are relevant to . . . whether the offense charged was especially heinous, atrocious or cruel." *Blackwelder*, 309 N.C. at 413, 306 S.E. 2d at 786. The victim did not die immediately; Brian Agner saw her "jittering back and forth" even after the defendant had driven away from the scene, and her heart was still beating when the rescue squad arrived. Whether death was immediate or delayed is relevant to whether the crime was especially heinous, atrocious or cruel. *State v. Hines*, 314 N.C. 522, 335 S.E. 2d 6 (1985). We hold that this evidence, taken together, shows excessive brutality and psychological suffering not normally present in second degree murders, and is therefore sufficient to support a finding that the offense was especially heinous, atrocious, or cruel.

[2] The defendant further argues that the trial judge's finding of this aggravating factor was erroneous because of a contrary finding in a pretrial order by Judge Herring. On 9 June 1986 a pretrial hearing was held on the defendant's motion to determine whether any aggravating factor existed under N.C.G.S. § 15A-2000(e) which would support the death penalty. The State submitted only one factor: "The capital felony was especially heinous, atrocious and cruel." Based on the evidence presented at the hearing, Judge Herring entered an order rejecting this factor. Thus the case was tried as a non-capital case.

The defendant argues that this order is binding on Judge Hobgood at the sentencing phase of trial. The defendant relies on the rule set forth in *State v. Jones*, 278 N.C. 259, 179 S.E. 2d 433 (1971), that "[o]rdinarily one Superior Court judge may not modify, overrule or change the judgment of another Superior Court judge previously made in the same action." *Id.* at 266, 179 S.E. 2d at 438. That rule is inapposite to the question presented here. Judge Hobgood did not modify, overrule or change Judge Herring's order; the case is still a non-capital case. However, Judge Herring's findings, relating to whether the case should be tried as a capital case under N.C.G.S. § 15A-2000, are not binding on Judge Hobgood, who has heard all the evidence in the case and

must determine the defendant's punishment under the Fair Sentencing Act. The defendant's assignment of error is overruled.

[3] The defendant next contends the trial court erred in denying his motion to dismiss the charge of discharging a firearm into occupied property. The defendant argues the evidence is insufficient to support the guilty verdict, in that the evidence tends to show that the gun was inside the victim's car when it was discharged. The defendant argues that if the gun was inside the vehicle it cannot have been discharged "into" the vehicle, within the meaning of N.C.G.S. § 14-34.1.

That statute provides, in pertinent part, as follows:

> Any person who willfully or wantonly discharges or attempts to discharge:
>
> . . . .
>
> (2) A firearm into any . . . vehicle . . . while it is occupied is guilty of a Class H felony.

The evidence is uncontradicted that at the time the defendant shot Ms. Russell, she was seated inside her car and he was standing outside of it.

The purpose of N.C.G.S. § 14-34.1 is to protect occupants of the building, vehicle or other property described in the statute. *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973). We cannot believe that the Legislature intended that a person should escape liability for this crime by sticking his weapon inside the occupied property before shooting. We hold that a firearm can be discharged "into" occupied property even if the firearm itself is inside the property, so long as the person discharging it is not inside the property.

[4] The defendant next assigns error to the trial court's refusal to admit the testimony of his witness Assistant Attorney General Augusta Turner. The defendant sought to have Ms. Turner testify on the State's procedures for treating people involuntarily committed to the State's mental health facilities. Upon the State's objection, a voir dire was held to determine the admissibility of Ms. Turner's testimony. Although the trial court found that Ms. Turner was an expert on involuntary commitment law, it sustained the State's objection because of the subject matter about

which she planned to testify. The defendant contends this was error. The defendant argues that the State "opened the door" to this subject matter by asking several questions of Dr. Donald Fidler in the same subject area.

We find no error in the trial court's ruling. N.C.G.S. § 8C-1, Rule 702 provides, in pertinent part, "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 . . . may testify thereto in the form of an opinion." A trial judge has "wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E. 2d 370, 376 (1984). The defendant in the present case has made no showing that Ms. Turner's testimony on involuntary commitment procedures would help the jury understand the evidence, or determine a fact in issue. Thus, the defendant has failed to show an abuse of the trial court's discretion.

The defendant's "opening the door" argument is without merit. The case he relies on, *Glace v. Town of Pilot Mountain*, 265 N.C. 181, 143 S.E. 2d 78 (1965), stands for the proposition that if evidence of a certain fact is admitted without objection, it is not prejudicial error to admit other evidence of the same fact. This Court, however, has never held that if evidence of a certain fact is admitted without objection, the trial court is required to admit any additional evidence of the same fact, whether or not it is relevant. This assignment of error is overruled.

[5] The defendant next assigns error to the trial court's denial of his motion to use the American Law Institute's definition of insanity in instructing the jury, rather than the "M'Naghten Rule" definition. The defendant is asking this Court to abandon the M'Naghten Rule definition of insanity, which North Carolina has adhered to for many years. Under this definition, the test of insanity as a defense to a criminal charge is whether the defendant was laboring under such a defect of reason from disease or deficiency of mind at the time of the alleged act as to be (1) incapable of knowing the nature and quality of his act, or (2) incapable of distinguishing between right and wrong with respect to such act. *State v. Evangelista*, 319 N.C. 152, 353 S.E. 2d 375 (1987). We

decline to abandon the "M'Naghten Rule" in determining the insanity defense.

[6] The defendant next contends the trial court erred in denying his request that the issue of insanity be submitted as the first issue for the jury's consideration, and the issue of guilt be submitted as the second issue, only to be reached if the insanity issue was decided against the defendant. As the defendant points out, this Court approved of this procedure in *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975). However, we held in that case that failure to submit the issues in that order is not ground for a new trial. Furthermore, we have since held that it is not error to submit the issue of guilt before the issue of insanity. *Evangelista*, 319 N.C. 152, 353 S.E. 2d 375; *State v. Linville*, 300 N.C. 135, 265 S.E. 2d 150 (1980). We believe the order in which the insanity issue is submitted should be left to the discretion of the superior court. This assignment of error is overruled.

[7] The defendant next contends the trial court erred in denying the defendant's request for a presentence diagnostic study pursuant to N.C.G.S. § 15A-1332. That statute provides, in pertinent part, "when the court desires more detailed information as a basis for determining the sentence to be imposed than can be provided by a presentence investigation, the court may commit a defendant to the Department of Correction for study for the shortest period necessary to complete the study, not to exceed 90 days, ..."

During trial, the court heard extensive testimony regarding the defendant's mental condition, including that of two psychiatrists and two psychologists. The court heard evidence about the defendant's performance on various psychological tests, including the MMPI, the Rorschach, the PAS, and the TAT. The court clearly did not "desire more detailed information." We can find no abuse of discretion in denying the defendant's request for a presentence diagnostic study.

No error.

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

ASSAAD v. THOMAS

No. 615P87.

Case below: 87 N.C. App. 276.

Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 3 February 1988. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

BEARD v. BLUMENTHAL JEWISH HOME

No. 532P87.

Case below: 87 N.C. App. 58.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

BRAWLEY v. BRAWLEY

No. 617P87.

Case below: 87 N.C. App. 545.

Petition by defendant (Brawley) for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

CLERK OF SUPERIOR COURT OF GUILFORD COUNTY v. GUILFORD BUILDERS SUPPLY CO., INC.

No. 609P87.

Case below: 87 N.C. App. 386.

Petition by defendant (Haines) for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

CRAVEN COUNTY v. HALL

No. 575P87.

Case below: 87 N.C. App. 256.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

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

DUNN ENTERPRISES v. WELLONS

No. 579P87.

Case below: 87 N.C. App. 293.

Petition by defendant (John H. Wellons) for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

FORTUNE v. FIRST UNION NAT. BANK

No. 552PA87.

Case below: 87 N.C. App. 1.

Motion by plaintiff to dismiss appeal for lack of substantial constitutional question denied 11 February 1988. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 11 February 1988.

HANCOCK v. BRAY'S RECAPPING SERVICE

No. 580P87.

Case below: 87 N.C. App. 293.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

HARDY v. BRANTLEY CONSTRUCTION CO. AND
WELLS v. BRANTLEY CONSTRUCTION CO.

No. 650A87.

Case below: 87 N.C. App. 562.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and App. Rule 16(b) as to additional issues allowed 14 January 1988.

HOOVER v. CHARLOTTE-MECKLENBURG
BD. OF EDUCATION

No. 602P87.

Case below: 87 N.C. App. 417.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

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

IN RE FORECLOSURE OF LAKE TOWNSEND AVIATION

No. 629P87.

Case below: 87 N.C. App. 481.

Petition by Aero Associates, Inc., for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

JENNINGS GLASS CO. v. BRUMMER

No. 665P87.

Case below: 88 N.C. App. 44.

Petition by defendant (Brummer) for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

LEDFORD v. MARTIN

No. 530P87.

Case below: 87 N.C. App. 88.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

McNEILL v. DURHAM COUNTY ABC BD.

No. 524PA87.

Case below: 87 N.C. App. 50.

Petitions by plaintiff and by defendants for discretionary review pursuant to G.S. 7A-31 allowed 3 February 1988.

MACON v. CAMPBELL CO.

No. 525P87.

Case below: 87 N.C. App. 176.

Motion by defendant (Allen M. Campbell Co. General Contractors, Inc.) for reconsideration of petition for review of decision of the Court of Appeals dismissed 3 February 1988.

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

MASSENGILL v. STARLING

No. 581P87.

Case below: 87 N.C. App. 233.

Petition by plaintiff (Harold E. Massengill) for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

PHARO v. CARLYLE

No. 547P87.

Case below: 87 N.C. App. 177.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

PITMAN v. FELDSPAR CORP.

No. 555P87.

Case below: 87 N.C. App. 208.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

ROBINSON v. SEABOARD SYSTEM RAILROAD

No. 658P87.

Case below: 87 N.C. App. 512.

Petition by defendant (Southern Railway Co.) for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

SIMPSON v. N.C. LOCAL GOV'T EMPLOYEES' RETIREMENT SYSTEM

No. 2P88.

Case below: 88 N.C. App. 218.

Petition by defendants for temporary stay allowed 12 January 1988.

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

STATE v. BAKER

No. 623P87.

Case below: 87 N.C. App. 678.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

STATE v. BRITT

No. 546P87.

Case below: 87 N.C. App. 152.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

STATE v. BUTTS

No. 648P87.

Case below: 87 N.C. App. 510.

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

STATE v. COLLINS

No. 618P87.

Case below: 87 N.C. App. 426.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

STATE v. DAVIDSON

No. 652P87.

Case below: 87 N.C. App. 510.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 February 1988.

STATE v. FLEMING

No. 604P87.

Case below: 87 N.C. App. 426.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988. Motion by the State to dismiss appeal for lack of substantial constitutional question allowed 3 February 1988.

STATE v. GRADY

No. 25P88.

Case below: 87 N.C. App. 427.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 February 1988.

STATE v. HILL

No. 631P87.

Case below: 87 N.C. App. 510.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

STATE v. KERLEY

No. 543P87.

Case below: 87 N.C. App. 240.

Temporary stay dissolved and petition by the Attorney General for writ of supersedeas denied 3 February 1988. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 3 February 1988. Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

STATE v. KNIGHT

No. 549P87.

Case below: 87 N.C. App. 125.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

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

STATE v. LEWIS

No. 531P87.

Case below: 87 N.C. App. 178.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

STATE v. McKNIGHT

No. 637P87.

Case below: 87 N.C. App. 458.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

STATE v. MACK

No. 516P87.

Case below: 87 N.C. App. 24.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

STATE v. MITCHELL

No. 608P87.

Case below: 87 N.C. App. 427.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

STATE v. MOORE

No. 550P87.

Case below: 87 N.C. App. 156.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

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

STATE v. PHILLIPS

No. 583P87.

Case below: 87 N.C. App. 246.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

STATE v. PLANTER

No. 633P87.

Case below: 87 N.C. App. 585.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

STATE v. ROLAND

No. 18A88.

Case below: 87 N.C. App. 19.

Motion by the State to dismiss appeal in part allowed 3 February 1988. Petition by defendant for discretionary review as to additional issues pursuant to App. Rule 16(b) denied 3 February 1988.

STATE v. SMITH

No. 574P87.

Case below: 87 N.C. App. 217.

Motion by the State to dismiss appeal for lack of substantial constitutional question allowed 3 February 1988. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

STATE v. TART

No. 56P88.

Case below: 88 N.C. App. 483.

Petition by defendant for writ of supersedeas and temporary stay denied 4 February 1988.

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

STATE v. WALKER

No. 636P87.

Case below: 87 N.C. App. 294.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 February 1988.

STATE v. WALL

No. 621P87.

Case below: 87 N.C. App. 621.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 22 December 1987.

STATE v. WHITE

No. 599P87.

Case below: 87 N.C. App. 311.

Motion by Attorney General to dismiss defendant's appeal for lack of substantial constitutional question allowed 3 February 1988. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 3 February 1988.

STATE v. WHITE

No. 24P88.

Case below: 87 N.C. App. 294.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 February 1988.

STATE v. WILSON

No. 610P87.

Case below: 87 N.C. App. 399.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

STATE v. WOODARD

No. 582P87.

Case below: 87 N.C. App. 295.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

STATE ex rel. EMPLOYMENT SECURITY COMM. v. FAULK

No. 28P88.

Case below: 88 N.C. App. 369.

Petition by defendant for writ of supersedeas of judgment of Court of Appeals denied 26 January 1988. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 26 January 1988.

STATE ex rel. LONG v. BEACON INS. CO.

No. 545P87.

Case below: 87 N.C. App. 72.

Petition by ICI and Plymouth for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

STEGALL v. ZONING BD. OF ADJUSTMENT OF COUNTY OF NEW HANOVER

No. 607P87.

Case below: 87 N.C. App. 359.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

THOMPSON CADILLAC-OLDSMOBILE, INC. v. SILK HOPE AUTOMOTIVE, INC.

No. 653P87.

Case below: 87 N.C. App. 467.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 February 1988.

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

TWO WAY RADIO SERVICE v.
TWO WAY RADIO OF CAROLINA

No. 29P88.

Case below: 88 N.C. App. 314.

Petition by defendant for writ of supersedeas and temporary stay allowed 27 January 1988.

WALKER v. CITY OF STATESVILLE

No. 647P87.

Case below: 87 N.C. App. 511.

Petition by plaintiffs for writ of certiorari to the North Carolina Court of Appeals denied 3 February 1988.

PETITION TO REHEAR

TRAVIS v. KNOB CREEK, INC.

No. 151PA87.

Case below: 321 N.C. 279.

Petition by defendants denied 3 February 1988.

LARRY N. HIGGINS v. JOANNE W. HIGGINS AND JOANNE W. HIGGINS v. LARRY N. HIGGINS

No. 486A87

(Filed 3 February 1988)

Husband and Wife § 12— separation agreement—property settlement—living separate and apart—effect of sexual relations

A provision of a separation agreement which required the wife to transfer to the husband her interest in the marital residence if the parties "lived continuously separate and apart" for a full year after the date of the agreement was not enforceable where the parties engaged in sexual intercourse during the one-year period, since a husband and wife do not live "separate and apart" if they have sexual relations.

Justice FRYE concurring in result.

Justice MARTIN joins in this concurring opinion.

Justice MEYER dissenting.

Justice WHICHARD joins in this dissenting opinion.

Justice WHICHARD dissenting.

APPEAL by Larry N. Higgins pursuant to N.C.G.S. § 7A-30(2) from an opinion by a divided panel of the Court of Appeals at 86 N.C. App. 513, 358 S.E. 2d 553 (1987). Heard in the Supreme Court 9 December 1987.

Appellant-husband and appellee-wife were married on 10 March 1979 and separated in November of 1983. The parties executed a separation agreement on 13 December 1983 which purported, in part, to distribute the marital property owned by the parties pursuant to N.C.G.S. § 50-20(d).

The basis of the dispute before this Court concerns Paragraph 4 of this "Agreement and Deed of Separation," which reads in part as follows:

> It is agreed that the residence and lot located at 3207 Edgewater Drive, Greensboro, North Carolina, shall remain titled in the name of Larry N. Higgins and JoAnne Higgins for a period of one year from the date of this Agreement and it is agreed that *if the parties have lived continuously separate and apart for that full period* that in that event Mrs. Higgins shall transfer her interest in the residence and lot to

> Mr. Higgins as part of property settlement as provided herein. Mr. Higgins and Mrs. Higgins have agreed upon a division of all their personal property and Mrs. Higgins agrees to remove all the personal property that she shall be entitled to from the residence located at 3207 Edgewater Drive within a reasonable time after execution of this agreement. (Emphasis added.)

This agreement also contained mutual releases of property rights and a waiver of equitable distribution.

In December 1984, one year after the execution of the separation agreement, the appellant asked the appellee to transfer her interest in the marital residence to him, in conformity with the fourth paragraph. When she refused to do so, he brought an action for a declaratory judgment, asking the court to order the appellee to comply with the terms of paragraph four. In response, the appellee brought an action for absolute divorce and for equitable distribution of the marital residence and certain personal property. The two actions were consolidated for hearing and Mrs. Higgins made a motion for summary judgment.

The papers submitted by the appellee at the hearing on the motion for summary judgment showed the following: The appellee moved out of the marital residence upon execution of the separation agreement and the parties ceased living together at that time. However, during the one year period following execution of this agreement, the parties traveled to Tennessee and Florida together to attend car and t-shirt shows. At each of the shows, the parties shared a motel room for up to four days. In each of these instances, the parties engaged in one or more acts of sexual intercourse. Appellee also attended the funeral of appellant's brother with appellant in March 1984, driving to and from the funeral with appellant and sharing a room with him on that occasion for two nights.

Over the course of the remainder of 1984, the appellant and the appellee attended several events together. They took their daughter to the circus in February of 1984 and the appellee took the appellant to the hospital for minor surgery in March of the same year. During the course of these events, the parties engaged in several acts of sexual intercourse.

The appellant, while disputing the number of times, admitted engaging in intercourse with his wife during this time period. The parties also spent at least two nights together in the former marital residence during their one-year separation.

The district court granted the appellee's motion for summary judgment and dismissed the appellant's action. The Court of Appeals affirmed with a dissent. Mr. Higgins appealed to this Court.

Hatfield & Hatfield, by Kathryn K. Hatfield, for plaintiff-appellee.

McNairy, Clifford, Clendenin & Parks, by Joy R. Parks, for defendant appellant.

WEBB, Justice.

The resolution of this appeal depends on the interpretation of the words of the agreement "if the parties have lived continuously separate and apart for that full period" (one year). It is undisputed that the parties engaged in sexual intercourse during that period. If these words are not ambiguous and to live separate and apart means the parties may not engage in sexual intercourse during that period, summary judgment was properly granted for the appellee. We believe that we are required to hold under *Murphy v. Murphy*, 295 N.C. 390, 245 S.E. 2d 693 (1978) and *State v. Gossett*, 203 N.C. 641, 166 S.E. 754 (1932), that the words are not ambiguous and the parties did not live continuously separate and apart during the year after the agreement was signed. In *Murphy*, the plaintiff brought an action for divorce on the ground of one year's separation. A separation agreement had been signed by the parties and the defendant brought a cross action to set it aside. The cross action was tried first. We held it was error for the district court to charge the jury that it took more than sexual intercourse for the parties to resume the marital relationship. In *Gossett*, the defendant was prosecuted for nonsupport of his wife. He defended on the ground that he and his wife had signed a separation agreement which relieved him of the duty to support her. This Court found no error in a charge in which the jury was told that if they found the parties entered into an agreement in which they agreed to live separate and apart and the defendant visited his wife on several occasions and had intercourse with her, they should treat the separation agreement as if it were of no validity.

Murphy and *Gossett* hold that sexual intercourse is all it takes to void an agreement in which the parties agree to live separate and apart. We believe these cases hold there is a precise meaning to "living separate and apart" and a husband and wife do not live separate and apart if they have sexual relations. The words as used in the separation agreement in this case are not ambiguous. The contingency upon which the husband was to receive the wife's interest in the marital residence did not occur. The wife was entitled to summary judgment in her favor.

The appellant contends and the dissents in the Court of Appeals and this Court say that this is an agreement drawn pursuant to N.C.G.S. § 50-20(d) which allows an agreement dividing property during the marriage. For that reason, says the appellant, the agreement in this case is enforceable although the parties had sexual relations within one year of the signing of the agreement. The appellant relies on *Love v. Mewborn*, 79 N.C. App. 465, 339 S.E. 2d 487, *disc. rev. denied*, 317 N.C. 704, 347 S.E. 2d 43 (1986) and *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E. 2d 97 (1984). We believe our decision in this case is consistent with N.C.G.S. § 50-20(d) as well as *Love* and *Buffington*. N.C.G.S. § 50-20(d) provides that married persons may provide for division of marital property while they are cohabiting. *Love* and *Buffington* hold that such agreements are enforceable under the statute. We do not hold in this case that such an agreement is unenforceable. The terms of the agreement in this case provide that for the defendant to receive the marital home the parties must live separate and apart for one year after the parties separate. They did not do this and under the terms of the agreement the appellant is not entitled to have the house conveyed to him. We do not hold that *Murphy* governs and the separation agreement is void. We do hold that at the time the agreement was executed *Murphy* and *Gossett* had defined "to live separate and apart" in such a way that the words meant that a husband and wife could not have intercourse if they were to live separate and apart. We hold the separation agreement should be enforced according to the meaning of these words.

The dissents would apply a subjective test to determine the intent of the parties at the time the separation agreement was made. *See* 1 E. Farnsworth, *Contracts* § 7.9 (1982) for a discussion of the objective and subjective theories of assent. The dissents

would have us attempt to search for the meaning the parties gave to the words regardless of the understanding which is normally given to them. In this case we believe we should use an objective test. The words "live continuously separate and apart" have a definite meaning. Larry Higgins' attorney could have told him the meaning of the words at the time the agreement was signed. A party to a contract should not be allowed to say he gave a different meaning to words which are not ambiguous.

We are advertent to N.C.G.S. § 52-10.2 which overrules *Murphy* and *Love*. The effective date of that statute is 1 October 1987. We did not consider it in the resolution of this case.

The decision of the Court of Appeals is

Affirmed.

Justice FRYE concurring in result.

This is a simple case. The parties to this lawsuit, husband and wife, entered into a separation agreement which provided, *inter alia*, that their residence should remain titled in their names for a period of one year from the date of the agreement and further provided "that if the parties have lived continuously separate and apart for that full period" the wife would transfer her interest in the residence to her husband as part of the property settlement. This agreement was executed on 13 December 1983. During the one year following execution of the agreement, the parties traveled to Tennessee and Florida, sharing a motel room for up to four days. In each of these instances, the parties engaged in one or more acts of sexual intercourse. They spent at least two nights together in the former marital residence, two other nights together away from the residence, and engaged in several acts of sexual intercourse on other occasions. The husband now seeks enforcement of that portion of the separation agreement requiring the wife to transfer her interest in the property to him. In order to do so, he must establish that they "have lived continuously separate and apart for that full period" of one year. The district court granted the wife's motion for summary judgment and the Court of Appeals affirmed.

The question before the trial court, the Court of Appeals and this Court is whether, admitting the facts as stated above, the

husband can prove that he and his former spouse "lived continuously separate and apart for that full period" as that language was used in their separation agreement.

Since this Court's famous (or infamous) decision in *Murphy v. Murphy*, 295 N.C. 390, 245 S.E. 2d 693 (1978), every divorce lawyer worth his salt has known that the resumption of even casual sexual relations between husband and wife during the period of separation meant that the parties were not living "continuously separate and apart" as that term is used in separation agreements. This language had a clear and unambiguous meaning in North Carolina at the time this agreement was executed and therefore it is unnecessary to have testimony of the parties as to what each of them intended when this language was used.

The dissent makes much of the fact that leading commentators have criticized the rule of *Murphy* and that the rule of *Murphy* has now been effectively overruled by recent action of the General Assembly. Such reliance is misplaced, however, since the meaning of the language in 1983 was clear, irrespective of whether the commentators liked it or not. Likewise, the fact that the separation agreement was executed after the enactment of the marital property act is also not controlling. The fact that a separation agreement may be entered into before, during or after the dissolution of a marriage does not prevent the parties from agreeing that certain property will be transferred only if the parties live "continuously separate and apart" for the stated period of time. Here, the husband agreed to a contract which provided for the transfer of the property only if a condition precedent was met. This condition precedent has not been met and the husband is not entitled to a conveyance under this separation agreement. That is the only question that was decided by each of the courts below and each of them decided it correctly. I therefore join the majority in voting to affirm.

In view of the dissenting opinions, I would note that this Court has not resurrected *Murphy v. Murphy*, 295 N.C. 390, 245 S.E. 2d 693, but simply recognized the absence of any ambiguity in the meaning of the clause in question at the time of the execution of the separation agreement.

Justice MARTIN joins in this concurring opinion.

Justice MEYER dissenting.

I concur in all respects with the dissent of Justice Whichard but wish to add my observations concerning what I perceive to be the majority's erroneous application of the rules governing summary judgment.

The majority concludes that certain language from the separation agreement in question, specifically the phrase "if the parties have lived continuously separate and apart for that full period" (one year), is unambiguous and subject to but one reasonable interpretation. For this case at least, says the majority, this interpretation is that a husband and wife live "continuously separate and apart" only if they do not engage in even a single act of sexual intercourse. Because it is admitted that the parties had sexual intercourse on at least one occasion during the period of time in question, continues the majority, the trial court's order granting the wife's motion for summary judgment was proper. In fact, the disputed language from the separation agreement is perfectly susceptible to at least two different and plausible meanings—either of which a jury could and should have been allowed to find as reflecting the intent of the parties when they entered into the contract of separation. In my opinion, the majority has clearly erred in affirming summary judgment for the wife.

Rule 56(c) of the North Carolina Rules of Civil Procedure provides that summary judgment will be granted only where a forecast of the evidence shows that there is *no* genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982); N.C.G.S. § 1A-1, Rule 56(c) (1983). The party moving for summary judgment must establish the lack of *any* triable issue, and all inferences of fact from the evidence proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion. *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 354 S.E. 2d 495 (1987). Summary judgment is a harsh and drastic remedy not to be granted "unless it is *perfectly clear* that *no* issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law." *Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E. 2d 214, 217 (1975) (emphasis added). Most importantly, a motion for summary judgment should be denied "if different material conclusions can be drawn from the evidence."

Credit Union v. Smith, 45 N.C. App. 432, 437, 263 S.E. 2d 319, 322 (1980).

Notwithstanding the majority's conclusion to the contrary, there is indeed a genuine issue of material fact in the case at bar —namely, just what this husband and wife intended by their use of the phrase "lived continuously separate and apart" in paragraph four of the disputed separation agreement. The majority here concludes incorrectly that the contested language could *only* be interpreted to mean that husband and wife must refrain from even a single act of sexual intercourse in order for the transfer of interest under paragraph four to go forward. In fact, the language used here by the parties is ambiguous. It could no doubt just as easily be found, for example, that these parties intended the language to mean that, during the year in question, they must not resume living together in the same household as husband and wife. In that event, the property would go to the husband. Where the language in question is unclear and the parties' intentions are in doubt, interpretation of an agreement is for the jury under proper instructions from the court. *Parker Marking Systems, Inc. v. Diagraph-Bradley Industries, Inc.*, 80 N.C. App. 177, 341 S.E. 2d 92, *disc. rev. denied*, 317 N.C. 336, 346 S.E. 2d 502 (1986).

This case is for the jury and entry of summary judgment for the wife was improper.

Justice WHICHARD joins in this dissenting opinion.

Justice WHICHARD dissenting.

The majority bases its holding on *Murphy v. Murphy*, 295 N.C. 390, 245 S.E. 2d 693 (1978), in which this Court held that "sexual intercourse between a husband and wife after the execution of a separation agreement avoids the contract." *Murphy*, 295 N.C. at 397, 245 S.E. 2d at 698. The decision in *Murphy* has been uniformly and severely criticized. An early critique stated:

> This decision is supported neither by reason nor by precedent. It directly conflicts with a desirable policy of preserving marriages by encouraging reconciliation attempts between separated spouses who have made a separation agreement, it is a much narrower holding than the facts of

the case demanded, and it inexplicably rejects case law developed by the court of appeals.

Survey of Developments in North Carolina Law, 1978, 57 N.C.L. Rev. 827, 1096 (1979). Professor Sally Sharp, a leading commentator on North Carolina family law, has observed:

> It is impossible, and useless, to speculate about what prompted the supreme court to rule as it did in *Murphy*. Certainly it would have been difficult for the court to have implied an intent to reconcile and resume marital relations from isolated acts of sexual intercourse. An *attempt* to reconcile could well be implied, but hardly a fully formed intent. The result of the holding is that parties (or at least one party) will be penalized for trying to reconcile if he or she is unsuccessful in that attempt. The conclusion that this result tends to inhibit efforts to reconcile seems inescapable.
>
> . . . .
>
> . . . [T]he principle that single acts of intercourse will constitute a reconciliation and therefore rescind a valid separation agreement should be given serious reconsideration. Neither the interest of the state in preserving marriage nor the interests of the parties in relying upon their contract is well served by the present rule.

S. Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C.L. Rev. 819, 841-43 (1981). *See also* S. Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C.L. Rev. 195, 204-05 n.52 (1987) (refers to "the Draconian effect of the *Murphy* rule" and notes that "[t]he issue . . . remains a serious problem"); *Note, Domestic Relations—Enforcement of Contractual Separation Agreements by Specific Performance—Moore v. Moore*, 16 Wake Forest L. Rev. 117 (1980) ("[W]hile the isolated-acts test serves the goal of judicial efficiency, it undermines the goal of judicial integrity.").

Perhaps in response to these critiques of *Murphy*, the General Assembly provided in the Equitable Distribution Act that parties may make a written agreement providing for distribution of their property "[b]efore, during or after marriage." N.C.G.S. § 50-20(d) (1987). The Court of Appeals has interpreted the effect

of this section to be that spouses may now execute a property settlement at any time, without separating afterwards, *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E. 2d 97 (1984), and that such settlements are not necessarily terminated by reconciliation, *Love v. Mewborn*, 79 N.C. App. 465, 339 S.E. 2d 487, *disc. rev. denied*, 317 N.C. 704, 347 S.E. 2d 43 (1986). In my view those cases were correctly decided and accurately reflect both legislative intent in the enactment of N.C.G.S. § 50-20(d) and sound public policy. If spouses may make an agreement for a property settlement during marriage, it follows that after execution of the agreement, they may continue to live together, or have sexual relations while living apart, without voiding the agreement.

The separation agreement here was entered into subsequent to the effective date of N.C.G.S. § 50-20(d). The agreement recites in paragraph 21 that it constitutes a distribution of marital property pursuant to that statute. Therefore, it was not voided by the parties' episodic sexual relations.

If *Murphy* governs, as the majority holds, the agreement is void, and the language used therein is immaterial. The majority thus is incorrect, under its view of the law, in stating that "[t]he resolution of this appeal depends on the interpretation of the words of the agreement 'if the parties have lived continuously separate and apart for that full [one year] period.' " The language of a void agreement is immaterial, so questions of interpretation do not arise.

While *Murphy* established a clear legal consequence for even a single act of sexual intercourse after entering a separation agreement—a consequence now removed by the enactment of N.C.G.S. § 50-20(d)—it did not give singular semantic or legal significance, divorced from context and intent, to the words "lived continuously separate and apart." The majority goes beyond the actual holding in *Murphy* in holding that it did.

The spouses here testified to their differing interpretations of the phrase "lived continuously separate and apart" in the context of their separation agreement. The wife testified:

> It meant that in a year's time if we lived continuously separate and apart that I would sign the house over. At the time I . . . signed the house over I thought that [my husband]

> and I would divide the interest in the house as far as my marital interest even though it was not stated. That's how I interpreted this paragraph. . . . If we lived continuously separate and apart. That meant no contact whatsoever. That I would sign the house over and I would be given my marital interest in the property. . . . I was obligated to turn the house over if we had no contact as far as having sex, going anywhere together appearing as husband and wife. If we had had no contact, if he went his separate way, I went my separate way, we did not talk about going back together, then I was going to sign [over] the house and I thought I would be getting my part of the house.

She further testified that she thought that if she and her husband had "sexual relations or even spen[t] the night together . . . , it voided [the agreement]. That was, to [her], going back and living as husband and wife." The husband testified, contrastingly:

> Q. What did you think paragraph 4 meant when you signed that agreement?
>
> . . . .
>
> A. I took it that if we're not living together after the first year that she would sign the house over to me.
>
> Q. . . . Did you think that if you had sex with her during that year that it would have anything to do with whether or not she was obligated to sign the house over to you?
>
> A. No.
>
> Q. Did anybody tell you . . . that having sex with her might void the provisions of paragraph 4?
>
> A. No.

As a matter of semantics, it cannot be gainsaid that the disputed language is subject to the different and plausible meanings expressed in the foregoing testimony. The language is in fact, and should be in law, ambiguous.

As stated in Justice Meyer's dissent: "Where the language in question is unclear and the parties' intentions are in doubt, interpretation of an agreement is for the jury under proper instruc-

tions from the court. *Parker Marking Systems, Inc. v. Diagraph-Bradley Industries, Inc.*, 80 N.C. App. 177, 341 S.E. 2d 92, *disc. rev. denied*, 317 N.C. 336, 346 S.E. 2d 502 (1986)." And, as stated in Judge Orr's dissent for the Court of Appeals:

> [R]esumption of sexual relations does not, as a matter of law, void a N.C.G.S. § 50-20(d) agreement. Therefore, to conclude that the parties "no longer live separate and apart" because of the resumption of sexual relations, is to give the phrase a meaning beyond the context of this agreement and affix to it a meaning reserved for situations other than a property settlement under N.C.G.S. § 50-20(d). There is no basis in our statutes or case law to conclude that the incorporation of the phrase "live separate and apart for one year" into a N.C.G.S. § 50-20(d) agreement means that sexual relations will result in the conclusion, as a matter of law, that the parties no longer live separate and apart. The intent of the parties as to the application of this phrase in their agreement is instead a question to be decided by the trier of fact.

Higgins v. Higgins, 86 N.C. App. 513, 520, 358 S.E. 2d 553, 557 (1987).

By enacting N.C.G.S. § 50-20(d), the General Assembly attempted to put to rest, in the context presented here, "the Draconian effect of the *Murphy* rule." S. Sharp, *supra*, 65 N.C.L. Rev. 195, 205 n.52. The majority today—unfortunately, in my view—resurrects the rule and its effect under the guise of a semantic certainty that is in fact absent. Not only does the majority resurrect *Murphy* from a well-deserved demise, but in the process it stretches it beyond its original effect. I find the holding of the majority contrary to express legislative enactment and neither required by the statutes and case law nor desirable as a matter of public policy. I therefore respectfully dissent.

MARY MURROW v. EDITH E. DANIELS, EXECUTRIX OF THE ESTATE OF WALTER CLEE DANIELS, EDITH E. DANIELS, INDIVIDUALLY, AND EDITH E. DANIELS, D/B/A HENRY JOHNSON'S MOTOR LODGE & RESTAURANT

No. 294A87

(Filed 3 February 1988)

1. **Innkeepers § 5; Negligence § 38— crimes against motel guests—contributory negligence—failure to look out bathroom window—absence of instruction**

In an action to recover for injuries received by plaintiff when she was robbed and raped while a registered guest at defendants' motel, the trial court did not err in failing specifically to instruct the jury that plaintiff's failure to look out her bathroom window to determine who was outside before opening the motel door was a basis for finding contributory negligence where the trial court properly summarized the evidence relevant to plaintiff's failure to look out the bathroom window and admonished jurors that it was their duty to consider all of the contentions argued by the parties; those arguments included and emphasized defendants' contention that the plaintiff's failure to open and look out the bathroom window was contributory negligence; and the trial court's recapitulation of the evidence and its instructions on the issue of contributory negligence thus properly permitted the jury to consider all of the evidence and contentions when deciding that issue.

2. **Innkeepers § 5; Negligence § 53.8— duty to protect patrons against criminal acts**

A proprietor of a public business establishment has a duty to exercise reasonable or ordinary care to protect his patrons from intentional injuries by third persons if he has reason to know that such acts are likely to occur.

3. **Innkeepers § 5; Negligence § 53.8— duty to safeguard invitees from criminal acts—test of foreseeability**

The test in determining when a proprietor has a duty to safeguard his invitees from injuries caused by the criminal acts of third persons is one of foreseeability. Liability for injuries may arise from failure of the proprietor to exercise reasonable care to discover that such acts by third persons are occurring, or are likely to occur, coupled with failure to provide reasonable means to protect his patrons from harm or give a warning adequate to enable patrons to avoid harm.

4. **Innkeepers § 5; Negligence § 56— business invitees—evidence of prior criminal acts by third parties—admissible to show proprietor's knowledge of security needs**

Evidence of prior criminal acts by third parties on or near business premises is admissible to show a defendant's knowledge of the need to provide adequate security measures to protect its business invitees unless such evidence is excluded by some specific rule. N.C.G.S. § 8C-1, Rule 402.

5. Innkeepers § 5; Negligence § 57.10— robbery and rape of motel patron—negligence by motel owner—sufficiency of evidence

In an action to recover for injuries received by plaintiff when she was robbed and sexually assaulted while a registered guest in defendants' motel, plaintiff's evidence was sufficient to raise triable issues of fact as to whether the attack on plaintiff was reasonably foreseeable by defendants and whether defendants were thus negligent in failing to maintain adequate security measures for the protection of its guests where it tended to show that defendants' motel was located at the intersection of Interstate 95 and N.C. Highway 70, and that defendants knew or had reason to know that this intersection is a high-crime area in which numerous criminal incidents had occurred, including five armed robberies at the motel next door to defendants' motel and crimes involving private property, larceny and vehicle theft at defendants' motel.

ON appeal by the plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 85 N.C. App. 401, 355 S.E. 2d 204 (1987), which granted the defendants a new trial in this case tried before *Herring, J.*, and a jury at the 27 May 1985 General Civil Session of Superior Court, JOHNSTON County. The defendants' petition for discretionary review of an additional issue was allowed on 28 July 1987. Heard in the Supreme Court on 10 November 1987.

Marvin Blount, Jr. and A. Charles Ellis for the plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, by C. Woodrow Teague and Linda Stephens, and Mast, Tew, Morris, Hudson & Schultz, by George B. Mast, for the defendant-appellants.

MITCHELL, Justice.

The plaintiff brought this action alleging, *inter alia*, that the defendants were negligent in failing to maintain adequate security measures for the protection of guests at Henry Johnson's Motor Lodge & Restaurant. The plaintiff contended that the defendants' negligence proximately caused her injuries, and she sought to recover compensatory and punitive damages from the defendants, jointly and severally.

The evidence offered at trial tended to show that on 2 June 1982, the plaintiff was sexually assaulted, raped and robbed while she was a registered guest at Henry Johnson's Motor Lodge in Smithfield, North Carolina. This attack occurred after the plaintiff opened her motel room door in response to an urgent knock

and loud voices. The plaintiff's assailants forced their way into her room, assaulted her and left her bound. The plaintiff alleged that the defendants were negligent in failing to maintain adequate security measures to protect her against assaults by third persons, when the defendants knew or should have known of prior criminal activity on or near the premises. The defendants denied that they were negligent and, in the alternative, asserted that the plaintiff was barred from recovery because she was contributorily negligent in voluntarily exposing herself to danger by opening her motel room door without first determining who was outside.

The trial court submitted this case to the jury on the issues of negligence, contributory negligence and compensatory damages, but did not submit any issue as to punitive damages. The jury found that the defendants were negligent and that their negligence proximately caused the plaintiff's injuries. The jury also found that the plaintiff was not contributorily negligent and awarded her $50,000 in compensatory damages.

The defendants' motion for judgment notwithstanding the verdict was denied. Upon the plaintiff's motion, the trial court, in its discretion, set aside the verdict on the issue of damages and ordered a new trial on that issue only. The defendants filed notice of appeal to the Court of Appeals and assigned as errors, *inter alia*, the admission and exclusion of certain evidence and the trial court's jury instructions on the issue of contributory negligence. On 5 May 1987, a divided panel of the Court of Appeals concluded that the trial court had erred in its jury instructions as to contributory negligence and awarded the defendants a new trial. Because Judge Becton's dissent addressed this issue only, it was the sole issue brought before this Court by the plaintiff's appeal of right pursuant to N.C.G.S. § 7A-30(2) (1986). The defendants, however, filed a petition for discretionary review of the Court of Appeals' conclusion that this case was properly submitted to the jury on the issue of the defendants' negligence. The defendants' petition was allowed by this Court on 28 July 1987. Therefore, both of these issues are before us for appellate review.

The plaintiff contends that the Court of Appeals erred in holding that the trial court's jury instructions on the issue of contributory negligence required a new trial. We agree.

When this case was tried, N.C.G.S. § 1A-1, Rule 51(a) (1985) required the trial court to instruct the jury as to the applicable law arising on the evidence and to apply the law to the variant factual situations presented by the conflicting evidence. *See Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 197, 188 S.E. 2d 342, 346 (1972); *but cf.* N.C.G.S. § 1A-1, Rule 51(a) (1986) (amended 1 July 1985). It is a well-established principle in this jurisdiction that in reviewing jury instructions for error, they must be considered and reviewed in their entirety. *See, e.g., Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E. 2d 488, 492 (1967). Where the trial court adequately instructs the jury as to the law on every material aspect of the case arising from the evidence and applies the law fairly to variant factual situations presented by the evidence, the charge is sufficient. *See King v. Powell*, 252 N.C. 506, 114 S.E. 2d 265 (1960). Bearing these principles in mind, we consider the jury charge in the present case to determine whether the trial court adequately instructed the jury on the defendants' contention that the plaintiff was contributorily negligent.

In the present case the trial court summarized the evidence, stated the parties' contentions, and instructed the jury on the applicable principles of law. During the summation of the evidence relevant to the issue of contributory negligence the trial court stated that the evidence tended to show, *inter alia*:

> That there are two locks on each door to each room in the motel and there are two sliding windows on the back which have automatic ball locks. That you can see out the bathroom window, which is at the front of the motel room when the window is closed. That the panes are frosted and the window opens and slides to the right.
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> . . . .
>
> That there are bathroom windows in the Johnson's Motel, and that reportedly by sliding them back and looking out the window that one can see the door from the bathroom window. That there were also telephones in the motel and a telephone in each room and in order to get the desk from room 39 all you had to do was pick up the receiver and the switchboard would answer. . . .

After summarizing the evidence, the trial court gave the following instructions on the law relative to the issue of contributory negligence:

> The second issue is the issue of contributory negligence raised by the defendants and I read the second issue again: Did the plaintiff, Mary Murrow, by her own negligence contribute to her injury and damages?
>
> I instruct you as to the second issue, members of the jury, that there may be more than one proximate cause of an injury and damage, and in this case the defendants take the position that even if you should find they were actionably negligent on the occasion complained of, that you should also find that the plaintiff, herself, was negligent and that her negligence combined and concurred with that of the defendants to bring about and create the injury and damage complained of, if any you find, as one of the proximate causes.
>
> It is the law in this state, members of the jury, that where there is both negligence and contributory negligence, then a plaintiff may not recover of the defendants because the negligence of the one sets off the negligence of the other.
>
> So here we have what is known as the issue of contributory negligence, and the law I have given you earlier applies equally to this issue. It is the same as that I gave you earlier in regard to foreseeability and negligence and proximate cause, except that contributory negligence here applies to acts or omissions on the part of the plaintiff whereas actionable negligence on the first issue applied to acts or omissions on the part of the defendants.

After instructing the jury on the applicable law, the trial court stated the defendants' contentions on the issue of contributory negligence as follows:

> Now, as to the second issue, the defendants allege that the plaintiff failed to exercise that degree of care which the ordinary prudent person would have exercised under all the attendant circumstances on the 2nd day of June, 1982, at the defendants' motor lodge and so was, herself, negligent in that first, she voluntarily exposed herself to danger by opening her room door, knowing there were questionable char-

> acters outside making noise and demanding entrance, and second, that she opened the room door when she could have called the desk. And the defendants further allege that such negligence on the part of the plaintiff was one of the proximate causes of her complaints and injury which bars any right of recovery in this case by the plaintiff.
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> . . . .
>
> Now, as to this second issue, the defendants say and contend, . . . that plaintiff, herself, voluntarily exposed herself to danger by opening her room door, and second, that she opened the door when she could have simply picked up the telephone and called the desk, and that this was a proximate cause . . . .

The trial court concluded its charge on this issue by admonishing the jury in the following manner:

> Now, again, I have not by any means summarized all of the contentions of counsel, either for the defendants or for the plaintiff, in this case, but, again, it is your duty to remember and to consider all of the contentions and positions that have been argued to you and as best you can determine the truth of the matter, applying the law as I have stated the law to be.

[1] After reviewing the charge, the Court of Appeals concluded that the trial court "committed prejudicial error in refusing to instruct the jury that they could also consider plaintiff's failure to look out the bathroom window as a basis for finding that she [the plaintiff] was contributorily negligent. . . . [T]he failure to charge as to the availability of the window had the inevitable effect, it seems to us, of erroneously depriving defendants of that part of their defense." 85 N.C. App. at 406-07, 355 S.E. 2d at 209. Based upon this conclusion, the Court of Appeals awarded the defendants a new trial. We disagree with the Court of Appeals' view that the trial court committed prejudicial error in failing to specifically instruct the jury that the plaintiff's failure to look out her bathroom window was a basis for finding contributory negligence.

As this Court has recognized, the trial court has wide discretion in presenting the issues to the jury and no abuse of

discretion will be found where the issues are "sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause." *Chalmers v. Womack*, 269 N.C. 433, 435-36, 152 S.E. 2d 505, 507 (1967). The trial court properly summarized the evidence relevant to the plaintiff's failure to look out the bathroom window and admonished jurors that it was their duty to consider all of the contentions argued by the parties. Those arguments included and emphasized the defendants' contention that the plaintiff's failure to open and look out the bathroom window was contributory negligence. In the case at bar, the trial court's recapitulation of the evidence and its instructions on the issue of contributory negligence properly permitted the jury to consider all of the evidence and contentions when deciding that issue and allowed the court to render a judgment fully determining the case. We therefore conclude that the instructions taken as a whole were sufficient under the standard articulated in *Chalmers* and reverse the Court of Appeals' holding to the contrary. *Id.*

With regard to the issue presented in the defendants' petition for discretionary review, the defendants contend that, as a matter of law, they were not negligent because the plaintiff's injury was not reasonably foreseeable. The Court of Appeals concluded that the evidence of criminal activity at or near Henry Johnson's Motor Lodge was sufficient to support a finding of foreseeability of the criminal attack on the plaintiff. Accordingly, the Court of Appeals ruled that the trial court properly denied the defendants' motions for a directed verdict and for judgment notwithstanding the verdict. We agree that the trial court's ruling on this issue should not be disturbed.

[2, 3] As this Court has recognized, ordinarily a possessor of land is not liable for injuries to invitees which are caused by the intentional criminal acts of third persons. Nevertheless, we also have recognized that a proprietor of a public business establishment has a duty to exercise reasonable or ordinary care to protect his patrons from intentional injuries by third persons, if he has reason to know that such acts are likely to occur. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638-39, 281 S.E. 2d 36, 38 (1981) *citing with approval* Restatement (Second) of Torts § 344 and comment f (1965); *see generally* Annotation, *Liability of Hotel or Motel Operator for Injury to Guest Resulting from As-*

sault by Third Party, 28 A.L.R. 4th 80 (1984 & Supplement). A proprietor owes his patrons the duty to exercise reasonable care for their personal safety but is not an insurer of their safety under any and all circumstances. *Rappaport v. Days Inn of America, Inc.*, 296 N.C. 382, 383, 250 S.E. 2d 245, 247 (1979). The test in determining when a proprietor has a duty to safeguard his invitees from injuries caused by the criminal acts of third persons is one of foreseeability. *Foster v. Winston-Salem Joint Venture*, 303 N.C. at 640, 281 S.E. 2d at 39; *Urbano v. Days Inn of America, Inc.*, 58 N.C. App. 795, 295 S.E. 2d 240 (1982). Liability for injuries may arise from failure of the proprietor to exercise reasonable care to discover that such acts by third persons are occurring, or are likely to occur, coupled with failure to provide reasonable means to protect his patrons from harm or give a warning adequate to enable patrons to avoid harm. *See Walkoviak v. Hilton Hotels Corp.*, 580 S.W. 2d 623, 625 (Tex. Civ. App. 1979); Annotation, 28 A.L.R. 4th 80, 84 (1984).

[4] As our Court of Appeals stated in *Sawyer v. Carter*, evidence of prior criminal acts by third parties on or near the premises involved is admissible to show a defendant's knowledge of the need to provide adequate security measures to protect its business invitees. 71 N.C. App. 556, 559, 322 S.E. 2d 813 (1984), *disc. rev. denied*, 313 N.C. 509, 329 S.E. 2d 393 (1985). We adopt the *Sawyer* Court's view that "evidence pertaining to the foreseeability of criminal attack *shall not be limited to prior criminal acts occurring on the premises.*" *Id.* at 561, 322 S.E. 2d at 817 (emphasis added). We agree that evidence of criminal acts occurring near the premises in question may be relevant to the question of foreseeability and hold that such evidence is admissible unless excluded by some specific rule. *See* N.C.G.S. § 8C-1, Rule 402 (1986); *see also Walkoviak v. Hilton Hotels Corp.*, 580 S.W. 2d at 625-26.

In reviewing a ruling upon a motion for judgment notwithstanding the verdict by the defendant, the trial court must consider the evidence in the light most favorable to the non-moving plaintiff, taking the evidence supporting the plaintiff's claims as true, resolving all contradictions, conflicts and inconsistencies in the plaintiff's favor. *See, e.g., Daughtry v. Turnage*, 295 N.C. 543, 544, 246 S.E. 2d 788, 789 (1978). The same standard is applied for review of a ruling upon a motion for a directed verdict. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). In ruling upon either

motion, the trial court "may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff." *Investment Properties of Asheville, Inc. v. Allen*, 281 N.C. 174, 180, 188 S.E. 2d 441, 445 (1972).

[5] In the present case, the defendants' motel was located at the intersection of Interstate Highway 95 and N.C. Highway 70. The evidence before the trial court tended to show that the defendants knew or had reason to know that numerous reports of criminal activities had been filed with the local sheriff's department regarding incidents at this intersection. The plaintiff presented evidence that one hundred incidents of criminal activity at the I-95 and Highway 70 intersection area had been reported to the sheriff's department from 1978 to June 1982. These reported incidents included: five armed robberies at Howard Johnson's Motel located next door to the defendants' motel, one kidnapping, three assaults, one vehicle theft, and sixty-three breaking and enterings and larcenies. The Smithfield Chief of Police, a reporter for the local newspaper, the Chief of Detectives for the Johnston County Sheriff's Department and the manager of the motel located next door to Henry Johnson's Motor Lodge & Restaurant testified that they were very familiar with the I-95 and Highway 70 intersection. In their opinions, this intersection was a high-crime area. Evidence was also presented tending to show that crimes had occurred at Henry Johnson's Motor Lodge and Restaurant from May 1977 until January 1980. These crimes included: damage to private property, larceny and vehicle theft.

The evidence, when viewed in the light most favorable to the non-moving plaintiff, was sufficient to raise a triable issue of fact as to whether the attack on the plaintiff was reasonably foreseeable. The evidence tended to show that the I-95 and Highway 70 intersection is a high-crime area in which numerous criminal incidents had occurred, including five armed robberies at the motel next door to the defendants' motel. It would be reasonable to infer that if criminal incidents occurred in such close proximity to the defendants' motel, the defendants were aware of facts which should have prompted them to take measures to protect their guests from potential assaults within the perimeters of their motel property. Further, evidence of crimes in the area immediately surrounding the defendants' motel was sufficient to raise issues of fact concerning the question of foreseeability of the

attack on the plaintiff. Such issues were for the jury and were not issues to be determined as a matter of law by the trial court. The trial court properly denied the defendants' motions and properly submitted the question of the defendants' negligence to the jury.

In their brief and arguments before this Court, the defendants sought to present other assignments of error by which they contend that certain evidence relating to criminal activity at another highway intersection some two miles away from the I-95 and Highway 70 intersection was erroneously admitted at trial. We assume *arguendo* that the admission of such evidence was erroneous as being evidence of criminal activity physically too remote from the defendants' motel to be of probative value in this case. We further assume *arguendo* that the defendants' assignments and contentions in this regard are before us for review. *See* App. R. 16(a). Even having made such assumptions, however, we conclude from our reading of the entire record in this case that any error in admitting such evidence was harmless in light of the overwhelming admissible evidence of criminal activity at the I-95 and Highway 70 intersection area, previously discussed herein.

In their brief in the Court of Appeals, the defendants assigned as error the trial court's order granting a new trial on the issue of damages and presented arguments in support of that assignment. The Court of Appeals did not address that assignment, however, and the defendants did not present or argue it before this Court. Therefore, that assignment is not before us for review. App. R. 16(a).

For the foregoing reasons we reverse the decision of the Court of Appeals which awarded the defendants a new trial. This case is remanded to the Court of Appeals for its further remand to the Superior Court, Johnston County, for proceedings not inconsistent with this opinion.

Reversed and remanded.

HUSSEIN SAYYED MUSSALLAM v. EEVA HANNELLE MUSSALLAM

No. 702PA86

(Filed 3 February 1988)

1. **Penalties § 1; Principal and Surety § 1— appearance rather than compliance bond—proceeds payable to school fund**

Where a Finnish court awarded custody of a child to its Finnish mother, the mother brought the child to North Carolina for a visit with the child's Kuwaiti father, the father removed the child to Kuwait, returned to North Carolina alone and refused to return the child to the mother, a superior court judge in a habeas corpus proceeding set a secured bond of $25,000 and ordered the father to appear in the district court with the child, the terms of the bond specifically made its proceeds payable to the State of North Carolina should it be forfeited, the father posted bond and fled the jurisdiction, and the district court ordered the bond forfeited, it was *held* that the bond set by the court in the civil case was an appearance bond intended to guarantee the father's appearance before the court and as a penalty in the event of his failure to appear as ordered rather than a compliance bond, and that under Art. IX, § 7 of the N.C. Constitution, the proceeds of the forfeited bond should be paid to the county school fund rather than to the mother.

2. **Penalties § 1— proceeds from penalties, forfeitures and fines—when payable to school fund**

The provisions of Art. IX, § 7 of the N.C. Constitution relating to the clear proceeds from penalties, forfeitures and fines identifies two distinct funds for the public schools: (1) the clear proceeds of all penalties and forfeitures in all cases, regardless of their nature, so long as they accrue to the State; and (2) the clear proceeds of all fines collected for any breach of the criminal laws.

3. **Principal and Surety § 1— appearance bond rather than bond to ensure return of child**

A $25,000 secured bond was an appearance bond intended to guarantee the appearance of the father in court rather than a bond required by the court under the authority of N.C.G.S. § 50-13.2(c) to ensure the return of a child to the court's jurisdiction.

Justice FRYE dissenting.

Chief Justice EXUM joins in this dissenting opinion.

ON discretionary review of a decision of the Court of Appeals, 83 N.C. App. 213, 349 S.E. 2d 618 (1986), affirming the order of *Daisy, J.*, entered in District Court, GUILFORD County, distributing the proceeds of plaintiff's forfeited $25,000 secured civil bond to defendant. Heard in the Supreme Court 11 November 1987.

Douglas, Ravenel, Hardy, Crihfield & Lung, by John W. Hardy, for appellant Guilford County Board of Education.

Hatfield & Hatfield, by John B. Hatfield, Jr., for surety-appellees Doris H. Harshaw and Jo Wilkins.

Manlin M. Chee and Smith, Patterson, Follin, Curtis, James & Harkavy, by John R. Kernodle, Jr., for defendant-appellee.

MEYER, Justice.

In 1981 the plaintiff-husband, Hussein Sayyed Mussallam, a Kuwaiti, obtained a divorce from his Finnish wife, the defendant Eeva Hannelle Mussallam, in Kuwait, but did not then seek custody of the child of the marriage. About six months later, the husband filed an action in Finland, where the wife and minor child were then living, seeking custody of the child. The Finnish court granted custody to the wife. In 1985 the wife brought the child to Greensboro, North Carolina, for a visit with the husband who was then a student at North Carolina A&T State University. The husband took the child, removed her to Kuwait, returned to North Carolina alone, and refused to return the child to the wife.

Seeking enforcement of the Finnish custody decree, the wife filed a copy of the custody decree in Guilford County pursuant to N.C.G.S. § 50A-15 and § 50A-23 and on 7 May 1985 filed a motion in the cause for immediate custody of her daughter. The district court entered a show cause order directing the husband to appear on 9 May 1985 with the minor child and requiring that he be held in custody without bond until after the 9 May hearing. On that date, the district court judge modified the order, releasing the husband from custody upon condition that he turn his two passports over to his attorney and that he return for a full hearing. At a 16 May 1985 hearing, the district court entered an order finding that the husband was in willful contempt of the Finnish custody decree and ordering that he be held in custody until he purged himself of contempt "by sending for the minor child, NORA CASSANDRA MUSSALLAM, and bringing her to this Court."

While in custody under this order, the husband petitioned the superior court for a writ of habeas corpus. On 17 May 1985, Superior Court Judge James A. Beaty set a secured bond of $25,000 and ordered the husband to appear before the district

court with the minor child on 24 May 1985 and to remain within the jurisdiction without removing himself from Guilford County until the child was returned. This order was extended to 31 May 1985. On 25 May 1985, the husband posted bond (comprised of two bonds, one for $20,000 and one for $5,000 through two sureties) and was released from custody. He then fled the jurisdiction, presumably returning to Kuwait. He has not been located since.

On 31 May 1985, when the husband failed to appear, the district court ordered the $25,000 secured bond forfeited immediately. The order and notice of forfeiture was served upon the sureties on the bonds, who filed motions to release the bonds or assess civil damages. A copy of the motions and notice to release the bonds was served upon the appellant, Guilford County Board of Education. The Board filed an answer seeking forfeiture of the amount of the bonds to the Guilford County School Fund. On 25 October 1985, after a hearing, the district court entered an order holding that appellant Board of Education had no interest in the proceeds of the forfeited bonds because the bonds had been set in a civil domestic case "solely for the purpose of producing the child of the parties and not for further proceedings requiring the [husband's] presence."

The Board of Education appealed. The Court of Appeals held that the district court had properly found that the superior court's order was solely for the purpose of ensuring compliance with its order to produce the minor child before the district court and that the combined bond was therefore a compliance bond as opposed to an appearance bond, thus precluding the Board's entitlement to its proceeds. We conclude, to the contrary, that the bond was an appearance bond required for the purpose of ensuring the defendant's presence before the district court and that under our constitution, the Guilford County Board of Education is entitled to the proceeds from its forfeiture. We therefore reverse the decision of the Court of Appeals.

[1] Both the Board and the wife agree that the bond is a civil bond, imposed in a civil proceeding. The wife argues, however, that it is a compliance bond because (1) her goal throughout was to regain custody of her daughter, (2) the goal of the district court and the superior court was to ensure that the child was brought before the court and returned to her custody absent any showing

of good cause by the husband, and (3) the husband's goal was to disobey the orders of the Finnish and North Carolina courts, even if it cost him $25,000 to do so. She analogizes the bond given here to those imposed in claim and delivery matters and civil cases in which noncustodial parents are found in contempt for failure to pay child support. She argues that when such bonds are forfeited, the proceeds are paid to the injured party, not to the school fund, and that the bond here should be similarly treated. N.C.G.S. § 50-13.2(c) (1987). We find the wife's analogy unpersuasive.

Our review of the record demonstrates that the judges who heard various aspects of this case were primarily concerned with the husband's attendance in court. At the 16 May 1985 hearing on the original motion to show cause, the district court made extensive findings of fact. The court observed that (1) the husband had not been released from custody because the court feared that he would flee the jurisdiction; (2) the court had later permitted the husband's release from custody provided he turn his passports over to his attorney; (3) the husband had taken the child to Kuwait and had returned alone to North Carolina; (4) the husband had declared through his attorney that he did not intend to return the child to North Carolina; and (5) the husband had no ties to North Carolina but had the means to flee the jurisdiction. The court then ordered the husband to be taken into custody. When the husband obtained his freedom under writ of habeas corpus, the superior court ordered that his release was to be conditioned on the posting of a secured bond. The title on the bonds in question is "Appearance Bond" and their terms provide in part:

> XX Pretrial Release—The conditions of this bond are that the above named defendant shall *appear* in the above entitled action whenever required and will at all times *render himself amenable to the orders and processes of the Court*. . . .
>
> . . . .
>
> If the defendant *appears* as ordered and otherwise performs the foregoing conditions of this bond, then the bond is to be void, but if the defendant fails to obey any of these conditions, the Court will enter an order declaring the bond forfeited.

(Emphasis added.) The fact that the order of forfeiture and notice bears on its reverse side a notation that this was a civil case does not effect a change in the intrinsic nature of the bonds. The box designated "Surety Appearance Bond" was checked and it provided that the sureties were bound to pay *the State of North Carolina* if the husband failed to appear. Though it would not affect the result we reach, we find no basis for the district court's 25 October 1985 conclusion that the bonds were compliance bonds "solely for the purpose of producing the child" and only incidentally required defendant's appearance. On the contrary, while the orders of the district and superior courts clearly contemplated that the child would be produced before the court at the same time, they were issued primarily to require plaintiff's appearance. The district court's 31 May 1985 order simply ordered the forfeiture of the bonds undertaken by the sureties upon the husband's failure to appear.

The wife argues that even if the bond in question is determined to be an appearance bond given to guarantee *plaintiff's* appearance, it still remains a civil bond, the proceeds of which she is entitled to under article IX, section 7 of the North Carolina Constitution. Article IX, section 7 provides:

> All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

N.C. Const. art. IX, § 7. The section has been codified at N.C.G.S. § 115C-452. The wife interprets article IX, section 7 to mean that the clear proceeds of penalties, forfeitures and fines go to the school fund only if they arise from criminal cases. Since this was a civil case, she argues, no penal laws have been breached and therefore section 7 does not apply to allow the Board to collect the proceeds of the forfeited bond. Although we agree that we are dealing with a civil case here, we cannot accept the wife's interpretation of section 7.

[2] We interpret the provisions of section 7 relating to the clear proceeds from penalties, forfeitures and fines as identifying two

distinct funds for the public schools. These are (1) the clear proceeds of all penalties and forfeitures in all cases, regardless of their nature, so long as they accrue to the state; and (2) the clear proceeds of all fines collected for any breach of the criminal laws. In the second category, it is quite apparent from the words of section 7 that the clear proceeds of all fines collected for the violation of the criminal laws are to be used for school purposes. One could not legitimately argue that the violation of a criminal law is not a "breach of the penal laws." While its intent as to the first category is less obvious, the wording of the entire section 7 makes its meaning clear. The term "penal laws," as used in the context of article IX, section 7, means laws that impose a monetary payment for their violation. The payment is punitive rather than remedial in nature and is intended to penalize the wrongdoer rather than compensate a particular party. *See* D. Lawrence, *Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis*, 65 N.C.L. Rev. 49, 82 (1986). Thus, in the first category, the monetary payments are penal in nature and accrue to the state regardless of whether the legislation labels the payment a penalty, forfeiture or fine or whether the proceeding is civil or criminal.

Applying this reasoning to the bond at issue here, it is clear that the superior court judge set the bond to ensure the husband's appearance. The punishment for his failure to so appear would be immediate forfeiture of the bond. The terms of the bond specifically made its proceeds payable to the State of North Carolina should it be forfeited. The bond therefore falls within the parameters of the first category.

The wife cites *Katzenstein v. R.R. Co.*, 84 N.C. 688 (1881), for the proposition that the framers of the North Carolina Constitution did not intend to award penalties and forfeitures arising out of civil matters to the county school fund, thus ignoring the damages of aggrieved individuals. However, in *Katzenstein* this Court distinguished between "those penalties that accrue to the state, and those that are given to the person aggrieved, or such as may sue for the same." *Id.* at 693.

Katzenstein was a civil case, yet the statutory penalty involved was recoverable by the state under the mandate of section

7. *See also In re Wiggins*, 171 N.C. 372, 88 S.E. 508 (1916); *Hodge v. Railroad*, 108 N.C. 24, 12 S.E. 1041 (1891). The cases upon which the wife relies are inapposite. In *McGowan v. The Railroad*, 95 N.C. 418 (1886), a statute fixed five days as a reasonable time for forward transportation by a common carrier. The penalty was obviously designed to compensate the individual party for the loss he incurred when his perishable goods were left in the carrier's warehouse. Similarly, in *Williams v. Hodges*, 101 N.C. 300, 7 S.E. 786 (1888), a register of deeds issued a marriage license enabling the underage daughter of the plaintiff to marry without her father's consent. There, the statute specifically made the penalty payable to "any person who shall sue for the same." *See also Cole v. Laws*, 104 N.C. 651, 10 S.E. 172 (1889). As we stated above, the distinction lies in the nature of the penalty or forfeiture, i.e., whether it was designed to penalize the wrongdoer or to compensate a particular party.

[3] Finally, the wife points out that under N.C.G.S. § 50-13.2(c) the court has authority in a civil custody action to require the posting of a bond to ensure the return of a child to the court's jurisdiction. She argues that the superior court judge imposed this type of bond in the husband's habeas corpus proceeding. Because we find that the bond at issue here was an appearance bond intended to guarantee the appearance of the husband, this argument is without merit.

The bond set by the superior court in this civil case was an appearance bond designed to guarantee the husband's appearance before the court and as a penalty in the event of his failure to appear as ordered. Under article IX, section 7 of our constitution, the appellant Board of Education is entitled to the clear proceeds of the forfeiture in question. The Court of Appeals' decision is therefore

Reversed.

Justice FRYE dissenting.

The majority reverses the decision of the Court of Appeals which upheld the district court's order distributing proceeds of the forfeited bonds to the child's mother.

I find the reasoning of the majority totally unpersuasive. The clear purpose of the proceeding was to enforce the custody decree by getting the child out of Kuwait and back to Greensboro so that the mother could retain custody. Judge Williams entered a show-cause order directing the husband to appear on a day certain *with the minor child.* He also found the husband in contempt and ordered him held in custody until he purged himself of contempt by "sending for the minor child . . . and bringing her to this Court." In the superior court, Judge Beaty set bond and ordered the husband to appear before the district court *with the minor child.* How the majority can then conclude that "the record demonstrates that the judges who heard various aspects of this case were primarily concerned with the husband's attendance in court" is completely baffling to me. It seems obvious that the husband's attendance in court was secondary to the primary purpose of the enforcement orders, that is, to secure the presence of the child.

The majority notes that the bonds actually signed by the husband were entitled "Appearance Bond" and contained the usual language for such bonds. While this language might be crucial if we were interpreting a question of the surety's liability on the bonds, that is not the question before the Court. The only question is who gets the proceeds of the bonds once those proceeds are paid into court. The answer should depend, not upon which form some clerk or magistrate had the surety sign, but rather upon the purpose of the bond, as shown by the nature of the proceeding and the orders of the court pursuant to which the bonds were given.

The nature of this proceeding is not an ordinary civil proceeding, and certainly not a criminal action. It is a custody proceeding, to enforce compliance with a previous decree awarding custody of the child to the mother. Her husband had taken the child out of the country and refused to return the child to her. The court orders pursuant to which the bonds were given clearly required the husband to appear *with the child.* Thus they were compliance bonds and not ordinary civil or criminal bonds.

When compliance bonds are forfeited, the proceeds are paid to the injured party. *See, e.g.,* N.C.G.S. § 1-478 (1983) (claim and delivery statute where failure to return property results in for-

feiture of bond proceeds to injured party with recovery limited to value of property plus damages and costs incurred); N.C.G.S. § 1A-1, Rule 65(e) (1983) (injunction statute where the injured party may recover bond proceeds from party obtaining the temporary injunction when this latter party does not prevail in the subsequent action). Here the mother is clearly the injured party, having been completely frustrated in her efforts to secure compliance with the court orders giving her physical custody of the child. These orders were also consistent with the policy of this State which permits a court to require the posting of a bond to ensure the return of a child to the court's jurisdiction. N.C.G.S. § 50-13.2(c) (1987). The decision of the majority is contrary to this policy and represents a triumph of form over substance. Accordingly, I dissent.

Chief Justice EXUM joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. MERRITT DRAYTON

No. 166A87

(Filed 3 February 1988)

Criminal Law § 138.24— second degree murder—aggravating factor—physical infirmity of victim—alcohol concentration of .29%

The trial court properly found as an aggravating factor for second degree murder that "the victim was physically infirm because he had an alcohol concentration of .29%" where the evidence would support inferences by the trial court that defendant and his accomplices knew the victim was under the influence of alcohol and targeted him for this reason and that, when the attack on the victim began, the attackers took advantage of his physical infirmity.

Justice MEYER dissenting.

Chief Justice EXUM joins in this dissenting opinion.

APPEAL by defendant pursuant to N.C.G.S. § 15A-1444(a1) and Rule 4(d) of the North Carolina Rules of Appellate Procedure from a judgment imposing a life sentence entered by *Rousseau, Judge*, at the 18 November 1986 Criminal Session of Superior Court, FORSYTH County. Heard in the Supreme Court 7 December 1987.

The defendant pled guilty to second degree murder. The evidence introduced at the sentencing hearing showed that in April 1986, while the defendant was incarcerated in the Forsyth County jail on an unrelated charge, he confessed to an unsolved murder which had occurred on 17 September 1983. In his confession, the defendant said that he, Samuel Mitchell and Darryl Hunt were in a "drink house" when they saw Arthur Wilson buying liquor and "flashing" a large amount of money. The three men agreed to rob Wilson when he left the "drink house." They accompanied Mr. Wilson for about two blocks when he left the drink house and "clotheslined" him. As Mr. Wilson lay on the ground, they kicked him and beat him with an ax handle until the blows sounded "mushy like." The three men then took Mr. Wilson's money and left.

There was evidence that corroborated the defendant's confession. An autopsy of Mr. Wilson's body showed he died of a blunt trauma to the head and that he had a blood alcohol content of .29 percent.

The court found three aggravating factors, including a finding that "The victim was physically infirm because he had an alcohol concentration of .29%." The court found as a mitigating factor that "At an early stage of the criminal process, the defendant voluntarily acknowledged wrong-doing in connection with the offense to a law enforcement officer." The court found the aggravating factors outweighed the mitigating factor and sentenced the defendant to life in prison. The defendant appealed.

Lacy H. Thornburg, Attorney General, by Daniel C. Oakley, Special Deputy Attorney General, for the State.

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

WEBB, Justice.

The defendant assigns error to the finding of the aggravating factor that "The victim was physically infirm because he had an alcohol concentration of .29%." The defendant contends that because a person has a blood alcohol content of .29 percent does not prove he is physically infirm. He argues further that if Mr. Wilson was physically infirm, there is no proof that he was tar-

geted for the crime because of his physical infirmity or the defendant took advantage of the infirmity in committing the crime.

The gravamen of the aggravating factor that the victim is physically infirm is vulnerability. If some disability "impedes a victim from fleeing, fending off attack, recovering from its effect, or otherwise avoid being victimized," such disability is a physical infirmity. *State v. Vaught*, 318 N.C. 480, 349 S.E. 2d 583 (1986). If the evidence shows the victim was targeted because of a physical infirmity or that the defendant took advantage of the infirmity, the aggravating factor is properly found. *State v. Thompson*, 318 N.C. 395, 348 S.E. 2d 798 (1986).

We hold that evidence that a person has a blood alcohol content of .29 percent may be used to prove that the person has a physical disability. If a person has a blood alcohol content of .10 percent while operating a motor vehicle on a street or highway in this state, he may be found guilty of impaired driving. N.C.G.S. § 20-138.1 (1983). We believe proof of a blood alcohol content of almost three times this amount supports a finding that a person's ability to flee, fend off an attack, or otherwise avoid being victimized is impaired.

In this case the perpetrators of the crime were in the "drink house" with the victim. It may be inferred from the evidence that he had a blood alcohol content of .29 percent that they knew he was under the influence of alcohol. The court could conclude from this that the defendant and his confederates targeted him for this reason. If the victim was not targeted for being under the influence of alcohol, we believe it is evident that when the attack on him began the attackers took advantage of his physical infirmity. The dissent contends that because of the sudden and powerful nature of the attack the victim's physical condition did not impede his ability to flee or fend off the attack. We believe it is evident that a person who was as much under the influence of alcohol as the victim in this case would have difficulty in seeing the attack develop or defending himself from it. This supports a conclusion that the victim's condition impeded him from fleeing or fending off the attack. This aggravating factor was properly found.

Affirmed.

Justice MEYER dissenting.

The majority holds that the trial judge acted properly in finding as a factor in aggravation of defendant's sentence that "the victim was physically infirm because he had an alcohol concentration of .29%." In my opinion, the majority's holding in this case constitutes a misapplication of the current case law concerning the aggravating factor in question, and further, it ignores the policy reasons this Court has long embraced in its sanction of the use of factors in aggravation of punishment pursuant to the Fair Sentencing Act. Accordingly, I dissent.

The majority has clearly misapplied our own case law in its resolution of the case before us. Pursuant to the Fair Sentencing Act, a trial judge is to consider certain statutory aggravating and mitigating factors in determining whether to vary a sentence of imprisonment given a criminal defendant from the presumptive term. *State v. Vaught*, 318 N.C. 480, 349 S.E. 2d 583 (1986). It is well established that the State bears the burden of proving the existence of an aggravating factor if it seeks a term of imprisonment greater than the presumptive term. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). Moreover, a factor in aggravation "cannot be proved by conjecture," *State v. Gore*, 68 N.C. App. 305, 307, 314 S.E. 2d 300, 301 (1984), but rather, must be "proved by the preponderance of the evidence," *State v. Melton*, 307 N.C. 370, 373, 298 S.E. 2d 673, 676 (1983); N.C.G.S. § 15A-1340.4(a) (1983).

The statutory aggravating factor specifically at issue in the case at bar is as follows: "The victim was very young, or very old, or mentally or *physically infirm*." N.C.G.S. § 15A-1340.4(a)(1)(j) (1983) (emphasis added). The majority correctly states that the gravamen of this particular aggravating factor is vulnerability. Indeed, this Court has recently stated as much in the case of *State v. Long*, 316 N.C. 60, 65, 340 S.E. 2d 392, 396 (1986). The policy goal underlying this aggravating factor is that of discouraging wrongdoers from taking advantage of a victim's very young or very old age or mental or physical infirmity. *State v. Thompson*, 318 N.C. 395, 348 S.E. 2d 798 (1986); *State v. Eason*, 67 N.C. App. 460, 313 S.E. 2d 221 (1984).

Recent case law has made explicit the nature of the State's burden in proving by the preponderance of the evidence that this

aggravating factor in fact exists. In *State v. Thompson*, 318 N.C. 395, 348 S.E. 2d 798, a case in which this Court found no error in the trial judge's finding of both the victim's advanced age and physical infirmity in aggravation of defendant's sentence, we stated as follows concerning the age question:

> There are at least two ways in which a defendant may take advantage of the age of his victim. First, he may "target" the victim because of the victim's age, knowing that his chances of success are greater where the victim is very young or very old. Or the defendant may take advantage of the victim's age during the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to effectively intervene or defend himself. In either case, the defendant's culpability is increased.

Id. at 398, 348 S.E. 2d at 800.

In that same opinion, we employed the identical analysis to the question of the victim's physical infirmity. In so doing, we stated that "it is not necessary that the victim be targeted because of her infirmity; only that this condition be taken advantage of by the defendant." *Id.* at 399, 348 S.E. 2d at 801. In short, in order for the trial judge's finding of that factor in the case at bar to be proper, the preponderance of the evidence must show that the deceased was *in fact* physically infirm at the time of his death. More importantly, it must also show that, because of his infirmity, the deceased was targeted for the crime *or* that the infirmity was taken advantage of by defendant during the course of the crime.

The majority concludes that the evidence in this case so shows. I simply cannot agree. The record here does not support the majority's conclusion that the victim was *in fact* infirm because of his consumption of alcohol or for any other reason. The majority simply assumes that he was infirm because anyone who has a blood alcohol content of .29 must necessarily have been rendered infirm. Even assuming arguendo, however, that the victim was *in fact* physically infirm due to drunkenness at the time of his death at defendant's hands, the record bears no evidence at all that defendant either targeted the victim due to his drunken

state or took advantage of that state during the course of the deadly assault.

I turn first to the question of whether the State has made a sufficient showing of targeting in the case at bar. It most certainly has not. Where a defendant decides to commit a crime against a person based in part at least on the increased likelihood that the crime will be successfully completed because of the intended victim's tender or advanced age or mental or physical infirmity, the trial court may properly find this aggravating factor. *See State v. Thompson*, 318 N.C. 395, 348 S.E. 2d 798. An instructive example of just such a case is this Court's decision in *State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986), where we held that the aggravation of the defendant's sentence on the basis of the victim's age was proper. There, in a statement to police, the defendant stated in pertinent part that he was told prior to the offense that "the old man was real old and it would be easy to rob him." *Id.* at 694, 343 S.E. 2d at 846. In my opinion, this is precisely the type of evidence which is and should be required as a prerequisite for a trial judge's finding of this aggravating factor on the basis of targeting.

The facts of the case at bar, however, stand in stark contrast to those of the *Barts* case. In the case before us, defendant pled guilty to second-degree murder, and the bulk of the State's case in support of the plea is comprised of statements by defendant himself and by witnesses to the crime. There is not one whit of evidence in any of these several statements that the victim appeared drunk while in the bar, that defendant saw the victim take a drink on the night in question, or even that defendant in fact knew or was informed that the victim was in a drunken state. Moreover, a completely different reason for defendant's decision to rob and assault the victim is plain on the face of the record—namely, that it was obvious to defendant and his confederates that the victim had a considerable amount of money on his person that night. The majority's assertion that defendant and his confederates targeted the victim because of his drunkenness is wholly without support in the record and is, quite frankly, pure conjecture and speculation of the worst kind.

I turn next to the question of whether, alternatively, the State made a sufficient evidentiary showing that defendant and

his associates took advantage of the victim's infirmity during the commission of the offense. Once again, notwithstanding the majority's conclusion to the contrary, under our current case law, it plainly did not.

In nontargeting cases such as the one before us, this Court has held that, as a general rule, the aggravating factor in question may still be properly found only where the evidence demonstrates that the defendant took advantage of the victim's age or physical infirmity during the actual commission of the offense. *State v. Thompson*, 318 N.C. 395, 348 S.E. 2d 798. This rule is, of course, not without exceptions. In the context of age, for example, we held in *State v. Hines*, 314 N.C. 522, 526, 335 S.E. 2d 6, 8 (1985), that in cases "involving victims near the beginning or end of the age spectrum," the State's presentation of evidence of the victim's age and of the crime committed will likely suffice. We so held because of our belief that, because extremely young and extremely old persons are so clearly more vulnerable than most, those criminal defendants who commit crimes against them knowing of their relative age are unambiguously more blameworthy and, as a result, clearly deserving of more severe punishment. *Id.* at 525-26, 335 S.E. 2d at 8. In my opinion, the same would be true as to persons of obvious substantial mental or physical infirmity. Obviously, however, the case before us today is not such a case. Here, the State must *show* that defendant took advantage of the victim's physical infirmity. It has simply not done so.

It is true that, in cases such as this, the State may carry its burden under this approach by demonstrating that the victim's physical infirmity impeded his ability to flee, to fend off attack, or to otherwise avoid being victimized. *State v. Vaught*, 318 N.C. 480, 349 S.E. 2d 583. Significantly, however, the physical infirmity of the victim does not aggravate the crime if the victim is no more vulnerable to the crime in question than the "average person." *State v. Long*, 316 N.C. 60, 66, 340 S.E. 2d 392, 396. Where, because of the sudden and powerful nature of the attack, even a person of ordinary firmness could not have avoided the attack or suffered less from it, the victim's physical infirmity does not make the assault more blameworthy. *See State v. Gaynor*, 61 N.C. App. 128, 300 S.E. 2d 260 (1983); *State v. Rivers*, 64 N.C. App. 554, 307 S.E. 2d 588 (1983). In *Gaynor*, for example, the court conceded that the victim was very old, but reasoned as follows:

> Regardless of the age or strength of the victim, defendant's single shot would have killed her in the same way. For this reason we hold that the trial judge incorrectly found the victim's age to be an aggravating factor.

Gaynor, 61 N.C. App. at 131, 300 S.E. 2d at 262.

The record reveals that the victim, who had accepted defendant's invitation to accompany him in walking from the bar to a nearby store, had no forewarning of the assault on the night in question. Moreover, the victim was felled by the first blow and, once downed, was rained with kicks and ax handle blows to the neck and head for "what seemed like 10 minutes." In fact, according to the defendant's own statement, the assailants continued to kick and strike the victim until the blows "started sounding mushy like." The autopsy report attributed the victim's death to blunt trauma to the head. The victim in this case would have no doubt met the same gruesome fate had he been stone cold sober. Here, the victim, in a surprise and violent attack, was assaulted and beaten to death by three men, one of whom apparently crushed his skull with an ax handle. Notwithstanding the majority's conclusion to the contrary, a clearer head would have made no difference.

While I am appalled by the brutal and senseless nature of the violent acts which took the victim's life, in my opinion, the State has failed to meet its burden of proving by the preponderance of the evidence that the victim's consumption of alcohol either led to his being targeted for the crime or that it in any way made him actually more vulnerable to the violent surprise attack upon him. Notwithstanding the majority's conclusion to the contrary, the trial judge's order finding the aggravating factor that "the victim was physically infirm because he had an alcohol concentration of .29%" was error. Pursuant to this Court's decision in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), this cause should be remanded for a new sentencing hearing.

Chief Justice EXUM joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. WILLIE JAMES CANTY

No. 362A87

(Filed 3 February 1988)

1. **Criminal Law § 138.42— second degree murder—victim's earlier stabbing of defendant—failure to find as mitigating circumstance**

The trial court in a second degree murder case did not err in failing to find as a nonstatutory mitigating circumstance that the victim stabbed defendant forty-eight hours prior to the shooting of the victim where the court found the statutory mitigating circumstance that the relationship between the victim and defendant was otherwise extenuating, and it is reasonable to assume that the trial court considered the stabbing incident as a fact tending to show the extenuating relationship.

2. **Criminal Law § 138.32— second degree murder—mitigating circumstance of duress—finding not required**

Evidence in a second degree murder case that the victim had stabbed defendant forty-eight hours before defendant shot the victim did not require the trial court to find the statutory mitigating circumstance that defendant acted under duress, N.C.G.S. § 15A-1340.4(a)(2)b, where the trial court found the statutory mitigating circumstance that the relationship between the victim and defendant was otherwise extenuating; defendant presented no evidence that the victim displayed a weapon or initiated the confrontation at the time of the killing; and defendant testified that the victim was unaware of defendant's presence at the time he shot the victim.

3. **Criminal Law § 138.38— second degree murder—mitigating circumstance of strong provocation—finding not required**

Evidence that the victim had stabbed defendant, that the victim had threatened defendant's life and refused to talk with him about the stabbing incident after defendant got out of the hospital, and that defendant believed the victim was armed at the time defendant shot him did not require the trial court to find the mitigating circumstance that defendant acted under strong provocation when he shot the victim where more than forty-eight hours had elapsed between the stabbing and the shooting; more than eight hours had elapsed between the time of the second confrontation after defendant got out of the hospital and the time of the shooting; and the evidence showed that defendant not only initiated the final confrontation but that the victim was unaware of defendant's presence when defendant opened fire on him.

4. **Criminal Law § 138.14— second degree murder—aggravating circumstance outweighing mitigating circumstances—no abuse of discretion in conclusion**

The trial court did not abuse its discretion in concluding that the aggravating factor of prior crimes punishable by more than sixty days in jail outweighed the mitigating circumstances that defendant voluntarily surrendered to the jurisdiction of the court and that the relationship between the victim and defendant was otherwise extenuating and in imposing a sentence of life imprisonment on defendant for second degree murder.

State v. Canty

APPEAL of right by defendant pursuant to N.C.G.S. § 15A-1444(a1) and Rule 4(d) of the North Carolina Rules of Appellate Procedure, from a judgment imposing a sentence of life imprisonment entered by *Griffin, J.*, at the 26 January 1987 Criminal Session of Superior Court, NEW HANOVER County, upon a plea of guilty to murder in the second degree. Pursuant to Rule 30(d) of the Rules of Appellate Procedure, the case was submitted for decision before the Supreme Court on the written briefs.

Lacy H. Thornburg, Attorney General, by Michael Rivers Morgan, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant-appellant.

FRYE, Justice.

Defendant was charged with first degree murder and tendered a plea of guilty to second degree murder. After conducting a hearing to determine that there was a factual basis for the guilty plea, the trial judge accepted the plea. At the sentencing hearing the trial court determined that the aggravating factor outweighed the mitigating factors and sentenced defendant to life imprisonment. Defendant now contends that the trial court erred in failing to find two statutory mitigating factors and abused its discretion in finding that the aggravating factor outweighed the two mitigating factors and in imposing a life sentence. We hold that the trial court did not err and we find no abuse of discretion.

At the sentencing hearing the evidence for the State tended to show that the victim, Michael Walker, had stabbed defendant on 8 May 1986, inflicting injuries requiring defendant to be hospitalized for one day. On 10 May 1986 Walker was at a restaurant in Wilmington, North Carolina, when defendant came to the screened doorway of the restaurant and shot Walker, who was standing by the jukebox, unaware that defendant was at the door. Walker died later that night. The autopsy showed that all of the bullets entered the knee and thighs of Walker except one that when through his arm and into his heart. Defendant left town shortly after the shooting, and on 2 July 1986 he contacted the Wilmington police. Initially, defendant denied being in town at the time of the shooting, but when his alibi proved false he confessed to the killing.

The State presented evidence showing that defendant had previously been convicted of the following: receiving stolen property, feloniously receiving stolen property, felonious breaking or entering, felonious larceny, two separate assaults on a female, and escape.

According to defendant, on the night of 8 May 1986, as he was attempting to break up a fight between two children, Walker yelled at him, "what have you got to do with it?" Defendant told Walker: "Man, I ain't talking to you." Defendant then approached Ernest Ferrell, who was sitting on a nearby porch with Walker, and asked Ferrell, for some "change on the wine." Walker told defendant: "Old Man, get off of here. The man told you he didn't have no change on the wine." Defendant then turned to walk away and as he did so Walker stabbed him in the neck and back. Defendant was taken to a hospital where he received several stitches for the wounds, and remained in the hospital overnight.

Defendant testified that around noon, on 10 May 1986, he returned to the scene of the stabbing in order to talk to Walker about the stabbing incident. Defendant saw Walker standing on the street. As defendant approached him, Walker, holding an unopened knife with brass knuckles, laughed in defendant's face. Defendant walked away without talking to him.

Further testimony by defendant shows that on the evening of 10 May 1986, defendant was told that Walker was looking for him and that defendant knew that Walker always carried a sawed-off shotgun in his backpack. Later that evening defendant, armed with a .22 caliber rifle, again started looking for Walker, intending to "shoot him in a place that wouldn't kill him." Upon seeing Walker in the restaurant defendant shot him five times and then left. Subsequent to the shooting defendant went to South Carolina and then to New York. Two weeks later defendant returned to Wilmington, and on 2 July 1986 defendant surrendered to the police.

At the conclusion of the testimony, defendant asked the court to find two statutory mitigating factors: (1) the defendant acted under strong provocation, and (2) the relationship between the defendant and the victim was an extenuating circumstance. N.C.G.S. § 15A-1340.4(a)(2)i (1983). Defendant also submitted two nonstatutory mitigating factors: (1) the defendant voluntarily sur-

rendered to a law enforcement agent, and (2) the victim assaulted the defendant with a deadly weapon inflicting serious injury within forty-eight hours prior to the shooting. The court found two mitigating factors: The non-statutory mitigating factor that defendant voluntarily committed himself to the jurisdiction of the court and the statutory mitigating factor that the relationship between the defendant and the victim was extenuating.

The State submitted and the trial court found one aggravating factor: The defendant has a prior conviction or convictions for criminal offenses punishable by more than sixty days confinement. N.C.G.S. § 15A-1340.4(a)(1)o (1983). The court also found that the statutory aggravating factor of defendant's prior convictions outweighed the two mitigating factors found and sentenced defendant to life imprisonment, a sentence in excess of the presumptive term for second degree murder.

Defendant first contends that the trial court erred in failing to find as a mitigating factor that the victim stabbed defendant forty-eight hours prior to the shooting. Although this factor was submitted to the sentencing judge as a non-statutory mitigating factor, defendant contends in his brief on appeal that the evidence supports the statutory mitigating factor that defendant committed the offense under duress, which was insufficient to constitute a defense but significantly reduced his culpability. N.C.G.S. § 15A-1340.4(a)(2)b (1983). Because the trial court failed to find this factor in mitigation, defendant argues he is entitled to a new sentencing hearing.

Findings in aggravation and mitigation must be proved by a preponderance of the evidence. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). The State has the burden of proving that aggravating factors exist, whereas the defendant has the burden of proving that mitigating factors are present. *State v. Parker*, 315 N.C. 249, 337 S.E. 2d 497 (1985). When considering whether non-statutory mitigating factors exist, the trial judge is given wide discretion that will not be upset absent a showing of abuse of discretion. *State v. Cameron*, 314 N.C. 516, 335 S.E. 2d 9 (1985).

Although the trial court must consider all statutory aggravating and mitigating factors that are supported by the evidence, the judge weighs the credibility of the evidence and determines by the preponderance of the evidence whether such factors exist.

State v. Jones, 314 N.C. 644, 336 S.E. 2d 385 (1985). Also, the trial judge has wide latitude in determining the existence of aggravating and mitigating factors, for it is "he who observes the demeanor of the witnesses and hears the testimony." *State v. Ahearn*, 307 N.C. 584, 596, 300 S.E. 2d 689, 697. To show that the trial court erred in failing to find a mitigating factor, the evidence must show conclusively that this mitigating factor exists, i.e., no other reasonable inferences can be drawn from the evidence. *State v. Michael*, 311 N.C. 214, 316 S.E. 2d 276 (1984).

[1] In the case *sub judice*, at the sentencing hearing, defendant submitted the non-statutory mitigating factor that the victim stabbed him forty-eight hours prior to the shooting. If viewed as a non-statutory mitigating factor, as submitted at the sentencing hearing, the determination of whether this factor exists was within the trial court's discretion. *State v. Spears*, 314 N.C. 319, 333 S.E. 2d 242 (1985). Moreover, "[a] ruling committed to a trial judge's discretion will be upset only upon a showing that it could not have been the result of a reasoned decision." *State v. Cameron*, 314 N.C. 516, 519, 335 S.E. 2d 9, 11. Defendant has failed to make such a showing, since it is reasonable to assume that the trial court considered the stabbing incident, occurring forty-eight hours prior to the shooting, as a fact tending to show an extenuating relationship between the victim and the defendant. A sentencing judge need not make a specific finding of every detailed fact supporting a mitigating circumstance.

[2] Considering defendant's argument on appeal that this factor should have been found as the statutory mitigating factor of duress, we note that defendant has the burden of proving that the evidence in support of any statutory mitigating factor is substantial, uncontradicted and manifestly credible. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451. Defendant testified that the victim had attacked him in an unprovoked incident, and there was uncontradicted evidence showing the antagonistic relationship between the victim and defendant. However, this evidence tends to support, as indeed the sentencing judge found, the statutory mitigating factor of N.C.G.S. § 15A-1340.4(a)(2)i, that the relationship between the victim and defendant was otherwise extenuating. Defendant presented no evidence that at the time of the killing the victim either displayed a weapon or had initiated the confrontation. *See State v. Bullard*, 79 N.C. App. 440, 339 S.E. 2d 664

(1986) (no evidence of duress when no evidence that victim was armed or that victim initiated the confrontation). Further, defendant testified that when he killed the victim, the victim was leaning over a jukebox in a restaurant, unaware of defendant's presence. Under these facts the evidence of duress was not so substantial and manifestly credible as to require the sentencing judge to find this statutory mitigating factor. N.C.G.S. § 15A-1340.4(a)(2)b (1983).

[3] Defendant next argues that the sentencing judge erred in failing to find the statutory mitigating factor, N.C.G.S. § 15A-1340.4(a)(2)i, that defendant acted under strong provocation when he killed Walker. Defendant argues that the following "undisputed evidence" supports this mitigating factor: That the victim viciously stabbed defendant in an unprovoked incident, that the victim coerced and threatened defendant after he got out of the hospital, and that the victim refused to peacefully discuss the earlier incident just hours before defendant killed him. Defendant contends the above evidence shows that he had no reasonable alternative except to commit the offense.

The legislature has provided this statutory mitigating factor to reduce a defendant's culpability when circumstances exist that "morally shift part of the fault for a crime from the criminal to the victim." *State v. Martin*, 68 N.C. App. 272, 276, 314 S.E. 2d 805, 807 (1984). Once a defendant offers evidence to support a claim of a mitigating factor of strong provocation, the trial court determines what facts are established by the preponderance of the evidence and whether these facts support a conclusion that this mitigating factor exists. *State v. Clark*, 314 N.C. 638, 336 S.E. 2d 83 (1985). A court is compelled to find a mitigating factor 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." *State v. Jones*, 309 N.C. 214, 220, 306 S.E. 2d 451, 455. This mitigating factor of strong provocation was found when the victim threatened the defendant with a loaded pistol just moments before the defendant killed the victim. *State v. Taylor*, 309 N.C. 570, 308 S.E. 2d 302 (1983). However, strong provocation was not found when defendant killed the victim within twenty minutes of an altercation with the victim, an altercation initiated by the victim. *State v. Highsmith*, 74 N.C. App. 96, 327 S.E. 2d 628, *disc. rev. denied*, 314 N.C. 119, 332 S.E. 2d 486

(1985). In *Highsmith*, the Court of Appeals held that "[w]hile the original altercation evidenced a threat or challenge by the victim to the defendant, . . . the ensuing events of defendant proceeding to his residence six blocks away, obtaining a shotgun and shells, and then returning to the vicinity of the original fight manifest actions more consistent with a prior determination to seek out a confrontation rather than a state of passion without time to cool placing defendant beyond control of his reason." *Id.* at 100-101, 327 S.E. 2d at 631.

In the case *sub judice*, defendant argues that he had no alternative but to shoot the victim because defendant was acting under strong provocation caused by the victim. Defendant contends he was strongly provoked since the victim had stabbed him two days previously, had threatened his life, and had refused to talk to him about the stabbing incident. However, defendant's own testimony reveals that at least forty-eight hours had elapsed between the time of the initial altercation in which the victim stabbed defendant and the time of the shooting of the victim by defendant. Accepting, *arguendo*, defendant's premise that the refusal of the victim to talk to him can be called a confrontation, nevertheless more than eight hours elapsed between the time of this second confrontation and the time of the actual shooting. Admittedly, the evidence is uncontradicted that defendant believed the victim was armed prior to the time of the shooting; however, the evidence also shows that defendant not only initiated this final confrontation but that the victim was totally unaware of defendant's presence in the restaurant when defendant opened fire on him. Under these circumstances we hold that the trial court did not err in failing to find the statutory mitigating factor of strong provocation.

[4] In his final assignment of error defendant contends that the court abused its discretion in concluding that the aggravating factor outweighed the mitigating factors and in imposing a life sentence, which is greater than the presumptive term of fifteen years for second degree murder. Defendant essentially argues there is no rational basis for giving greater weight to the aggravating factor that defendant had previously committed crimes punishable by more than sixty days in jail than to the mitigating factors that defendant voluntarily surrendered to the jurisdiction of the court and that the relationship between the victim and

defendant was otherwise extenuating. Defendant argues that greater weight should have been given to the mitigating factors.

The balance struck by a trial court when weighing mitigating and aggravating factors will not be disturbed if there is support in the record for the trial court's determination. *See State v. Watson*, 311 N.C. 252, 316 S.E. 2d 293 (1984). The discretionary task of a trial court to weigh factors in mitigation and aggravation is not merely an application of simple mathematics, *State v. Melton*, 307 N.C. 370, 380, 298 S.E. 2d 673, 680 (1983); thus, the fact that there are more mitigating factors than aggravating factors is not determinative. *State v. Penley*, 318 N.C. 30, 347 S.E. 2d 783 (1986). Once a trial court has found, by the preponderance of the evidence, that aggravating factors outweigh mitigating factors, the trial court has the discretion not only to increase the sentence above the presumptive term, but also the discretion to determine to what extent the sentence will be increased. *State v. Melton*, 307 N.C. 370, 380, 298 S.E. 2d 673, 680. Moreover, a discretionary decision of a trial court will be reversed only if it is "manifestly unsupported by reason." *State v. Brown*, 314 N.C. 588, 595, 336 S.E. 2d 388, 392 (1985) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E. 2d 829, 833 (1985)).

Defendant makes various arguments for the purpose of showing that the sentencing judge should have given greater weight to the mitigating factors found. He then contends the aggravating factor was minor in comparison to the mitigating factors. Defendant essentially argues that less weight should be given to the statutory aggravating factor that defendant has convictions for criminal offenses punishable by more than sixty days confinement since most of those convictions were for property crimes, not crimes of violence. First, as defendant concedes and the record shows, defendant had twice been convicted of assault on a female, clearly a crime involving violence. Further, defendant cites no authority and indeed we know of none that requires a sentencing judge to give less weight to this aggravating factor when the prior crimes are property crimes. The statute does not distinguish between crimes of violence and property crimes. *See* N.C.G.S. § 15A-1340.4(a)(1)o (1983). Here, the sentencing judge determined, in his discretion, that the aggravating factor found outweighed the mitigating factors found and sentenced defendant to the maximum term permitted by law. We are not prepared to

hold that these discretionary decisions were manifestly unsupported by reason. Accordingly, we find no abuse of discretion.

Affirmed.

STATE OF NORTH CAROLINA v. RANDOLPH RAEL

No. 237A87

(Filed 3 February 1988)

1. **Witnesses § 1.2— four-year-old sex offense victim—competent witness**

The trial court did not abuse its discretion in a prosecution for crime against nature, taking indecent liberties with a child, and first degree sexual offense by ruling that the victim was competent to testify where, during the *voir dire*, the victim correctly stated his age and date of birth and the name of the school he had attended for a short period, indicated his ability to distinguish truthful and untruthful statements and his knowledge that he could be put in jail if he lied during his testimony, and promised to tell the truth in his testimony during both direct and cross-examination. Furthermore, the trial court did not err by failing to make findings of fact and more detailed conclusions concerning the child's competency; *State v. Fearing*, 315 N.C. 167, is not authority for the proposition that a defendant is entitled to a new trial if the court fails to make formal findings when exercising its discretion in determining competency to testify.

2. **Criminal Law § 34.4— sexual offense and indecent liberties with a child—magazines and videotape—admissible**

The trial court did not err in a prosecution for crime against nature, taking indecent liberties with a child, and first degree sexual offense by admitting into evidence a videotape and magazines found in defendant's home where the tape and magazines were relevant to corroborate the victim's testimony that defendant had shown him such materials at the time defendant committed the crimes for which he was on trial. The exhibits and testimony were therefore relevant to a fact in issue other than the character of the accused. N.C.G.S. § 8C-1, Rule 404(b), N.C.G.S. § 8C-1, Rule 401.

APPEAL by the defendant from judgments entered by *Strickland, J.*, at the 5 January 1987 Criminal Session of Superior Court, ONSLOW County. Heard in the Supreme Court on 10 December 1987.

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

Robin E. Hudson for the defendant appellant.

MITCHELL, Justice.

The defendant was tried upon proper indictments for crime against nature, taking indecent liberties with a child, and first degree sexual offense. The jury found the defendant guilty of all offenses as charged. The trial court entered judgments sentencing the defendant to concurrent sentences of life imprisonment for first degree sexual offense, a term of three years for crime against nature and a term of three years for taking indecent liberties with a child. The defendant appealed his conviction for first degree sexual offense and the resulting life sentence to this Court as a matter of right under N.C.G.S. § 7A-27(a). On 13 May 1987, this Court allowed the defendant's motion to bypass the Court of Appeals on his appeal of his convictions and sentences for taking indecent liberties with a child and crime against nature.

The State's evidence at trial tended to show, *inter alia*, that the victim was a male child who reached his fourth birthday in November 1986. In July 1986, the victim lived in the home of his maternal grandparents with his mother and sister. The defendant is the victim's father. The defendant and the child's mother had separated in May, and the defendant did not live with the family.

On 4 July 1986, the victim spent the day at the defendant's mobile home pursuant to a visitation arrangement provided for in a separation agreement between the victim's mother and the defendant. The testimony of the victim tended to show that, during that visit with the defendant, the defendant put him in the shower and put vaseline on his "pooty." "Blood came out and it hurt." During the victim's visit with the defendant, the defendant also showed him movies and magazines containing pictures of naked men and women. The victim testified that the defendant also put his "peepee" in the victim's mouth. The defendant also put the victim's "peepee" in the defendant's mouth. The victim testified that a man, a woman and a boy were present in the defendant's home at the times when the defendant was "playing bad games" on the victim.

The victim's mother testified that on 5 July 1986, she was changing the victim's clothes when he put his hands on his penis. She asked him why he was doing that, and the victim answered that his daddy had taught him to do so and that they had played with each other's "peepees." The victim told her that he and the

defendant had put their "peepees" in each other's mouths and looked at movies and magazine pictures of naked men and women. Others were present when the victim described such occurrences to his mother.

The defendant testified, *inter alia*, that his wife had called him shortly after they had separated and said that he would not have to pay child support if he would agree in writing to have nothing to do with the victim. She would not let the defendant see the child from the time they separated in May until their separation agreement giving the defendant visitation rights was signed in June. The defendant testified that, when his wife brought the victim to his home for visitation on 4 July 1986, she had argued with the defendant about a child support payment and accused him of not paying her. He told her that he had given her the check earlier in compliance with their separation agreement.

The defendant testified that he did not have the victim watch any pornographic movies or show him any pornographic magazines on 4 July 1986 or any other day. The defendant denied all of the acts forming the basis of the charges against him. He testified that on 4 July 1986, he and the victim had watched television, made a spaceship and played with some of the victim's toys. Thereafter, they went to a store where the victim picked out some video tapes to watch and then returned home.

The defendant testified that his mother-in-law called him on 5 July 1986 and quarreled with him about his payments of child support. During the conversation, his mother-in-law became angry with him and accused him of not paying child support. She then said that she had "other ways of dealing with him."

Lance Corporal Daniel Renos, United States Marine Corps, testified that he was in the defendant's home on 4 July 1986. He arrived between 7:00 p.m. and 8:00 p.m. and found the home very neat and clean. He did not observe any pornography or any other people present. That evening Renos and the defendant watched television and drank beer. Renos became so intoxicated that the defendant would not let him drive, and Renos spent the night on a sofa in the home.

Other evidence and testimony introduced at trial are discussed hereinafter where pertinent.

[1] The defendant first assigns as error the action of the trial court in ruling that the victim was competent to testify. The defendant's argument is that from all appearances, the child was not competent to testify. Even if he was, however, the defendant maintains that the voir dire concerning competency conducted by the trial court was inadequate, and that the trial court's ruling was not based on adequate findings or supported by the evidence. The defendant argues that, as a result, the trial court's determination of competency could not have been based on a reasoned exercise of discretion.

The victim was called as the State's first witness at trial. He was unable at first to say what a "story" or "fib" was, but then answered that "a fib is a lie and it's not the truth." The victim was asked to identify certain colors of clothing. When the colors were properly identified by the prosecutor, the child answered that the prosecutor's statement was true. When the prosecutor misidentified the colors or called them by the wrong name, the child would respond that the prosecutor's statement was false.

The prosecutor then began to address substantive questions to the child victim. The defendant objected, and the trial court excused the jury and conducted a voir dire to determine the child's competency to testify. The State having no further questions at that time concerning the competency of the child, counsel for the defendant cross-examined him. During this examination, the child correctly identified his father, indicated that he was four years old and gave his birth date. The child also described his house and a school he had attended briefly. He could not explain the difference between right and wrong in an ethical or theological sense. However, the child testified that he knew it was wrong to tell a story because "I just know it" and that he would be put in jail if he lied. The child promised to tell the truth with regard to everything he said during his testimony.

Having observed the child's demeanor and his testimony during the voir dire, the trial court ruled that: "The question of competency of a child to testify being a matter within the judge's discretion, it is the ruling of this Court that this child is competent to testify." Thereafter, the child was permitted to testify fully concerning the events of 4 July 1986.

The general rule is that every person is competent to testify unless determined to be disqualified by the Rules of Evidence. *State v. DeLeonardo*, 315 N.C. 762, 766, 340 S.E. 2d 350, 354 (1986). Rule 601(b) provides that:

> A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

N.C.G.S. § 8C-1, Rule 601(b) (1986).

We have held that: "There is no age below which one is incompetent, as a matter of law, to testify." *State v. Turner*, 268 N.C. 225, 230, 150 S.E. 2d 406, 410 (1966). The issue of the competency of a witness to testify rests in the sound discretion of the trial court based upon its observation of the witness. *State v. Hicks*, 319 N.C. 84, 89, 352 S.E. 2d 424, 426 (1987). Absent a showing that a trial court's ruling as to competency could not have been the result of a reasoned decision, it will not be disturbed on appeal. *Id.*

During the voir dire in the present case, the victim correctly stated his age and date of birth and the name of the school he had attended for a short period. He indicated his ability to distinguish truthful and untruthful statements and his knowledge that he could be put in jail if he lied during his testimony. During both direct and cross-examination, he promised to tell the truth in his testimony in the present case. Having observed the child's demeanor during all of such testimony, the trial court concluded that he was competent to testify. We cannot say on the record before us that the trial court's exercise of its discretion in ruling that the child victim was competent to testify could not have been the result of a reasoned decision. *See generally State v. Hicks*, 319 N.C. 84, 352 S.E. 2d 424.

The defendant further argues in support of this assignment that, even if the evidence supported the trial court's ruling that the child victim was competent to testify, the trial court committed reversible error by failing to make findings of fact and more detailed conclusions concerning the child's competency. In support

of this argument, the defendant relies upon *State v. Fearing*, 315 N.C. 167, 337 S.E. 2d 551 (1985). The defendant's reliance in this regard is misplaced, as our primary concern in *Fearing* was that the trial court exercise its independent discretion after observing the witness and not a concern regarding the form in which the trial court entered its ruling on competency. The trial court's ruling in the present case in no way ran afoul of our decision in *Fearing*. *Fearing* is not authority for the proposition that a defendant is entitled to a new trial if the trial court fails to make formal findings when exercising its discretion in determining that a witness is competent to testify. This assignment is without merit and is overruled.

[2] The defendant also assigns as error the admission into evidence of video tapes and magazines found in his home during a search conducted with his consent. The defendant argues that this evidence was inadmissible under any of the North Carolina Rules of Evidence.

The victim testified that, on the day the defendant committed the acts for which he was convicted in the present case, the defendant also showed him magazines and movies in which the people were naked and the victim could see their "peepees." Detective Sergeant Sammy Martin of the Jacksonville Police Department testified that he searched the defendant's residence, with the consent of the defendant on 8 July 1986. Over the defendant's objection, Detective Martin was permitted to testify that during this search, he found and seized a "playboy playmate workout" video tape and several magazines, including one which he described as "a homosexual magazine." Detective Martin was then permitted, over the defendant's objection, to identify several of the State's exhibits in chronological order as follows:

> Three, is the tape. Number four, is a Num's Magazine, August 1986 Edition. Number five is a club magazine, August 1986. Number six, is entitled, Big Girls, Poster Size Photos, summer 1984 Edition. Seven is a Hustler Humor magazine, November 1981 edition. Number eight is a Hustler Humor Magazine, May 1986 Edition. Number nine is Hustler Humor magazine, March 1981 Edition.

Detective Martin identified these exhibits as the items he had seized from the defendant's home and testified that they had not

been altered or modified. The exhibits were then admitted into evidence.

The defendant argues that the magazines and video tape and Detective Martin's testimony concerning them were rendered inadmissible by Rule 404(b) of the North Carolina Rules of Evidence, because they tended to prove only the character of the defendant in order to show that he acted in conformity therewith. It is true, of course, that evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C.G.S. § 8C-1, Rule 404(b) (1986). It is equally clear, however, that evidence of other crimes or acts by a defendant is admissible so long as it is *relevant to any fact or issue* other than the character of the defendant. *State v. Weaver*, 318 N.C. 400, 403, 348 S.E. 2d 791, 793 (1986).

Under Rule 401, " 'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1986). Here, the video tape and magazines and Detective Martin's testimony concerning them were relevant to corroborate the victim's testimony that the defendant had shown him such materials at the time the defendant committed the crimes for which he was on trial. *State v. Wood*, 311 N.C. 739, 744, 319 S.E. 2d 247, 250 (1984). Since the exhibits and testimony were relevant to a fact or issue other than the character of the accused, Rule 404(b) did not require that they be excluded from the evidence at trial. *State v. Weaver*, 318 N.C. at 403, 348 S.E. 2d at 793. The trial court did not err in admitting the materials and Detective Martin's testimony concerning them, given the facts of this case. This assignment of error is without merit and is overruled.

No error.

STATE OF NORTH CAROLINA v. ALVA PATRICK BROWNING

No. 215A87

(Filed 3 February 1988)

1. **Bills of Discovery § 6— failure to disclose composite—exclusion from evidence rather than mistrial as sanction**

The trial court did not abuse its discretion in refusing to allow a composite to be introduced into evidence as a sanction for the State's failure to disclose the composite pursuant to defendant's discovery motion rather than allowing defendant's motion for a mistrial when a reference was made to the composite.

2. **Criminal Law §§ 50.2, 86.8— testimony concerning composite—no improper lay opinion—no improper opinion about witness credibility**

An officer's testimony that after viewing a composite he formed an opinion that it was a very similar likeness of defendant and that he then sought out the two child victims and obtained from them a positive identification of defendant as the person who assaulted them did not constitute an improper expression of a lay opinion in violation of Rule of Evidence 701. Nor did such testimony constitute an impermissible opinion about the credibility of the victim who helped prepare the composite since the victim did not testify as to her part in the preparation of the composite or whether it resembled defendant.

3. **Criminal Law § 134.4— first degree sexual offense—mandatory life sentence—youthful offender statute inapplicable**

The committed youthful offender statute, N.C.G.S. Ch. 148, Art. 3B, does not apply to a conviction or plea of guilty to a first degree sexual offense for which the punishment is mandatory life imprisonment.

APPEAL by defendant from judgments sentencing defendant to concurrent terms of life imprisonment for each of two convictions of sexual offense in the first degree and nine years for each of two offenses of kidnapping in the second degree, said judgments imposed by *Rousseau, J.*, at the 1 December 1986 session of Superior Court, FORSYTH County. Heard in the Supreme Court 7 December 1987.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant.

MARTIN, Justice.

Defendant contends that the trial judge erred by admitting incompetent evidence and by failing to determine whether defendant should be sentenced as a committed youthful offender. We find no prejudicial error in defendant's trial and sentencing.

The state's evidence showed that on 8 May 1986 two young girls, the victims in this case, were at Hanes Park in Winston-Salem with their mother. While their mother practiced softball, the victims, eight and five years old, played on the swings. A man, who identified himself to the children as "Patrick," pushed them on the swings and offered to take them to a merry-go-round. He held their hands and led them away and would not release them when they pulled back. He took them under a bridge and forced each child to perform fellatio upon him. The girls ran away and told their mother what had happened. She promptly reported the incident to the police. When Officer Neal Blue arrived, the children told the same story to him and led him to the tunnel under the bridge where the assaults occurred. There Officer Blue found footprints. The girls were taken to the hospital and then to the police station where they assisted in the preparation of a composite likeness of defendant. Later in the month the girls were attending Mayfest (a street fair) in Winston-Salem with the witness Kendra Wilborn. The eight-year-old child saw the defendant there and told Wilborn, "There is the man." Officers were called and Officer Jenkins took defendant to the police station where he was questioned and released. Thereafter Officer Jenkins saw the composite and questioned the girls further about the identity of the perpetrator. Both children made a positive identification of defendant.

Defendant's evidence showed that at the time of the alleged offenses he was living with his father and working in his aunt's restaurant. Defendant's mother abandoned the family in 1980. Defendant's father is a paranoid schizophrenic and is unable to give him any direction. Defendant's aunt, Wanda Ball, testified that defendant had had a "rough time" since his mother left him. Defendant's father testified that defendant was at home with him during the early evening hours of 8 May 1986. Defendant testified that he did not go to Hanes Park on 8 May and did not know anything about the alleged offenses. He said that he was at home on

8 May until after 9:00 p.m. Further, defendant testified that he had never seen the victims until Mayfest. Defendant was sixteen years old on the day in question.

Defendant contends that the trial court erred in allowing Officer Jenkins to testify concerning a composite likeness of the defendant. The older victim assisted in the preparation of the composite. At trial the following took place during the testimony of Mike Jenkins, a Winston-Salem police officer, as to the events at Mayfest on 17 May:

> A. I was approached by several black males and females and children.
>
> Q. What did you do at that time?
>
> A. One of the ladies who I later identified as Shewanna Wilborn stated that two children that was with her—[the victims]—
>
> . . . .
>
> A. —had been sexually assaulted. And I said well, what has this got to do with Mayfest? And she said that this white male that assaulted the children were [sic] at the Mayfest. I asked them which one? And they pointed out—
>
> . . . .
>
> A. —pointed out the defendant, Mr. Patrick Browning here.
>
> . . . .
>
> A. . . . And so I went to the defendant over here, Mr. Browning, and asked for identification. He said he didn't have any. I asked him his name and address and he stated Alva Patrick Browning, I believe, 409 Westdale. I'm not sure of the address. He asked me then what it was all about. And I advised him that all I knew was concerning some sexual assault case.
>
> . . . .
>
> A. So we went to the command post on 4th Street, School of the Arts Building. I asked him to go with me and

he, you know, advised he would. Went at this time to the basement, communications post and I attempted to call the clerk's office in record division in attempt to find these warrants that the—Mrs. Wilburn had said was on this gentleman. And the Clerk's office said there were no warrants and records division said no warrants either.

So, Mr. Patrick left at that time. . . .

. . . .

Q. After that, where did you go?

A. I went to the Public Safety Center in an attempt to find this complaint report that was made on this earlier. . . .

. . . .

Q. While you were there, did you see a composite?

A. Yes, I did, in records division.

Q. And was that composite made in connection with an earlier report?

MR. GRAHAM: Objection.

. . . .

Q. Well, I'll show you this piece of paper that I mark—

MR. GRAHAM: Motion for mistrial, Your Honor. That's one of the things he should have given me a long time ago.

During a colloquy in the absence of the jury, the trial judge ruled that the composite was not admissible as evidence but that the officer could testify what he did as a result of viewing it. Thereafter, over defendant's objections, the witness testified before the jury that after looking at the composite he formed an opinion that it was a very similar likeness of the defendant. He thereupon contacted his supervisor and then located the two children and asked them whether the man that they had earlier pointed out to him at Mayfest was the person who had assaulted them. Both children answered yes and also identified him by name, Patrick.

[1] Defendant first argues that his motion for a mistrial should have been allowed when the state first made reference to the composite because the state had failed to disclose the composite upon defendant's motion for discovery. On 19 June 1986 defendant filed a motion for an order requiring discovery pursuant to N.C.G.S. § 15A-902(a), requesting "any . . . papers, documents . . . or other tangible objects." Defendant failed to pursue his motion until the case was called for trial on 2 December 1986. At the hearing of the discovery motion, the composite was not disclosed by the state. As previously noted, when the issue of the composite was raised later at trial, the trial judge would not allow it to be introduced into evidence. This form of sanction for failing to comply with discovery is expressly authorized by N.C.G.S. § 15A-910(3). The choice of sanction, if any, rests within the discretion of the trial court. *State v. Thomas*, 291 N.C. 687, 231 S.E. 2d 585 (1977). Defendant has failed to demonstrate any abuse of discretion by the trial judge, *State v. McCoy*, 303 N.C. 1, 277 S.E. 2d 515 (1981); therefore we reject this argument.

Defendant further reasons that the testimony of the witness Jenkins, set forth above, was inadmissible as violating the sanctions order of the trial judge and because it was improper lay opinion testimony. We disagree. The testimony of the witness Jenkins was precisely within the ruling of the trial judge. In the absence of the jury, the trial judge told counsel:

> Well, I'll let you ask him if he saw a composite picture and what he did about it. As I understand, your statement was he saw a composite and saw it looked like this defendant and then called for the children's mother to bring the children down and identify them.
>
> MR. LYLE: Is that what happened, Officer Jenkins?
>
> THE WITNESS: Yes, sir.

The testimony of Jenkins did not violate the trial judge's ruling.

[2] Defendant further argues that the challenged testimony constituted an improper expression of lay opinion in violation of Rule 701 of the North Carolina Rules of Evidence. Rule 701 permits opinion testimony by a lay witness where the opinion is (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a

fact in issue. Here Jenkins' opinion was based upon his own perception by looking at the composite. The testimony was helpful to the jury in understanding his testimony: it showed why, after viewing the composite, he sought out the two children again and obtained from them a positive identification of defendant as the person who assaulted them. This was in turn helpful in determining the issue of whether defendant was the perpetrator of the crimes.

Defendant's argument that the testimony constituted an impermissible opinion about the older victim's credibility as a witness misses the mark. Here we do not have a witness testifying that the victim's testimony is consistent, or believable, or not fantasy. *See State v. Aguallo*, 318 N.C. 590, 350 S.E. 2d 76 (1986); *State v. Ramey*, 318 N.C. 457, 349 S.E. 2d 566 (1986); *State v. Bowman*, 84 N.C. App. 238, 352 S.E. 2d 437 (1987). The child witness did not testify as to her part in the preparation of the composite or whether it resembled defendant.

Moreover, assuming arguendo that the opinion testimony was error, there has been no showing by defendant that a different result would have been reached if the testimony had been excluded. N.C.G.S. § 15A-1443(a) (1983). Defendant does not challenge the competency of the eight-year-old child as a witness. The state's evidence identifying defendant as the perpetrator of the crimes left little to be desired. The witness described the perpetrator as white, tall, wearing blue jeans, T-shirt, no socks, and white shoes; he had curly blond hair and his face looked red; and he said his name was Patrick. She was with the person for a period of several minutes, at the swings and during the alleged assaults. This gave her ample time to observe him. Later in the month of May she recognized defendant at the crowded Mayfest street celebration, remembered his name, and pointed him out to Kendra Wilborn, who notified the police. Later that same day at Mayfest she identified to Officer Jenkins the defendant as the person who assaulted her. Ultimately, at trial some six months later, she unequivocally identified defendant as the perpetrator. Further, she described in graphic terms the events leading to the crimes as well as the assaults themselves. Officer Jenkins' challenged opinion added little, if anything, to the credibility of the child witness. We find no prejudicial error in defendant's trial and conviction.

[3] Last, defendant urges that he is entitled to a new sentencing hearing to determine whether he should be sentenced as a committed youthful offender. He argues that *State v. Niccum*, 293 N.C. 276, 238 S.E. 2d 141 (1977), is not dispositive of this issue. In *Niccum*, a murder case, this Court held that the committed youthful offender statute did not apply to convictions or pleas of guilty of crimes for which a life sentence is the mandatory punishment. Defendant reasons that because this is a sex offense case, *Niccum* does not apply. However, this Court has held in *State v. Ziglar*, 308 N.C. 747, 304 S.E. 2d 206 (1983), and *State v. Mathis*, 293 N.C. 660, 239 S.E. 2d 245 (1977), that the holding of *Niccum* applies to first degree rape cases.

We now hold that article 3B of chapter 148 of the General Statutes of North Carolina does not apply to a conviction or plea of guilty of a sexual offense in the first degree, N.C.G.S. § 14-27.4 (1986), for which the punishment is mandatory life imprisonment. The rationale expressed by Chief Justice Sharp in *Niccum* has been a part of our law for more than ten years without modification by the General Assembly, although the legislature has amended the committed youthful offender statute in other respects. The rationale of *Niccum* is equally applicable to the case before us. The trial judge properly refused to consider whether defendant should be sentenced as a committed youthful offender.

Defendant received a fair trial, free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. WILLIE LEE SQUIRE

No. 530A86

(Filed 3 February 1988)

1. Criminal Law § 85.1— character evidence—must be tailored to particular trait relevant to case

Under N.C.G.S. § 8C-1, Rule 404(a)(1), an accused may no longer offer evidence of undifferentiated good character; rather, he must tailor the evidence to a particular trait relevant to an issue in the case.

2. Criminal Law § 85.1— character evidence—general character trait admissible in context of proceedings

The trial court erred in a prosecution for first degree murder in which defendant claimed self-defense by precluding defendant from offering evidence of character traits other than peacefulness and truthfulness. Although an accused must now tailor his character evidence to a pertinent, *i.e.* relevant, trait, the trait may be general in nature provided that it is relevant in the context of the crime charged. N.C.G.S. § 8C-1, Rule 404(a)(1).

3. Criminal Law § 85.1— exclusion of character traits other than peacefulness and truthfulness—prejudicial

The trial court's erroneous exclusion of character traits other than peacefulness and truthfulness in a prosecution for first degree murder was prejudicial where the case was close on the issue of whether the homicide was committed in self-defense, defendant demonstrated that the victim was a violent person who had directed his anger toward him in the past, and defendant also offered a plausible, corroborated explanation for his fear at the time he shot the victim.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by *Allsbrook, J.*, at the 5 May 1986 Criminal Session of Superior Court, NORTHAMPTON County, upon defendant's conviction of first degree murder. Heard in the Supreme Court on 15 October 1987.

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

Glover & Petersen, by James R. Glover, for defendant-appellant.

EXUM, Chief Justice.

The question presented by this appeal is whether the trial court committed reversible error when it precluded defendant from offering evidence of character traits other than his traits for peacefulness and truthfulness. We hold that the trial court's decision to prohibit defendant from introducing evidence of other relevant character traits constituted prejudicial error.

I.

Both the state's and defendant's evidence tended to show that on 29 June 1985 James Ingram died as the result of a single gunshot wound from a .38 caliber pistol fired by defendant, Willie Lee Squire. The shooting took place around 8 p.m. at a softball

field in Northampton County known as Smith Field. About one hundred people were present at the ball field at the time of the shooting, many of whom had known both the victim and defendant all of their lives. Defendant's brother reported the shooting to the Northampton County Sheriff's Department. Defendant turned over the gun used in the incident and was taken to the Sheriff's Office in Jackson, North Carolina, where he gave a statement.

The dispute at trial concerned the circumstances that led to the shooting and the defendant's mental state when he fired the revolver. In particular, the trial related to defendant's claim that he shot in self-defense, out of fear that the victim was about to cause him serious harm.

The state's evidence tended to show that on the afternoon of his death the victim played two games of softball at Smith Field for a team composed of men from Gaston, North Carolina, against a team from Weldon, North Carolina. These games ended at approximately 6:30 after which women's teams from Gaston and Weldon played a doubleheader. After the men's games ended, some of the players gathered near a grill where food was being prepared. The victim was standing near the grill when a car in which defendant was a back-seat passenger drove up. Defendant's brothers, Josephus and Nathaniel, were in the front. According to Reginald Butcher and Larry Davis, who testified that they were with the victim at the grill, defendant yelled, "James come here." The victim walked to the car, and rested his hands on top. Butcher testified that defendant and the victim argued. After about thirty seconds, Butcher heard a shot and looked over to the car. The victim was grabbing his heart and saying "I'm shot."

Dazelle Williams, an assistant coach on the Weldon team, testified that she saw the victim approach defendant's car and then lay both hands on top of it. Ten to twenty seconds later the victim turned to his right and took one hand off the car. He put his hand back on the car. According to Williams, the victim looked as if he were about to walk away. A shot rang out, and the victim staggered away from the car.

Linwood Squire, Jr., a relative of both the victim and defendant, testified that two or three months before the date of the shooting he rode with defendant and Nathaniel Squire. According to Linwood Squire, defendant mentioned the victim and said,

"Cous, I know James is your first cousin, but he say anything to me, I'm going to kill the bitch."

Defendant's evidence tended to show that defendant was a staff sergeant in the United States Army. He served tours of duty in Italy, Germany and the United States. On the date of the shooting he was assigned to Fort Belvoir, Virginia. He was the Assistant Communications Chief for the 902nd Engineering Company. He received a number of awards and commendations during his military service, including three good conduct medals and the Army Commendation Medal.

Defendant put on evidence concerning the victim's character, which tended to show that the victim had a violent and aggressive nature. Katie Moody, the mother of two children by the victim, described several occasions when he assaulted her. Police records from Northampton and Halifax counties indicated that the victim was convicted of assault on Katie Moody three times. Defendant testified that in November 1984, the victim put a knife to defendant's throat and then cut him on the back of the neck when he discovered defendant and Moody riding in defendant's car. According to defendant, the victim issued repeated warnings to defendant to stay away from Moody. Gregory Barnes, a friend of Moody's, testified concerning three occasions when the victim threatened him with deadly weapons after finding him with Moody.

Defendant testified concerning the events surrounding the shooting, stating that he was in North Carolina on the day of the shooting in order to attend a cookout honoring his parents. While at home, he decided to go to Smith Field. There he saw the victim. The victim shouted at defendant, "Why are you down here?" Defendant responded that he had not said or done anything to anybody. The victim said, "While you are down here, you better watch yourself or your won't be around for long." Defendant left Smith Field, returning at a later time with his brothers. Defendant sat in the back seat of his car. Upon arriving at the ball field, the Squire brothers drove near the place where the victim stood beside the grill. The victim approached the car shouting to defendant, "[W]hat are you trying to prove?" and, "[G]et out of the damn car." Defendant did not leave the car. The victim then exclaimed, "[S]ince you won't get out, I'll knock your fucking eyes out." The victim then drew back his right hand, in which he held

a beer can, and reached into his pocket with his left hand. Defendant shot the victim. Defendant testified that he was afraid the victim was going to throw the can of beer in his face and come out of his pocket with a knife. Defendant maintained he was not trying to kill the victim but to disarm him.

Defendant presented testimony from his two brothers, Nathaniel and Josephus, which corroborated his version of the events. The jury returned a verdict of first degree murder.

II.

Defendant contends the trial court committed reversible error when it precluded defendant from offering evidence of his good character traits other than peacefulness and truthfulness. We agree.

Before trial, the state served a Motion to Suppress, in which it moved the court, *inter alia*, "to exclude evidence of defendant's good character to show defendant's lack of a propensity to commit the crime of murder." At trial, a question posed by defense counsel on cross-examination of Officer Ellis Squire, a detective with the Northampton County Sheriff's Department, precipitated a hearing on the state's motion. Defense counsel asked, "[N]ow Officer Squire do you know Sergeant Willie Squire's character and reputation in the community in which he lives and has resided in Gaston, N.C.?" The state objected, arguing that evidence of general reputation and character is inadmissible under Rule 404(a)(1) of the North Carolina Rules of Evidence. The state contended that evidence of defendant's character should be limited to traits of peacefulness, in support of a claim of self-defense, and truthfulness, in support of his credibility as a witness. The trial court sustained the state's objection, ruling that defendant would be limited to offering evidence of his truthfulness if he testified as a witness, and evidence of his peacefulness if he offered evidence of self-defense.

We hold the trial court erred in limiting defendant to offering evidence of traits of peacefulness and truthfulness. While Rule 404(a)(1) requires that character evidence offered by an accused must be of a "pertinent" trait, it is not so narrow as to preclude evidence of character traits even though general in na-

ture provided that such traits are relevant to some issue in the case.

N.C.G.S. § 8C-1, Rule 404(a)(1) provides:

> (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. . . .

(1986). This rule became effective on 1 July 1984. It is a significant departure from our previous practice under the common law in that it permits an accused to introduce evidence of specific traits of his character. Under our previous rule, developed under the common law, the only method for introducing evidence of character was by general reputation. *See State v. McCormick*, 298 N.C. 788, 259 S.E. 2d 880 (1979); *State v. Hairston*, 121 N.C. 579, 28 S.E. 492 (1897); *see generally* 1 Brandis on North Carolina Evidence § 114 (1982). According to Dean Brandis, North Carolina was unique in prohibiting elicitation of evidence concerning particular character traits. 1 Brandis on North Carolina Evidence § 114 (1982). Rule 404(a)(1) abrogates this restriction, thus aligning North Carolina with the majority rule.

[1] An issue arising in the instant case is whether Rule 404(a)(1) not only permits but also requires that character evidence offered by an accused relate to a particular character trait. We conclude that under Rule 404(a)(1) an accused may no longer offer evidence of undifferentiated "good character" as permitted by our previous practice; rather, he must tailor the evidence to a particular trait that is relevant to an issue in the case. We find support for this conclusion in the Advisory Committee's Note on Rule 404(a)(1). According to the Advisory Committee, this rule differs with previous North Carolina practice in that it "speaks in terms of a 'pertinent trait of his character.' This limits the exception to relevant character traits, whereas North Carolina practice permits use of evidence of general character." Dean Brandis echoes this interpretation in his treatise on North Carolina evidence when he writes, "[i]t seems clear, therefore, that when character evidence

is circumstantial, counsel, on direct examination, shall inquire as to the trait involved, and not as to the 'general character' prescribed by prior case law. . . ." 1 Brandis on North Carolina Evidence § 114 (Cum. Supp. 1986).

Our determination that admissible character evidence must concern a particular character trait, rather than good character generally, coincides with the history of, and practice under, Federal Evidentiary Rule 404(a)(1). Federal Rule 404(a)(1), after which our rule is patterned, permits evidence of traits only. An earlier draft of the federal rule would have permitted evidence of character generally as well as evidence of particular traits. *See* Advisory Committee's Note to Rule 404; Proposed Federal Rules of Evidence 404(a)(1), 46 F.R.D. 161, 227 (1969). The draft was modified, however, and the language permitting evidence of general character was deleted. *Id.* The practice in federal courts is not to permit evidence of general good character, but to require that character evidence pertain to a particular trait. *See generally* 22 C. Wright & K. Graham, Federal Practice and Procedure § 5236 (1978). We find the history of the federal rule, and the practice in federal courts, instructive for the purpose of interpreting North Carolina Evidentiary Rule 404(a)(1) since our rule is identical to its federal counterpart. We believe that the practice under the federal rule lends support to our conclusion that character evidence must tend to establish a certain trait to be admissible under Rule 404(a)(1).

[2] Having established that under Rule 404(a)(1) an accused must elicit evidence regarding particular character traits in his presentation of character evidence, it remains to be discussed what constitutes a "pertinent" trait within the rule's meaning. It is generally accepted that the term "pertinent," as used in Federal Rule 404(a)(1), is synonymous with "relevant." *United States v. Angelini*, 678 F. 2d 380, 381 (1982); 22 Wright & Graham, Federal Practice and Procedure § 5236 at 383. This meaning is also conveyed by the Advisory Committee in its commentary on North Carolina's rule when it explains that the rule limits an accused to offering evidence of "relevant character traits." Following the view evidenced by federal practice, and conveyed by the Advisory Committee's commentary on our rule, we believe that "pertinent" in the context of Rule 404(a)(1) is tantamount to relevant. Thus, in determining whether evidence of a character trait is ad-

missible under Rule 404(a)(1), the trial court must determine whether the trait in question is relevant; i.e., whether it would "make the existence of any fact that is of consequence to the determination of the action" more or less probable than it would be without evidence of the trait. N.C.G.S. § 8C-1, Rule 401.

Before the new rule, our law was clear that evidence of general good character was relevant to the issue of guilt or innocence of a criminal defendant. *State v. Huskins*, 209 N.C. 727, 184 S.E. 480 (1936); *State v. Morse*, 171 N.C. 777, 87 S.E. 946 (1916); *State v. Henry*, 50 N.C. 65 (1857); *See* 1 Brandis on North Carolina Evidence § 102 (1982). Under the present rule, an accused must tailor his character evidence to a "pertinent" trait, but the trait may be general in nature provided that it is relevant in the context of the crime charged.

An example of a character trait of a general nature which is nearly always relevant in a criminal case is the trait of being law-abiding. The admissibility of this trait has been the subject of several state and federal cases. The Fifth Circuit conducted a thorough survey and concluded that the "practice in the states has generally been to permit defendants to establish their character for lawfulness, and the federal courts have unanimously assumed that to be the practice." *United States v. Hewitt*, 634 F. 2d 277, 280 (5th Cir. 1981). Our cases reveal that the essence of our former rule permitting evidence of general good character was to enable an accused to illustrate his character for abiding by the law, thereby suggesting to the jury it would be out of character for him to have committed the crime charged. *See State v. Huskins*, 209 N.C. at 728, 184 S.E. at 481; *State v. Laxton*, 76 N.C. 216, 217 (1877); *see generally* 1 Brandis on North Carolina Evidence § 104 (1982).

Rule 404(a)(1) does not render evidence of the character trait of being law-abiding irrelevant in the context of a criminal proceeding. It merely enables the defendant to prove this trait directly rather than by implication. Evidence of other character traits which are general in nature may be likewise admissible under Rule 404(a)(1) provided that the traits are relevant in the context of the particular proceedings.

Applying these principles to the present case, we hold that while the trial court correctly sustained the state's objection to

defense counsel's question regarding defendant's general reputation in the community, it erred in ruling that defendant could not elicit evidence of character traits other than peacefulness and truthfulness. The trial court seems to have labored under the misconception, advanced by the state at trial, that evidence of a general character trait is not "pertinent" within the rule's meaning and is therefore inadmissible. The critical determination, however, is not whether a trait is general or specific, but whether it is relevant to the proceeding. As our cases illustrate, general traits of character are not less relevant because they are general. *See State v. McCormick*, 298 N.C. at 790-91, 259 S.E. 2d at 882; 1 Brandis on North Carolina Evidence §§ 104, 114 (1982). Indeed, in some cases, evidence of character traits which are general in nature may be the deciding factor in the determination of the defendant's guilt or innocence. Thus, an accused should not be prohibited from introducing this potentially exculpatory evidence.

[3] We hold further that under N.C.G.S. § 15A-1443(a) the trial court's error in precluding defendant from introducing evidence of character traits other than peacefulness and truthfulness prejudiced the defendant. According to this statute, nonconstitutional prejudicial error occurs "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." N.C.G.S. § 15A-1443(a). This was a close case on the issue of whether the homicide was committed in self-defense. Defendant demonstrated that the victim was a violent person who had directed his anger toward him in the past. Defendant also offered a plausible explanation for his fear at the time he shot the victim which was corroborated by two witnesses. Evidence of favorable character traits other than peacefulness and truthfulness, such as, for example, being law-abiding which defendant clearly could have offered, might have weighed heavily in the jury's determination of whether the defendant acted in self-defense. Moreover, in the event the jury found defendant did not act in self-defense, such evidence might have influenced the jury to return a verdict of voluntary manslaughter or second degree murder rather than first degree murder.

While we ordinarily do not find reversible error in the exclusion of evidence unless the nature of the evidence excluded is clear from the record, the error here is more than simply the exclusion of discrete evidence. The error is the trial court's unwar-

ranted general prohibition of evidence of character traits other than peacefulness and truthfulness. This prohibition precluded defendant from offering evidence of at least one other relevant trait which he was obviously in a position to offer. In light of these things, the confusion among bench and bar engendered by this new evidence rule, and lack of guidance until now by this Court, we feel compelled to conclude that defendant is entitled to a new trial because of the trial court's restrictive ruling.

We conclude, therefore, that defendant has demonstrated a reasonable possibility that, had this erroneous ruling not been made, the result at trial would have been different.* The result is a

New trial.

STATE OF NORTH CAROLINA v. ARTHUR COLUMBUS SPAUGH

No. 39A87

(Filed 3 February 1988)

1. **Criminal Law § 164— review of sufficiency of evidence—necessity for motion to dismiss at close of all evidence**

Under Rule of App. Procedure 10(b)(3), a defendant who fails to make a motion to dismiss at the close of all of the evidence may not attack on appeal the sufficiency of the evidence at the trial. To the extent that N.C.G.S. § 15A-1446(d)(5) is inconsistent with Rule 10(b)(3), the statute must fail.

2. **Witnesses § 1.2— competency of child witness—failure to hold voir dire and make findings—harmless error**

Where the testimony of the thirteen-year-old prosecutrix observed by the trial court fully supported a conclusion that the prosecutrix was not disqualified as a witness for failure to understand her duty to tell the truth as a witness, the trial court's failure to conduct a *voir dire* inquiry and make specific findings and conclusions concerning the competency of the prosecutrix to testify was, at worse, harmless error.

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* Defendant also contends that he deserves a new trial because of two instances of prosecutorial misconduct. We decline to address these issues because of the likelihood that they will not arise again at defendant's new trial.

3. Rape and Allied Offenses § 4.1— continuing course of sexual acts—rape victim shield statute—failure to hold in camera hearing

In a prosecution of defendant for first degree rape and first degree sexual offense committed against his daughter, the daughter's testimony that defendant often engaged in sexual intercourse with her was not prohibited by Rule of Evidence 412, and any error by the trial court in failing to conduct the *in camera* hearing required by Rule 412 before admitting such testimony was harmless error. N.C.G.S. § 8C-1, Rule 412(b)(1).

4. Rape and Allied Offenses § 4.1— other acts of intercourse—competency to show common plan or scheme

In a prosecution of defendant for first degree rape and first degree sexual offense committed against his daughter, testimony by the daughter that defendant had engaged in a continuing course of acts of sexual intercourse with her was admissible under Rule of Evidence 404 to establish the relevant fact that defendant took sexual advantage of the availability and susceptibility of his young victim at times when she was left in his care. Furthermore, the trial court did not abuse its discretion in failing to exclude this testimony under Rule of Evidence 403 as being more prejudicial than probative.

APPEAL by the defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing concurrent life sentences entered by *Freeman, J.*, at the 15 September 1986 Criminal Session of Superior Court, DAVIE County. Heard in the Supreme Court on 8 September 1987.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for the defendant appellant.

MITCHELL, Justice.

The defendant was tried upon proper indictments for first degree sexual offense and first degree rape. The jury found the defendant guilty of both offenses as charged, and the trial court entered separate judgments sentencing the defendant to concurrent sentences of life imprisonment. Upon the defendant's appeal of right to the Supreme Court from both judgments, the trial court determined that he was an indigent and appointed the Appellate Defender as counsel to represent him for purposes of this appeal.

The State's evidence at trial tended to show, *inter alia*, that the victim lived with her parents in September of 1985, which was the month prior to her thirteenth birthday. The defendant is her father. The victim testified that she came home from school and was watching television in the family living room. The defendant was the only other person in the home at the time.

The defendant asked the victim to come to his bedroom. When she entered the bedroom, the defendant was naked and lying on the bed. He told the victim to take her clothes off and lie down with him. She did as the defendant, her father, commanded and he committed sexual intercourse and sodomy upon her. She cried but the defendant yelled at her to be quiet. After completing the acts of sexual intercourse and sodomy upon the victim, the defendant told her to dress and to make the bed. He instructed her not to tell anyone about what had happened, or she "could get hurt."

The defendant offered evidence tending to show that neither his wife nor his other children had any reason to believe that the defendant had engaged in any sexual activities with the victim. The defendant testified that he had never had sexual relations with the victim at any time. He specifically denied that he had sex with the victim on an afternoon in September of 1985.

[1] Appellate counsel for the defendant first contends that the evidence as submitted to the jury was insufficient with regard to the victim's age to support the defendant's conviction for first degree rape. Although the defendant's counsel at trial made a motion for dismissal at the close of the State's evidence, that motion was waived when the defendant introduced evidence. N.C.G.S. § 15-173 (1983); App. R. 10(b)(3). Trial counsel for the defendant did not renew the motion to dismiss at the close of all of the evidence. Although N.C.G.S. § 15A-1446(d)(5) provides that questions of insufficiency of the evidence may be the subject of appellate review, even when no objection or motion has been made at trial, North Carolina Rule of Appellate Procedure 10(b)(3) provides that a defendant who fails to make a motion to dismiss at the close of all of the evidence may not attack on appeal the sufficiency of the evidence at trial. We have specifically held in this regard that: "To the extent that N.C.G.S. 15A-1446(d)(5) is inconsistent with N.C.R. App. P. 10(b)(3), the statute must fail." *State*

v. Stocks, 319 N.C. 437, 439, 355 S.E. 2d 492, 493 (1987). Accordingly, we reject this contention by appellate counsel.

[2] The defendant next contends that he is entitled to a new trial because the trial court failed to conduct a voir dire examination to determine the competency of the victim as a witness and failed to make findings of fact and conclusions in this regard. We do not agree.

In support of his contention that the trial court was required to conduct a voir dire hearing and make findings and conclusions as to the competency of the victim as a witness, the defendant relies on the recent statement of this Court that:

> The obligation of a trial judge to make a preliminary determination of a witness's competency is embodied in Rules 104(a) and 601(a) and (b) of the new North Carolina Evidence Code. . . . Underlying the evidence rules as codified and the traditional case law analysis is the assumption that, in exercising his discretion in ruling on the competency of a child witness to testify, a trial judge must rely on his personal observation of the child's demeanor and responses to inquiry on *voir dire* examination. . . . Obviously, there can be no informed exercise of discretion where a trial judge merely adopts the stipulations of counsel that a child is not competent to testify without ever having personally examined or observed the child on *voir dire*. The competency of a child witness to testify at trial is not a proper subject for stipulation of counsel absent the trial judge's independent finding pursuant to his opportunity to personally examine or observe the child on *voir dire*.

State v. Fearing, 315 N.C. 167, 173-74, 337 S.E. 2d 551, 555 (1985). In *Fearing* we held that the trial court erred in relying on a stipulation of counsel as to the competency of a child witness, rather than relying on its own observation of the child in exercising its discretion in determining the child's competency to testify. As can be seen from the foregoing quotation from *Fearing*, our primary concern was that the trial court exercise its independent discretion in deciding competency after observation of the child and not the particular procedure whereby the court conducted its observation. *Fearing* is not authority for the proposition that a defendant is entitled to a new trial in every instance in which a

trial court fails to conduct a voir dire inquiry into the competency of a child witness or fails to make formal findings and conclusions as to a child's competency as a witness.

The general rule is that every person is competent to be a witness unless determined to be disqualified by the Rules of Evidence. *State v. DeLeonardo*, 315 N.C. 762, 766, 340 S.E. 2d 350, 354 (1986); N.C.G.S. § 8C-1, Rule 601(a) (1986). Rule 601(b) provides in pertinent part: "A person is disqualified to testify as a witness when the court determines that he is . . . (2) incapable of understanding the duty of a witness to tell the truth." N.C.G.S. § 8C-1, Rule 601(b) (1986). We have held that the issue of the competency of a witness rests in the sound discretion of the trial court based upon its observation of the witness. *State v. Hicks*, 319 N.C. 84, 89, 352 S.E. 2d 424, 426 (1987). Absent a showing that the trial court's ruling as to competency could not have been the result of a reasoned decision, it will not be disturbed on appeal. *Id.*

In the present case, the victim took the stand and testified, without objection, that she would reach her fourteenth birthday in approximately one month. She named the school she attended and testified that she was then a student in the ninth grade. She testified that she understood what it meant to tell the truth and that she was going to tell the truth in her testimony. The defendant's trial counsel then requested a voir dire examination of the witness "to ascertain if she knows what the truth is, what it means to tell the truth." The trial court denied the request and permitted the witness to proceed with her testimony. During later cross-examination of the witness, the defendant's trial counsel was permitted to inquire further into the witness's ability to understand the concept of truthfulness. When asked by the defendant's trial counsel if she knew what a lie was, the victim responded affirmatively. When asked to define a "lie" the victim stated: "It means when you don't tell something that is true."

We conclude that the testimony of the victim observed by the trial court in the present case fully supported a conclusion that the victim was not disqualified as a witness for failure to understand her duty to tell the truth as a witness. *See State v. DeLeonardo*, 315 N.C. at 767, 340 S.E. 2d at 354. Assuming *arguendo* that the trial court erred in failing to conduct a voir dire examination of the witness and in failing to make specific

findings and conclusions as to the witness's competency, we conclude that any such error was harmless. When, as here, the evidence clearly supports a conclusion that the witness is competent, the trial court's failure to conduct a voir dire inquiry and make specific findings and conclusions concerning the witness's competency is, at worst, harmless error. *Cf. State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972) (trial court's failure to conduct voir dire and make specific findings of fact concerning suggestiveness of photographic lineup deemed harmless error); *State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353 (1968) (same result where suggestiveness of live lineup involved).

The defendant next contends that the trial court erred in admitting testimony of the victim that the defendant had often engaged in sexual intercourse with her. The defendant argues that the admission of such testimony violated Rules 403, 404, and 412 of the North Carolina Rules of Evidence.

[3] The defendant first argues that this testimony violated Rule 412(d), because the trial court failed to conduct the required in camera hearing to determine its admissibility. Rule 412 was designed to protect rape and sexual offense victims from unnecessary and irrelevant inquiry into their prior sexual behavior. It is unnecessary here, however, for us to decide whether Rule 412 can ever be used as a sword by the defendant in a rape case rather than as a shield for the victim. Subdivision (b) of Rule 412 states in pertinent part that: "Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior: (1) Was between the complainant and the defendant . . . ." N.C.G.S. § 8C-1, Rule 412(b) (1986). In the present case it is both obvious and uncontested that all of the testimony complained of by the defendant related to sexual behavior between the complainant and the defendant. Therefore, even if it is assumed *arguendo* that the trial court erred by failing to conduct the required in camera hearing before admitting such testimony, the error was harmless.

[4] The defendant next argues that his daughter's testimony that he had engaged in a continuing course of acts of sexual intercourse with her was inadmissible under Rule 404, and that its admission was also prohibited by Rule 403 as being more prejudicial than probative. We reject both arguments.

Rule 404(b) provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1986). We have stated that "as a careful reading of Rule 404(b) clearly shows, evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused." *State v. Weaver*, 318 N.C. 400, 403, 348 S.E. 2d 791, 793 (1986). In cases decided both before and after the adoption of Rule 404(b), we have held evidence that perpetrators of sexual offenses have committed other sexual acts with their victims to be relevant and admissible. *E.g., State v. Frazier*, 319 N.C. 388, 354 S.E. 2d 475 (1987) (applying Rule 404); *State v. Arnold*, 314 N.C. 301, 333 S.E. 2d 34 (1985) (prior to adoption of Rule 404); *State v. Sills*, 311 N.C. 370, 317 S.E. 2d 379 (1984) (same). Here, as in *Arnold*, the victim's testimony clearly tended to establish the relevant fact that the defendant took sexual advantage of the availability and susceptibility of his young victim at times when she was left in his care. 314 N.C. at 305, 333 S.E. 2d at 36-37. We conclude that the victim's testimony concerning her father's other acts of sexual intercourse with her was admissible under Rule 404. Further, the trial court did not abuse its discretion in failing to exclude this testimony under Rule 403. *See State v. Frazier*, 319 N.C. at 390, 354 S.E. 2d at 477.

Finally, the defendant contends that the imposition of sentences of life imprisonment for first degree rape and first degree sexual offense constituted cruel and unusual punishments prohibited by the eighth amendment to the Constitution of the United States. We have previously held that the imposition of sentences of life imprisonment for such offenses does not violate the prohibition against cruel and unusual punishments. *State v. Cooke*, 318 N.C. 674, 351 S.E. 2d 290 (1987) (first degree sexual offense); *State v. McClintick*, 315 N.C. 649, 340 S.E. 2d 41 (1986) (first degree rape). This contention is without merit.

The defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. HENRY LEE McCOLLUM AND LEON BROWN

No. 666A84

(Filed 3 February 1988)

Criminal Law § 113.6— murder and rape—two defendants—instructions which failed to separate cases against them—error

The trial court erred in the joint trial of two defendants for first degree murder and first degree rape where the trial court's instructions to the jury during the guilt determination phase of the case were readily susceptible to being interpreted as instructions to convict each defendant if the jury found that the other defendant had committed the crimes charged and were not clearly limited to the theories of felony murder or acting in concert.

APPEAL of right by the defendants from judgments sentencing each defendant to death for murder in the first degree and to imprisonment for life for first degree rape, entered by *Lane, J.*, at the 8 October 1984 Criminal Session of Superior Court for ROBESON County. Heard in the Supreme Court on 8 December 1987.

Lacy H. Thornburg, Attorney General, by David Roy Blackwell and William N. Farrell, Jr., Special Deputy Attorneys General, for the State.

Adam Stein for the defendant-appellant Leon Brown.

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

MITCHELL, Justice.

The defendants, Henry Lee McCollum and Leon Brown, were tried upon separate bills of indictment charging each of them with the first degree murder and first degree rape of Sabrina Buie.

They were tried jointly during the 8 October 1984 Criminal Session of Superior Court for Robeson County. The jury returned verdicts finding each defendant guilty of both crimes as charged. The jury found each defendant guilty of first degree murder on both the theory of premeditation and deliberation and the felony murder theory. After a sentencing hearing, the jury recommended a sentence of death for each defendant for first degree murder. The trial court entered judgments on 25 October 1984 sentencing each defendant to death for first degree murder and to imprisonment for life for first degree rape. The defendants appealed to this Court as a matter of right.

A complete recitation of the evidence introduced at trial is unnecessary in resolving the issue which we find dispositive of this case on appeal. The State's evidence tended to show, *inter alia*, that Sabrina Buie, an eleven-year-old child, was missing from her home at approximately 12:20 a.m. on Sunday, 25 September 1983, when her father returned home from working the midnight shift at a nearby business. The child's nude body was found in a bean field in Robeson County on the afternoon of 26 September 1983.

An autopsy was performed upon the body of Sabrina Buie. Linear abrasions on her back and buttocks revealed a pattern indicating that the body had been dragged over a rough surface. There was a tear or laceration deep within the victim's vagina and a tear or laceration in her anal canal. Petechial hemorrhaging, characterized as the bursting of small blood vessels caused by pressure, was observed in the victim's eyes. Similar hemorrhaging caused by a pressure mechanism was also observed in the heart and lungs. The brain appeared slightly swollen due to a lack of oxygen.

A stick and pair of panties was wedged in the victim's airway opening, completely obstructing the airway. Dr. Debra Radisch, Chief Assistant Medical Examiner for the State of North Carolina, testified that the victim died of asphyxiation.

The defendant Henry Lee McCollum gave a statement to law enforcement officers on 28 September 1983. He said that he saw the victim Sabrina Buie and a male named Darrell Suber come out of Sabrina's house at about 9:30 p.m. on 24 September 1983. McCollum and four other males joined them, and the group then

went to a "little red house near the ballpark." The five males tried to convince Sabrina to have sexual intercourse with them, but she refused. Two of the males went to a nearby store and bought malt liquor. When they returned, the males discussed having sexual intercourse with Sabrina. One of the males, Louis Moore, refused to participate and left.

McCollum, Sabrina and the others then walked across a bean field behind the store. They sat there in some bushes and drank the malt liquor. Suber then said that he was going to have sexual intercourse with Sabrina. The defendant Henry Lee McCollum grabbed Sabrina's right arm, and another member of the group grabbed her left arm. Suber then raped her while McCollum and the other male held her. Each man raped Sabrina while others held her. Evidence presented tended to show that two of the men also sodomized her.

Suber then said, "we got to do something because she'll go uptown and tell the cops we raped her." The defendant Henry Lee McCollum grabbed Sabrina's right arm and held her while another male grabbed her left arm. Chris knelt over Sabrina's head and with a stick pushed her panties down her throat. After they knew she was dead, McCollum and Chris dragged her body away to hide it from view.

The defendant Leon Brown gave a statement to law enforcement officers on 29 September 1983 which implicated him in the murder and rape of Sabrina Buie.

The defendants assign as error, *inter alia*, instructions given the jury during the guilt determination phase of their joint trial. Each defendant contends that the instructions, taken as a whole, failed to separate the cases against them and failed to insure consideration by the jury of the individual guilt or innocence of each defendant. We conclude that these assignments are meritorious and hold that each defendant must receive a new trial on the charges against him.

This Court has often found reversible error where two or more defendants are tried together for the same offense upon jury instructions susceptible to the construction that the jury should convict all of the defendants if they find beyond a reasonable doubt that any of the defendants committed the offense

charged. *E.g., State v. Parrish*, 275 N.C. 69, 165 S.E. 2d 230 (1969). In the present case, the trial court did specifically instruct the jury when stating the elements of premeditated and deliberate first degree murder: "Of course, you will be required to determine the guilt or innocence of each defendant on the basis of the evidence as presented against him." At several other points in the instructions, the trial court also used terms such as "the defendant," "each defendant," or "he" which could be construed as indicating that the trial court intended the jury to deal with the defendants' cases individually. Nevertheless, we are unable to say here, as we have said in other cases, that we are "convinced that the jurors were not misled by the portion of the charge to which defendants except." *State v. Tomblin*, 276 N.C. 273, 277, 171 S.E. 2d 901, 904 (1970).

The trial court's instructions to the jury during the guilt determination phase of this case, taken as a whole, were readily susceptible to being interpreted as instructions to convict each defendant if the jury found that the other defendant had committed the crimes charged. Further, such instructions were not clearly limited to the jury's consideration of the theory of felony murder or the theory that the defendants had acted in concert, although the trial court did instruct the jury on those theories.

We find the following quotations from the trial court's instructions during the guilt determination phase to be fairly representative of the instructions taken as a whole. In defining the elements the State must prove under the felony murder rule, for example, the trial court instructed the jury:

> I further charge you that for you to find *the defendant* guilty of first degree murder under the First Degree Felony Rule the State must prove three things beyond a reasonable doubt.
>
> First, that *the defendant* and each of them *or either of them* committed the felony of rape.

(emphasis added). Although the trial court thereafter instructed on the law with regard to defendants acting in concert, the foregoing quotation could have misled the jury into believing that they could convict both defendants if only one of them raped the victim, even if the jury did not believe that they were acting in

concert. Later portions of the instructions did little to clarify this matter and, in fact, added to the uncertainty.

In the trial court's mandate to the jury with regard to the theory of premeditated and deliberate murder, the trial court instructed in part:

> So with respect to the charge of murder I charge if you find that from the evidence beyond a reasonable doubt that on or about the 24th of September 1983, the defendant Henry Lee McCollum *and* the defendant Leon Brown intentionally shoved the stick wrapped in her panties down the throat of the said Sabrina Buie, proximately causing the death of Sabrina Buie, and that *the defendant* intended to kill Sabrina Buie and that each defendant acted with malice after premeditation and deliberation, it will be your duty to return a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation.

(emphasis added).

The trial court then gave its mandate to the jury with regard to the felony murder theory, which included the following:

> Whether or not you find *the defendant Henry Lee McCollum or the defendant Leon Brown* guilty of first degree murder on the basis of malice, premeditation and deliberation you will also consider whether *either or all of them* are guilty of first degree murder under the First Degree Felony Murder Rule.
>
> . . . .
>
> So I charge you if you find from the evidence beyond a reasonable doubt that on or about the 24th of September, 1983, *the defendant Henry Lee McCollum or the defendant Leon Brown*, while committing the felony of rape upon one Sabrina Buie, stuffed or shoved a stick down the throat of the said Sabrina Buie with panties wrapped around the stick, or aided in the stuffing or shoving of that stick with the panties around it down the throat of the said Sabrina Buie, and that the stuffing of that stick with the panties around it was a proximate cause of the death of Sabrina Buie, *it would be*

> *your duty to return a verdict of guilty* of first degree murder under the Felony Murder Rule.

(emphasis added).

The trial court thereafter gave its mandate concerning the manner in which the jury would consider the defendants' guilt *vel non* of second degree murder, if it found them not guilty of first degree murder. The trial court's mandate as to second degree murder included the following:

> Now, second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. In order for you to find *the defendant* guilty of second degree murder the State must prove beyond a reasonable doubt that the defendant Henry Lee McCollum and the defendant Leon Brown, *or either of them*, intentionally shoved the stick with the panties wrapped around it, or aided in the shoving of the stick with the panties around it, down the throat of the said Sabrina Buie . . . .

(emphasis added).

The trial court then undertook to define the elements of first degree rape and to give its mandate to the jury concerning the charges of first degree rape against these defendants. The trial court stated in part in this regard that:

> And fourth, that the defendant *or either or both of them* was aided or abetted by one or more persons . . . .
>
> So I charge if you find from the evidence beyond a reasonable doubt that on or about the 24th of September, 1983, the defendant Henry McCollum *and* the defendant Leon Brown engaged in vaginal intercourse with Sabrina Buie and that *the said Henry McCollum and/or the said Leon Brown* did so against her will by throwing her to the ground and holding her on the ground, each holding a hand while the rape occurred, and that—and by striking her and this was sufficient to overcome any resistance which the said Sabrina might make and the said Sabrina Buie did not consent to and that it was against her will, and that the defendant was aided and abetted by one or more persons, keeping in mind that the person would be aided and abetted if that person was

present at the time of the rape and knowingly advised, encouraged and aided him to commit the crime, it would be your duty to return *a verdict of guilty* of first degree rape.

(emphasis added).

It is true that the trial court instructed the jury that, as to each offense charged, they should consider the defendants' cases individually and render verdicts against each of them individually. However, we are unable to say that the instructions taken as a whole were not susceptible to the construction that the jury should convict both defendants if it found one guilty. Given the instructions and mandates of the trial court in this case, the jury reasonably could have believed that it was to consider and decide each defendant's guilt individually, but that it could convict *both* defendants if only one defendant committed the crimes charged.

This case differs from *Tomblin* in which we found one inadvertent error in the trial court's mandate on a charge of rape to have been cured by repeated thorough instructions on the jury's duty to consider each defendant's case individually and separately. Here, throughout its instructions and mandates, the trial court used singular and plural references to the defendants interchangeably. The trial court also made interchangeable references to the defendants in the disjunctive, the conjunctive, and various combinations of the conjunctive and disjunctive. The jury instructions in this case were far more likely to mislead the jury than those in *Tomblin*.

This Court has long held that where, as here, "two or more defendants are jointly tried for the same offense, a charge which is susceptible to the construction that the jury should convict all if it finds one guilty is reversible error." *State v. Tomblin*, 276 N.C. at 276, 171 S.E. 2d at 903. The instructions in the present case being susceptible to just such a construction, these defendants must be, and are, granted a new trial as to all of the charges against them giving rise to this appeal.

New trial.

CRAFTIQUE, INC.; BAKER FURNITURE, A DIVISION OF BAKER, KNAPP AND TUBBS, INC.; HECKMAN COMPANIES, A DIVISION OF BEATRICE FOODS CO.; HENREDON FURNITURE INDUSTRIES, INC.; AND STATESVILLE CHAIR CO. v. STEVENS AND CO., INC.; AND GEORGE B. STEVENS

No. 267PA87

(Filed 3 February 1988)

1. **Guaranty § 2— letter promising personal payment of debt upon dissolution of corporation—dissolution of corporation not condition precedent**

The trial court correctly entered summary judgment for plaintiffs in an action based on a letter which plaintiffs claimed was a personal guaranty where the individual defendant wrote a letter to plaintiff creditors indicating that the corporation would be dissolved and that he would personally assume all obligations and debts of the company, but the corporation was never dissolved. There was no condition precedent because the letters did not contain any language plainly and clearly indicating that the dissolution of the corporation and the transfer of its assets were a condition precedent to defendant's guaranty; defendant should have anticipated that plaintiffs would construe the letters as promises of guaranty.

2. **Judgments § 55— guaranty action—prejudgment interest—from breach of guaranty contract**

Prejudgment interest was properly awarded in a guaranty action from the date of the principal's breach rather than from the breach of the guaranty contract. N.C.G.S. § 24-5.

ON appeal of an unpublished decision of the Court of Appeals, 85 N.C. App. 348, 355 S.E. 2d 265 (1987), which reversed a judgment entered by *Ross, J.*, on 1 May 1986, in Superior Court, IREDELL County. Heard in the Supreme Court 12 November 1987.

Stern, Graham and Klepfer, by James W. Miles, Jr., for the plaintiff appellant.

Homesley, Jones, Gaines & Fields, by Edmund L. Gaines and Clifton W. Homesley, for the defendant appellee George B. Stevens.

MITCHELL, Justice.

The primary issue before us is whether the Court of Appeals erred in reversing the trial court's entry of summary judgment for the plaintiffs, Craftique, Inc. and Henredon Furniture Industries, Inc., on their claim for breach of a personal guaranty. We hold that the Court of Appeals erred in this regard and re-

verse its ruling. Further, we conclude that the trial court properly calculated and awarded interest on the amounts owed.

Craftique, Inc. and Henredon Furniture Industries, Inc. are in the business of manufacturing furniture and selling it to retail dealers. For several years they supplied the defendant Stevens & Co., Inc. furniture on an open account, and the corporation paid its bills regularly. In 1981, however, the defendant corporation fell behind in its payments.

On 19 February 1982 the corporation's president, the defendant George B. Stevens, sent the plaintiffs the following letter:

> Gentlemen:
>
> This letter is written to you to advise of a change being made in the financial structure of the retail furniture business being operated in Mooresville, North Carolina, under the name of Stevens and Company. All of the common stock in this corporation is owned by George B. Stevens.
>
> This corporation is being dissolved under Section 337 of the Internal Revenue Code and this business will continue to operate as a sole proprietorship owned by George B. Stevens. All the assets of Stevens and Company will be transferred to George B. Stevens, individually, and George B. Stevens will personally assume all obligations and debts of Stevens and Company. Your position as a vendor of Stevens and Company will be strengthened by this change.
>
> If you have any questions concerning the foregoing please feel free to contact me.
>
> Yours very truly,
>
> s/GEORGE B. STEVENS
> George B. Stevens

Both Craftique and Henredon relied on the letter as a personal guaranty and continued to make shipments of furniture. When they did not receive payment, they filed this action against Stevens & Co. and George B. Stevens, individually, seeking to collect money owed.

[1] The plaintiffs sought relief on the theory that the letter was a personal guaranty by George Stevens that he would pay the

bills if the defendant company defaulted. The trial court entered summary judgment in favor of the plaintiffs. George Stevens appealed.

The Court of Appeals concluded that the letter was not clearly a guaranty, but even if it was, it included a condition precedent that had not occurred. That condition was that Stevens & Co. was to be dissolved and all assets transferred to George B. Stevens before he would become personally liable. Even by the time of trial, the condition had not occurred. The Court of Appeals reversed the trial court's summary judgment for the plaintiffs and remanded the case to the Superior Court, Iredell County, for entry of summary judgment for the defendants.

Craftique and Henredon petitioned this Court for discretionary review on the issue of whether the letters George Stevens sent to them included a condition precedent. We conclude that they did not and that they constituted his personal guaranty to pay the past, present, and future debts of Stevens & Co. A guaranty of payment is an absolute promise to pay the debt of another if the debt is not paid by the principal debtor. *Investment Properties v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972). When the terms of a guaranty are clear and unambiguous, its meaning is a matter of law for the court. *North Carolina National Bank v. Corbett*, 271 N.C. 444, 156 S.E. 2d 835 (1967).

In *Cargill, Inc. v. Credit Assoc., Inc.*, 26 N.C. App. 720, 217 S.E. 2d 105 (1975), the Court of Appeals defined "conditions precedent" as

> 'those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available.' 3A Corbin, Contracts § 628, at 16 (1960). On the other hand, one who makes a promise expresses an intention that some future performance will be rendered and gives the promisee assurance of its rendition.

Cargill, 26 N.C. App. at 722-23, 217 S.E. 2d at 107-108. Conditions precedent are not favored by the law. *Jones v. Palace Realty Co.*, 226 N.C. 303, 305-306, 37 S.E. 2d 906, 907-908 (1946). Absent plain language, a contract ordinarily will not be construed as containing

a condition precedent. *Construction Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 118, 123 S.E. 2d 590, 596 (1962). The use of language such as "when," "after," and "as soon as" clearly indicates that a promise will not be performed except upon the happening of a stated event, i.e., a condition precedent. *Jones*, 226 N.C. at 306, 37 S.E. 2d at 908. The letters from George Stevens to Henredon and Craftique did not contain any language plainly and clearly indicating that the dissolution of Stevens & Co. and the transfer of its assets to George Stevens were a condition precedent to his guaranty. Rather, the letters merely stated that the transaction would take place and that George Stevens would assume the obligations and debts of Stevens & Co.

Ordinarily, when such operative words can be construed as either a promise or a condition, the presumption is in favor of a promise. *Cargill*, 26 N.C. App. at 722, 217 S.E. 2d at 107. "In resolving doubts as to whether an event is made a condition of an obligor's duty, . . . an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk." Restatement (Second) of Contracts § 227 (1979). Here, the control of the dissolution of Stevens & Co. and the transfer of assets to George Stevens were within his volitional control as sole shareholder of the company. The language of his letters conveyed a promise and not a condition.

In the analogous case of *Clear Fir Sales Company v. Carolina Plywood Distributors*, 13 N.C. App. 429, 185 S.E. 2d 737 (1972), the Court of Appeals affirmed the entry of summary judgment against an individual guarantor of a corporation's debt. The guarantor had sent the creditor a letter, which the trial court determined to be a guaranty as a matter of law. The Court of Appeals reasoned that the language of the letter must be given the construction that the guarantor should have anticipated it would be given by the creditor. We find that reasoning equally applicable in this case. Because George Stevens failed to use clear and plain language in his 19 February 1982 letters to create a condition to his assuming the debts and obligations of Stevens & Co., he should have anticipated that Craftique and Henredon would construe them as promises of guaranty. The trial court correctly interpreted the letters as letters of guaranty.

[2] The defendant George Stevens brings before this Court another issue, which the Court of Appeals did not address. He contends that the trial court's award of prejudgment interest to Henredon and Craftique was erroneous. He argues that he is liable for interest only from the date of demand for payment, which he contends was the date this action was filed, and not from the date of breach.

N.C.G.S. § 24-5 authorizes awards of interest on damages resulting from breach of contract from the date of the breach at the rate of interest provided in the contract, or at the legal rate if the parties have not agreed on their own rate. When interest is not made payable on the face of the instrument, payment of interest will be imposed by law in the nature of damages for the retention of the principal of the debt. *Security National Bank v. Travelers' Ins. Co.*, 209 N.C. 17, 182 S.E. 702 (1935). In the present case Henredon had an agreed interest rate in its contract; Craftique did not. Therefore, the trial court awarded interest at Henredon's contract rate for the debt owing to it and at the legal rate for the debt owing to Craftique.

George Stevens' agreements to "assume all obligations and debts of Stevens and Company" were guaranty agreements to pay the principal amounts of Stevens & Co.'s accounts with Henredon and Craftique, and to pay interest at the contract rate to Henredon and at the legal rate to Craftique for balances not paid within thirty days. The trial court's award of prejudgment interest on all amounts not paid by Stevens & Co. within thirty days from the date of invoice was not based on George Stevens' breach of his collateral guaranty contract, but was an element of the debt that Stevens had agreed to pay.

> A guarantor may be charged with interest on the principal sum either because: (1) interest was a part of the primary obligation and the guaranty contract, properly interpreted, guaranteed both the principal sum plus interest thereon; or (2) the guarantor did not pay the creditor the amount guaranteed as that amount became legally due under the guaranty contract and interest is properly chargeable, under applicable rule of law, on that amount. . . .
>
> Where interest is recoverable because it is part of the guaranteed underlying obligation, interest is generally allot-

> ted on the sum guaranteed from the time of default of the principal. Where interest is recoverable because the guarantor has not paid the obligation which has matured and has become a primary obligation of the guarantor, interest is recoverable from the guarantor from the time of notice and demand.

38 Am. Jur. 2d *Guaranty* § 76, at 1081-82 (1968).

We conclude that the trial court properly entered summary judgment against George Stevens for interest on the principal amounts owed by Stevens & Co., at the contract rate for Henredon and at the legal rate for Craftique, on all amounts not paid within thirty days of the date of the invoice. These interest awards were proper because George Stevens had guaranteed interest as well as principal amounts owed by Stevens & Co. and not as a result of his breach of the guaranty contract. Therefore, interest was properly chargeable from the date of Stevens & Co.'s breach, rather than from the date of demand and notice to George Stevens.

We hold that summary judgment in favor of the plaintiffs, Henredon and Craftique, was proper because there are no genuine issues of material fact, and these plaintiffs are entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56 (1983). George Stevens' 19 February 1982 letters to Henredon and Craftique were unconditional guaranty contracts to pay all of Stevens & Co.'s debts and obligations to these plaintiffs, including interest. The opinion of the Court of Appeals is reversed, and the case is remanded to that court for reinstatement of the trial court's summary judgment in favor of the plaintiffs.

Reversed and remanded.

STATE OF NORTH CAROLINA v. MILDRED WATKINS VANDIVER

No. 91A87

(Filed 3 February 1988)

1. **Constitutional Law § 30; Bills of Discovery § 6— police memorandum—refusal to order discovery**

The trial court did not err in refusing to order disclosure pursuant to N.C.G.S. § 15A-903(f)(2) of a police memorandum purportedly containing a prior inconsistent statement by a State's witness where the memorandum contained only a narrative of the offense and did not attribute oral statements to any of the three witnesses mentioned therein, and it thus did not contain a witness's prior "statement" within the meaning of section 903.

2. **Criminal Law § 138.29— perjury not proper aggravating factor**

Perjury may no longer constitute a nonstatutory aggravating factor in North Carolina. Prior case law conflicting with this decision is overruled.

APPEAL by defendant from judgment sentencing her to life imprisonment for conviction of murder in the second degree, said judgment imposed by *Hight, J.*, at the 1 December 1986 session of Superior Court, CUMBERLAND County. Heard in the Supreme Court 11 November 1987.

Lacy H. Thornburg, Attorney General, by Edmond W. Caldwell, Jr., Special Deputy Attorney General, for the state.

Robin E. Hudson for defendant.

MARTIN, Justice.

The victim, Robert Eugene Scott, bled to death from a single stab wound to the neck on 28 December 1985. On that date, the victim had been visiting his mother and stepfather, Shirley and Joseph Haselden, in their apartment on the second floor of a Fayetteville rooming house. At about 6:45 p.m., the victim became embroiled in an argument with defendant's boyfriend, Paul Hair, outside defendant's first-floor apartment. Shortly thereafter the victim suffered a stab wound which severed his carotid artery. At trial the state theorized that defendant stabbed the victim, while defendant maintained that Paul Hair was solely responsible for the crime.

The state's evidence tended to show that the Haseldens, the victim, and Gregory Davis, another second-floor resident, agreed

to confront defendant and complain about loud music coming from her apartment below. The group went downstairs and knocked on defendant's door. Paul Hair came to the door yelling and cursing, and an argument ensued between him and the victim. Defendant warned the victim not to bother Hair and disappeared back into her apartment. Recognizing the futility of the dispute, Davis and Mr. Haselden went back to their own apartments. The victim remained at defendant's door and Mrs. Haselden lingered on the stairs.

Mrs. Haselden, the only purported eyewitness to the crime, testified that she was standing at the bottom of the stairs across from defendant's door when she heard Paul Hair say "Go ahead and do it if you're going to." Defendant then came out of her apartment, exclaimed "No son of a bitch tells me I'm not allowed to play my [expletive] music," and stabbed the victim with a butcher knife.

Defendant testified on her own behalf, denying any participation in the crime. She testified that the victim continued arguing with Hair after the others had gone upstairs. At one point during the dispute the victim came inside the apartment and slapped defendant's face. Hair then followed the victim into the hallway outside the apartment with a steak knife in his hand. Defendant did not see the actual stabbing but did notice that the victim was bleeding. Later, Hair told defendant that police would not prosecute a woman and encouraged her to take the blame for the stabbing.

The jury convicted defendant of murder in the second degree. The trial judge found one factor in mitigation, that defendant's criminal record consisted solely of misdemeanors punishable by not more than sixty days' imprisonment, and one factor in aggravation, that defendant's testimony was perjured. Having determined that the aggravating factor outweighed the mitigating factor, the trial judge sentenced defendant to life imprisonment.

[1] Defendant first argues that she is entitled to a new trial because the trial judge refused to order disclosure of a police memorandum purportedly containing a prior inconsistent statement by witness Shirley Haselden. Following Mrs. Haselden's direct testimony that she had observed the stabbing from the bot-

tom of the stairs, defense counsel requested that the report in question, filed by Officer J. D. Bronson of the Fayetteville Police Department on the night of the killing, be admitted for purposes of cross-examination. This request was denied. Counsel renewed the motion during cross-examination of Detective David Pulliam of the Fayetteville Police Department and it was again denied. The trial court made written findings of fact and conclusions of law, then sealed the report for appellate review.

Defendant argues that the trial court's ruling was a clear violation of N.C.G.S. § 15A-903(f)(2), which provides:

> After a witness called by the State has testified on direct examination, the court shall, on motion of the defendant, order the State to produce *any statement of the witness* in the possession of the State that relates to the subject matter as to which the witness has testified. If the entire contents of that statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(Emphasis added.)

We have opened the sealed envelope and examined the document in question. Our own impressions of the report are accurately reflected by the voir dire testimony of Detective Pulliam:

> [Mr. VanStory]: The report that you just looked at, that was a field report made by a uniformed officer?
>
> [Detective Pulliam]: Yes, sir, it is.
>
> Q. What are the purposes of those field reports?
>
> A. He writes down his investigative notes on the incident as any physical observation that he makes or any information that may have been transferred to him from any outside source. And he does a summation or a narrative of the information given to him, and then he places that information in a summary report or an original report.
>
> Q. Is it meant to be a detailed account of what occurred?
>
> A. No, sir, it's not.

Q. In this particular report that you just looked at, he doesn't specify from whence this information came or from whom it came; is that correct?

A. That's correct.

Q. As a matter of fact, three different people is [sic] listed as possible sources of the information?

A. That is correct.

Q. And he doesn't indicate who told him what?

A. That is correct.

The term "statement" as used in N.C.G.S. § 15A-903(f)(2) includes statements signed or otherwise adopted by the witness and "substantially verbatim" recitals or oral statements which are contemporaneously recorded. N.C.G.S. § 15A-903(f)(5) (1983). Because the report in question contains only a narrative of the offense and does not attribute oral statements to any of the three witnesses mentioned therein, we conclude that it does not contain Mrs. Haselden's prior "statement" for purposes of section 903. Defendant's assignment of error is overruled.

[2] Defendant next challenges the validity of the life sentence imposed. She contends that the trial judge erroneously found as a nonstatutory aggravating factor that defendant's testimony was perjured.

We first approved the use of perjury as an aggravating factor in *State v. Thompson*, 310 N.C. 209, 311 S.E. 2d 866 (1984). Recognizing that our decision was "fraught with potential dangers," however, we strongly cautioned that "a trial judge should exercise extreme caution in this area and should refrain from finding perjury as an aggravating factor except in the most extreme case." *Id.* at 226-27, 311 S.E. 2d at 876. We have been careful to reiterate this admonishment on each occasion on which the issue has arisen. *See 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*, --- U.S. ---, 90 L.Ed. 2d 733 (1986).

Experience has demonstrated that the concerns expressed in *Thompson* were well-founded. The "extreme case" standard has proved unworkable and our words of caution insufficient bulwarks

against misuse of the aggravating factor. This is amply demonstrated by the facts of this case. Here, the only evidence of perjury was the fact that defendant's testimony was contradicted by Shirley Haselden. The trial judge noted that the jury "by its verdict obviously found that the defendant's testimony was false." That the trial judge's finding of perjury was conjectural is certain.

Because a trial judge's determination of the factor is basically dependent upon his subjective evaluation of the defendant's demeanor, we find it impossible to formulate adequately concrete guidelines to prevent future erroneous findings. In the interests of justice, we therefore hold that perjury may no longer constitute a nonstatutory aggravating factor in North Carolina. If the facts of the particular case warrant it, a defendant who commits perjury may be prosecuted under a separate indictment for that offense. In so ruling, we intend no criticism of the trial judges who have wrestled unsuccessfully with this problematic sentencing issue.

The rule herein announced shall be effective in all sentencing hearings commencing on or after the certification date of this opinion, including the resentencing of this defendant. Prior case law is overruled to the extent that it conflicts with this decision. This cause is remanded to the Superior Court, Cumberland County, for a new sentencing hearing.

Remanded for new sentencing hearing.

STATE OF NORTH CAROLINA v. LOUIS EDWARD BOYD

No. 36A87

(Filed 3 February 1988)

1. Criminal Law § 34.7— other sex offense—admissible to show scheme or intent

The trial court did not err in a prosecution of defendant for the first degree rape of his twelve-year-old stepdaughter by admitting testimony from defendant's wife concerning an incident with her eight-year-old female cousin where that incident had been the basis of a statement by the witness to a doctor that she thought defendant had had intercourse with her daughter and

where there were similarities with the incident for which defendant was charged. N.C.G.S. § 8C-1, Rule 404(b), N.C.G.S. § 8C-1, Rule 403.

2. **Criminal Law §§ 34.3 and 128.1— first degree rape—testimony of previous charge—mistrial denied—no abuse of discretion**

The trial court did not abuse its discretion in the prosecution of defendant for the first degree rape of his stepdaughter by denying his motion for a mistrial after defendant's wife testified that her husband had been brought to court before for rape. The trial court took prompt and sufficient corrective action by sustaining defendant's objection, allowing defendant's motion to strike, and instructing the jury not to consider the response; moreover, overwhelming evidence of defendant's guilt had already been admitted.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment, entered by *Allsbrook, J.*, at the 22 September 1986 Criminal Session of Superior Court, WASHINGTON County. Heard in the Supreme Court 9 December 1987.

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

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

FRYE, Justice.

Defendant was indicted for first degree rape and for taking indecent liberties with a child. During the trial, the second count of the two-count bill of indictment was dismissed and the case was submitted to the jury solely on the first count charging first degree rape. The jury returned a verdict of guilty.

The State's evidence tended to show that on the evening of 18 November 1985, a week before the victim's thirteenth birthday, the victim was left alone at home with her half-brother, half-sister, and defendant, her stepfather. The victim's mother worked the midnight shift that night and left the children in the custody of defendant. On that evening, defendant entered the room of his stepdaughter, climbed into the top bunk of her bunk bed with her, inserted his finger into her vagina, and then proceeded to have sexual intercourse with her. The victim testified that this was not the first occasion that defendant had sexual contact with her and she recounted several prior episodes of sexual contact in-

cluding intercourse. Defendant was subsequently found guilty of first degree rape and sentenced to life imprisonment.

[1] Defendant assigns as error the admission of evidence concerning an earlier incident of alleged sexual misconduct and the failure of the trial court to grant a motion for mistrial after the jury heard that defendant had been accused of another rape. We, however, find no error.

Approximately four weeks after the 18 November 1985 incident, the child complained of vaginal irritation and was taken by her mother to see a doctor. She was subsequently diagnosed as having gonorrhea, trichomonas, and herpes. Eight months prior to the incident, defendant had been diagnosed as having herpes. Defendant's wife testified that she told the examining doctor, after hearing the diagnosis, that she thought defendant had had intercourse with her daughter, stating that "if it was anybody, it had to be my husband." She was then asked by the prosecutor why she had been of this opinion. Mrs. Boyd testified that she had found defendant asleep naked in her daughter's bottom bunk bed with her eight-year-old female cousin on one occasion. Defendant objected to this line of questioning and requested a *voir dire* examination. It was then established that the alleged incident involving the cousin took place sometime within twelve months of the rape of defendant's stepdaughter, in the stepdaughter's room, and while Mrs. Boyd was at work.

The trial judge overruled defendant's objection and admitted this evidence since it formed the foundation for Mrs. Boyd's belief that defendant had had intercourse with his stepdaughter and because the testimony was admissible under Rule 404(b) of the North Carolina Rules of Evidence.[1] The trial court was correct in its ruling.

Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissi-

1. The trial judge also based his decision to admit the evidence on this Court's holding in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), which established the "other crimes" exception now codified in N.C.G.S. § 8C-1, Rule 404(b).

ble for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1986).

We have held in several recent cases that evidence of prior sex acts may have some relevance to the question of defendant's guilt of the crime charged if it tends to show a relevant state of mind such as intent, motive, plan, or opportunity. *See State v. Gordon*, 316 N.C. 497, 342 S.E. 2d 509 (1986); *State v. DeLeonardo*, 315 N.C. 762, 340 S.E. 2d 350 (1986); *State v. Arnold*, 314 N.C. 301, 333 S.E. 2d 34 (1985). Such evidence is deemed admissible and not violative of the general rule prohibiting character evidence. *See* N.C.G.S. § 8C-1, Rule 404(b) (1986); *State v. Weaver*, 318 N.C. 400, 348 S.E. 2d 791 (1986).

In *Weaver*, this Court held that "as a careful reading of Rule 404(b) clearly shows, evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused." *Weaver*, 318 N.C. at 403, 348 S.E. 2d at 793. Nevertheless, the ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403. *State v. Cotton*, 318 N.C. 663, 665, 351 S.E. 2d 277, 278-79 (1987).

Defendant challenges the applicability of the exception in Rule 404(b) arguing that the only "commonness" between the rape of his stepdaughter and his being caught in bed naked with his wife's young cousin is the fact that children were involved in both incidents. Defendant ignores other similarities between the two incidents.

The stepdaughter testified to no less than four acts of sexual assault upon her by her stepfather. On each occasion the stepfather took advantage of the young child when she was left in his custody while the mother was at work. On this occasion, defendant is accused of raping his stepdaughter in her bunk bed while her mother was working late at night. Mrs. Boyd's testimony tends to show that defendant similarly took advantage of her cousin when the child was left in his custody, while in his stepdaughter's bunk bed, and while Mrs. Boyd was working late at

night. This testimony concerning defendant's conduct with the young cousin then was not only relevant in explaining Mrs. Boyd's comment to the doctor but it also tended to demonstrate defendant's scheme or intent to take sexual advantage of young female relatives left in his custody while his wife was working.

We conclude that Mrs. Boyd's testimony concerning her husband's other act of misconduct with her minor cousin was admissible under the exception of Rule 404(b). Furthermore, we find no abuse of discretion by the trial court in failing to exclude this testimony under the balancing test of Rule 403 since the alleged incident was sufficiently similar to the act charged and not too remote in time. We are not unmindful of the danger of allowing Rule 404(b) exceptions to become so pervasive that they swallow the rule, a danger vigorously argued in defendant's brief. We, however, do not find that its application to the facts of this case encourages that danger.

[2] Finally, defendant argues that the trial court erred in denying his motions for mistrial. During Mrs. Boyd's testimony, the following exchange took place:

> Q. Was [sic] there any other incidents or any other reasons why you related to Dr. Brunson that you thought it might be your husband?
>
> A. Yes. My husband's been brought to Court before for rape.

At this time the defense attorney objected and his objection was sustained. He then moved to strike. The trial judge allowed his motion and admonished the jury not to consider the statement in any way. On the next day of trial, defendant moved for a mistrial. The trial judge denied the motion after hearing arguments because, in the court's opinion, Mrs. Boyd's response did not result in substantial and irreparable prejudice to defendant's case. This same motion was again made and denied after the jury returned its verdict.

N.C.G.S. § 15A-1061 provides:

> Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the

> proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.

N.C.G.S. § 15A-1061 (1983). The decision whether to grant a motion for mistrial rests within the sound discretion of the trial judge and will not ordinarily be disturbed on appeal absent a showing of abuse of that discretion. *State v. Primes*, 314 N.C. 202, 333 S.E. 2d 278 (1985). The scope of appellate review, then, is limited to whether in denying the motions for a mistrial, there has been an abuse of judicial discretion. *State v. McCraw*, 300 N.C. 610, 268 S.E. 2d 173 (1980).

When Mrs. Boyd made her response that triggered the motion for mistrial, the jury had already heard the most damning testimony to defendant and that most critical to proving the State's case. It was not until after testimony of the incident itself heard from the mouth of the young victim, testimony of the transmission of venereal diseases, and testimony regarding an earlier act of misconduct involving a minor cousin, that this improper testimony was offered. The cumulative effect of this evidence was to demonstrate overwhelmingly defendant's guilt. Upon defendant's motion, the trial court took prompt and sufficient corrective action by sustaining defendant's objection, by allowing defendant's motion to strike and by instructing the jury not to consider Mrs. Boyd's response. Under these circumstances and in light of the strong evidence already properly admitted, the trial court correctly concluded that Mrs. Boyd's response did not result in substantial and irreparable prejudice to defendant. We, therefore, hold that the trial court did not abuse its discretion in denying defendant's motion for mistrial.

No error.

STATE OF NORTH CAROLINA v. LEWIS JAMES STOVER, JR.

No. 11A87

(Filed 3 February 1988)

1. **Criminal Law § 113.5; Indictment and Warrant § 17.2— instructions on date of offense—no deprivation of alibi defense**

The trial court in a rape and sexual offense case did not deprive defendant of his alibi defense by instructing the jury to return verdicts of guilty if it found that defendant committed the crimes charged "on the date alleged" and by refusing to include the specific date of 21 December 1985 in its mandate to the jury where all of the State's evidence was to the effect that the crimes occurred on 21 December 1985 as alleged in the indictments, and where defendant's testimony that he had seen the victim at a card party at his girlfriend's house on 9 December 1985, even when combined with defendant's alibi evidence relevant to 21 December 1985, was not evidence from which the jury could properly infer that the crimes charged were committed on 9 December 1985.

2. **Criminal Law § 128.2— spectator glaring at jury foreperson—exclusion from courtroom—denial of mistrial**

The trial court did not err in the denial of defendant's motion for a mistrial made on the ground of possible juror intimidation after he learned that a spectator who had been subpoenaed by defendant but did not testify had been excluded from the courtroom by the trial judge because he was glaring at the jury foreperson where the court questioned the jurors individually from a list of questions prepared by defense counsel, most of the jurors stated that they did not associate the spectator with defendant, all jurors stated that the spectator's actions did not influence their verdict, and the trial court made findings and conclusions that no prejudice to defendant had been shown.

APPEAL by the defendant pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by *Pope, J.*, at the 9 September 1986 Criminal Session of Superior Court, GUILFORD County. Heard in the Supreme Court on 9 November 1987.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.

Robin E. Hudson for the defendant-appellant.

MITCHELL, Justice.

The defendant was properly indicted by the Grand Jury of Guilford County in bills of indictment charging him with the com-

mission of first degree rape and the commission of two first degree sexual offenses. A jury found the defendant guilty of each of the three offenses as charged. The trial court consolidated the cases against the defendant for judgment and entered judgment sentencing him to imprisonment for life. The defendant appeals to this Court as a matter of right.

The State's evidence at trial tended to show, *inter alia*, that the defendant, Lewis James Stover, Jr., was the boyfriend of the victim's next door neighbor, Renee Carroll, and at times lived with Carroll. On 21 December 1985, the victim went to the Carroll residence to play with Jamie Holder, a female child approximately six years of age, who was the daughter of Renee Carroll. The victim, a female child, was ten years of age at the time. On that occasion, the defendant called the victim into the bathroom. He pulled down his pants, pulled down the child's pants and stuck his finger in her "private part" or "place where you use the bathroom." She tried to push him away, but was unable to do so. When the victim declined the defendant's invitation to commit certain sex acts upon him, he allowed her to leave the bathroom. The victim then went to Jamie's room and sat with her.

The defendant then called the victim into Renee Carroll's bedroom. When the victim went to the bedroom, the defendant pushed her onto the bed and put his "private part" into her "private part." He pressed down and "started moving around" while the child attempted unsuccessfully to push him away.

The defendant then got up and went into the bathroom. He returned and put vaseline around the child's "private part," and then stuck his "private part" into her again while she tried to push him away. Thereafter, he took his "private part" out of her and stuck it in her mouth. She felt as though she "was getting ready to choke" and pushed him away. He then put his tongue on her "private part."

The victim returned to Jamie's room. Thereafter, the defendant again took her into the bathroom and told her "to pull his private part" which the victim did. Thereafter, the victim left the home.

The defendant offered alibi evidence, in the form of his own testimony and the testimony of Renee Carroll's mother, tending

to show that neither he nor the victim were in the Carroll home on 21 December 1985.

[1] The defendant first assigns as error the trial court's instructions to the jury. He contends that the trial court's instructions concerning the date of the crimes as charged in the bills of indictment improperly deprived him of his alibi defense. The trial court instructed the jury, in pertinent part, to return verdicts of guilty if it found that the defendant committed the crimes charged "on the date alleged." Immediately after the trial court completed its jury instructions, but before the jury retired, counsel for the defendant requested a correction of the trial court's mandate to the extent that the date of 21 December 1985 be specifically inserted therein. At that time, trial counsel argued that the specific date alleged in the indictment should be included in the mandate to the jury, because evidence had been introduced tending to show that the offenses alleged might have taken place on a day other than 21 December 1985. The trial court denied this request.

The defendant's counsel on appeal concedes that there was evidence tending to show that the crimes charged occurred on 21 December 1985. However, counsel argues that there also was evidence from which the jury could have inferred that the offenses occurred on 9 December 1985. Counsel argues that it was crucial for the jury to be reminded to convict the defendant only if it found that the offenses had been committed by him on 21 December 1985 as alleged in the indictments, because the defendant had offered alibi evidence as to that date but not as to 9 December 1985. We find no merit in such arguments, given the evidence introduced in this case.

Here the State did not present evidence in its case in chief that the crimes occurred on one date, then attempt to change its theory of the date of the crimes after alibi evidence had been introduced by the defendant. *See generally State v. Christopher*, 307 N.C. 645, 300 S.E. 2d 381 (1983); *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961). All of the State's evidence was to the effect that the crimes occurred on 21 December 1985, as alleged in the indictments.

The evidence which the defendant contends would permit the jury to infer that the crimes occurred on 9 December 1985 arose from the defendant's testimony. He testified that he had seen the

victim at a card party he held at his girlfriend's home on 9 December 1985, but that he had not been alone with the victim on that occasion. Such testimony, even when combined with the defendant's alibi evidence relevant to 21 December 1985, was not evidence from which the jury properly could infer that the crimes charged were committed on 9 December 1985. We conclude that the trial court's instructions could not have caused the jury to believe that it was to return a verdict of guilty if it found the defendant committed the offenses charged on some date other than that contained in the bill of indictment and supported by all of the evidence—21 December 1985.

[2] The defendant next assigns as error the trial court's failure to declare a mistrial. After the jury returned its verdicts in this case, counsel for the defendant made a motion for mistrial based upon possible intimidation of the jurors by Terry Lee Garner, who had been subpoenaed by the defendant but was not called as a witness at trial. The defendant's trial counsel stated that after the jury had begun deliberations, she had become aware of the fact that Garner had been excluded from the courtroom by the trial court because the jury foreperson had complained that Garner was glaring at her.

The trial court conducted a voir dire in chambers and questioned the jurors individually from a list of questions prepared by counsel for the defendant. Although some of the jurors indicated that they had been aware of the fact that Garner was staring or glaring at the foreperson of the jury, most of the jurors indicated that they did not associate Garner with the defendant. All of the jurors specifically stated that Garner's actions had not influenced their verdict in any way. The trial court made findings and conclusions to the effect that no prejudice to the defendant had been shown and denied the defendant's motion for a mistrial. Even assuming *arguendo* that the defendant's motion for mistrial was made "during the trial" within the meaning of N.C.G.S. § 15A-1061, the evidence before the trial court supported its conclusion that Garner's actions had not resulted in any substantial and irreparable prejudice to the defendant's case. Therefore, the trial court properly denied the defendant's motion for a mistrial.

No error.

LINDA H. JACKSON, ADMINISTRATRIX OF THE ESTATE OF MARY MAGDALENE JACKSON v. HOUSING AUTHORITY OF THE CITY OF HIGH POINT

No. 374PA87

(Filed 3 February 1988)

1. **Constitutional Law § 24.9— civil case—peremptory challenges to jurors based on race—unconstitutional**

Art. I, § 26 of the North Carolina Constitution applies to the use of peremptory challenges in all cases, civil and criminal, and prohibits the exclusion of persons from jury service for reasons of race.

2. **Appeal and Error § 40; Jury § 5.2— exercise of peremptory challenges on racial basis—statement by counsel—not sufficient to support finding of discriminatory use**

A statement by plaintiff's counsel was not alone sufficient to support a finding of discriminatory use of peremptory challenges; counsel who seek to rely upon an alleged impropriety in the jury selection process must provide the reviewing court with the relevant portions of the transcript of the jury *voir dire*.

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

ON defendant's petition for discretionary review prior to determination of plaintiff's appeal to the Court of Appeals from judgment of *Hyatt, J.*, at the 10 November 1986 session of Superior Court, GUILFORD County. Heard in the Supreme Court 9 November 1987.

Kennedy, Kennedy, Kennedy and Kennedy, by Harold L. Kennedy III, Harvey L. Kennedy, and Annie Brown Kennedy, for plaintiff-appellant.

Henson Henson Bayliss & Coates, by Perry C. Henson, J. Victor Bowman, and Jack B. Bayliss, Jr.; and Edward N. Post, for defendant-appellee.

MARTIN, Justice.

[1] A statement of the facts of this case is contained in the opinion on the first appeal, reported in 316 N.C. 259, 341 S.E. 2d 523 (1986). The sole issue before us on this appeal is whether article I, section 26 of the North Carolina Constitution proscribes peremp-

tory challenges to jurors in civil cases on the basis of race. We hold that it does.

Article I, section 26 provides:

> No person shall be excluded from jury service on account of sex, race, color, religion, or national origin.

By its plain terms, this section of our constitution prohibits the exclusion of persons from jury service for reasons of race. It makes no distinction between civil and criminal trials. We conclude that this section applies to the use of peremptory challenges in *all* cases, civil and criminal. Furthermore, this provision of the constitution would be eviscerated if the use of peremptory challenges did not come within its ambit. It is true that a litigant in a civil case may exercise peremptory challenges during the voir dire process, N.C.G.S. § 9-19 (1986); *Freeman v. Ponder*, 234 N.C. 294, 67 S.E. 2d 292 (1951), but such challenges must be exercised in a constitutional manner. Property rights, as well as life and liberty, are protected by our constitution. N.C. Const. art. I, § 19. Although long embedded in our common law, the use of peremptory challenges is based upon statutory authority and is not of constitutional dimension. Therefore, the statutory authority to exercise peremptory challenges must yield to the constitutional mandate of section 26.

Although the issue decided today is of recent origin, our holding finds support in the decisions of other state courts. *Holley v. J & S Sweeping Co.*, 143 Cal. App. 3d 588, 192 Cal. Rptr. 74 (1983); *City of Miami v. Cornett*, 463 So. 2d 399 (Fla. App. 1985).

Our decision is based solely upon adequate and independent state constitutional grounds. *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed. 2d 1201 (1983). Therefore, we do not find it necessary to discuss plaintiff's federal constitutional arguments.

[2] Our analysis of this appeal does not end with the above discussion. Plaintiff has failed to provide this Court with an adequate record from which to determine whether jurors were improperly excused by peremptory challenges in this trial. The statement by plaintiff's counsel is not sufficient, standing alone, to support a finding of discriminatory use of peremptory challenges. Impropriety in the selection of the jury cannot be supported solely by statements of counsel. *State v. Corl*, 250 N.C.

258, 108 S.E. 2d 615 (1959). The moving party has the burden to offer evidence in support of its motion. *Id.* It is the duty of the appellant to provide the Court with the materials necessary to decide the issue on appeal. *Mooneyham v. Mooneyham*, 249 N.C. 641, 107 S.E. 2d 66 (1959); *see* N.C.R. App. P. 9. The appellate courts can judicially know only what appears of record. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). Even though we have no reason to doubt the accuracy of counsel's statement, it cannot serve as a substitute for record proof.

We hold that as a rule of practice, counsel who seek to rely upon an alleged impropriety in the jury selection process must provide the reviewing court with the relevant portions of the transcript of the jury voir dire. Plaintiff has failed to do so in this appeal. We do not have a sufficient record to determine the issue plaintiff urges. Accordingly, in the trial below we find

No error.

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

STATE OF NORTH CAROLINA *EX REL.* UTILITIES COMMISSION v. AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC.

No. 238A87

(Filed 3 February 1988)

Telecommunications § 1.2— interLATA Private Line Service—different rates for nonresellers and resellers

An order of the Utilities Commission establishing different interLATA Private Line Service rates for AT&T's nonreseller customers and its reseller customers was discriminatory on its face.

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

APPEAL by AT&T Communications of the Southern States, Inc. from the Order Establishing Rate Design Guidelines issued 23 December 1986 by the North Carolina Utilities Commission in

State ex rel. Utilities Comm. v. AT&T Communications

Docket No. P-140, Sub 9. Heard in the Supreme Court 9 December 1987.

Robert P. Gruber, Executive Director, by Antoinette R. Wike, Chief Counsel, for the Public Staff, North Carolina Utilities Commission, appellee.

Dwight W. Allen, Vice President-General Counsel & Secretary, and Jack H. Derrick, General Attorney, for Carolina Telephone and Telegraph Company, appellee.

Tharrington, Smith & Hargrove, by Wade H. Hargrove, and Gene V. Coker, for AT&T Communications of the Southern States, Inc., appellant.

PER CURIAM.

AT&T Communications of the Southern States, Inc. (AT&T) appeals from the 23 December 1986 order of the North Carolina Utilities Commission (Commission) contending inter alia that the order is fatally deficient as a matter of law. We agree.

This proceeding involves AT&T's petition to adjust its existing rates for interLATA Private Line Service. LATAs are Local Access and Transport Areas located in five geographical areas within North Carolina, at Asheville, Charlotte, Greensboro, Raleigh, and Wilmington. Telephone calls between LATAs are "interLATA" service. InterLATA service is provided by two types of carriers: "facility based," such as AT&T, MCI, and Sprint, and "resale" carriers. Facility based carriers own and operate their own facilities. Resale carriers acquire service from facility based carriers and resell the service to end user customers. It is necessary for facility based carriers to interconnect lines and facilities with local telephone companies which provide *intra*LATA service. For these interconnections such carriers as AT&T must pay an access fee, regulated by the Commission.

Private Line Service involves a dedicated facility to one or more points designated by the customer and is always available for the customer's exclusive use. Private Line Service cannot be "switched" onto outside telephone networks but services only locations on the Private Line Service.

AT&T is presently authorized to provide interLATA Private Line Service to its end user customers. As stated above, in order to provide this service AT&T must acquire access service from such local exchange companies. Access fees paid by AT&T form a part of its costs in providing this service. These costs are recovered in the rates charged by AT&T known as "Station Terminal Rates."

In its order, the Commission prescribed different Private Line Service rates for AT&T's nonreseller (end user) customers and its reseller customers. For nonresellers, the Commission approved a 25 percent increase in the "Station Terminal Rate" component of the rate structure but did not change the interLATA Private Line Service component.

For resellers, the Commission deleted the Station Terminal Rate component entirely and ordered resellers to obtain Special Access for the local link directly from local exchange telephone companies, rather than from AT&T as had been previously done. The Commission also reduced the interLATA Private Line Service rates for resellers. Thus the Commission established a higher rate for AT&T's nonreseller customers than for its reseller customers.

We conclude that upon the face of the order dated 23 December 1986 the rates established are discriminatory. There may be legally adequate reasons why the order is not unjustly discriminatory within the meaning of N.C.G.S. § 62-2(4). However, such reasons, if any, do not appear in the order. The Commission has the duty to enter final orders that are sufficient in detail to enable this Court on appeal to determine the controverted issues. N.C.G.S. § 62-79(a) (1982); *State ex rel. Utilities Comm. v. Conservation Council*, 312 N.C. 59, 320 S.E. 2d 679 (1984). This the Commission has failed to do. The order must be sufficient within itself to comply with the statute. Failure to include all necessary findings of fact and details is an error of law and a basis for remand under N.C.G.S. § 62-94(b)(4) because it frustrates appellate review. *State ex rel. Utilities Comm. v. The Public Staff*, 317 N.C. 26, 343 S.E. 2d 898 (1986). Therefore, the order of the Commission is vacated and this cause is remanded to the Commission for further proceedings not inconsistent with this opinion.

Vacated and remanded.

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

HUYCK CORPORATION, HUYCK FORMEX DIVISION; ATHEY PRODUCTS CORPORATION; NEUSE PLASTIC COMPANY, INC.; CHAPPELL MOTORS, INC., D/B/A BOSTROM FORD; RONNIE R. BAILEY AND WIFE, ELSIE M. BAILEY; MARVIN C. FRAZIER AND WIFE, LARA F. FRAZIER; ROY W. WHEELER AND WIFE, BETTY R. WHEELER; WILLIAM L. BYRD AND WIFE, CAROLYN H. BYRD; DONALD M. WHITT AND WIFE, NANCY GARNER WHITT; DOUGLAS WALSTON AND WIFE, PATRICIA WALSTON; HOWARD L. CASH AND WIFE, MARGIE A. CASH; C. B. CASH AND WIFE, JOYCE CASH; C. D. HORTON AND WIFE, MRS. C. D. HORTON; RICHARD A. COX AND WIFE, MRS. RICHARD A. COX; WILLIAM L. ROBINSON AND WIFE, BEATRICE ROBINSON; JOSEPH L. SAVAGE AND WIFE, RUBY L. SAVAGE; J. WAIDAS NINES AND WIFE, MRS. J. WAIDAS NINES; MORRIS W. EDWARDS; WILLIAM TERRY MARTIN AND WIFE, CAROL P. MARTIN; CHARLIE H. SAMMONS AND WIFE, RUBY M. SAMMONS; GEORGE L. BROWN, JR. AND WIFE, EMMA BROWN; RUSSELL S. FINCH AND WIFE, ANNE C. FINCH; RICHARD E. HAILEY AND WIFE, BECKY HAILEY; JERRY W. LAWS AND WIFE, PAT LAWS; JAMES L. DAVIS AND WIFE, MRS. JAMES L. DAVIS; JAMES L. LARSON AND WIFE, LOTTIE LARSON; R. D. BECK, JR. AND WIFE, MRS. R. D. BECK, JR.; LOUIS A. ROLLINS AND WIFE, ESTHER LEE ROLLINS; DOCK R. RAY AND WIFE, LUCILLE RAY; JODIE L. HOCKADAY; TERRY ROBERT YOUNG AND WIFE, GAYLE YOUNG; JIM HOY AND WIFE, MRS. JIM HOY; WILLIAM E. ALFORD AND WIFE, GLORIA J. ALFORD; BURLEY G. MUNN AND WIFE, CATHERINE MUNN; WILLIAM R. DICKERSON AND WIFE, BECKY DICKERSON; A. W. ADAMS AND WIFE, MRS. A. W. ADAMS; ROBERT SUMERLIN AND WIFE, ANNA SUMERLIN; THOMAS J. PENDERGRASS AND WIFE, SOPHIE E. PENDERGRASS v. TOWN OF WAKE FOREST

No. 320PA87

(Filed 3 February 1988)

ON discretionary review of a unanimous decision of the Court of Appeals, 86 N.C. App. 13, 356 S.E. 2d 599 (1987), affirming the judgment entered by *Farmer, J.*, at the 7 July 1986 Mixed Session of Superior Court, WAKE County.

Petitioners sought a review by the trial court of the action of the Board of Commissioners of the Town of Wake Forest in adopting on 1 February 1984 Ordinance No. 84-2 entitled: "An Or-

dinance to Extend the Corporate Limits of the Town of Wake Forest, Under the Authority Granted by Part 2, Article 4A, Chapter 160A of the General Statutes of North Carolina." The superior court entered judgment holding the ordinance valid and affirming the action of the Board of Commissioners in adopting it, from which judgment the petitioners appealed to the Court of Appeals. The Court of Appeals unanimously affirmed the trial court. The petitioners' petition for discretionary review was allowed by this Court on 3 September 1987. Heard in the Supreme Court 7 December 1987.

I. Beverly Lake and Jane P. Harris for petitioner-appellants.

Ellis Nassif and Manning, Fulton & Skinner, by Howard E. Manning and Charles E. Nichols, Jr., for respondent-appellee.

PER CURIAM.

Affirmed.

RICHARD M. BOOHER AND NANCY ANN BROWN v. WILLIAM C. FRUE, RONALD K. PAYNE AND MICHAEL Y. SAUNDERS

No. 465A87

(Filed 3 February 1988)

APPEAL as 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, 86 N.C. App. 390 (1987), reversing a judgment entered by *Owens, Judge*, on 27 March 1986 in Superior Court, BUNCOMBE County. Heard in the Supreme Court 9 December 1987.

Kennedy Covington Lobdell & Hickman, by James E. Walker and Alice Carmichael Richey, for plaintiff appellees.

Ronald W. Howell, for defendant appellants.

PER CURIAM.

Affirmed.

JULIO MEDINA, JR. v. TOWN AND COUNTRY FORD, INC., AND NCNB NATIONAL BANK OF NORTH CAROLINA

No. 338A87

(Filed 3 February 1988)

APPEAL of right by defendant Town and Country Ford, Inc. from the decision of a divided panel of the Court of Appeals, 85 N.C. App. 650, 355 S.E. 2d 831 (1987), finding no error in a trial by *Friday, J.*, at the 21 April 1986 Civil Jury Session of Superior Court, MECKLENBURG County. On 28 July 1987 we allowed defendant Town and Country Ford, Inc.'s petition for discretionary review of issues in addition to that presented as the basis of the dissenting opinion in the Court of Appeals. Heard in the Supreme Court 8 December 1987.

Weinstein & Sturges, P.A., by Fenton T. Erwin, Jr., for plaintiff appellee.

Bailey, Patterson, Caddell & Bailey, P.A., by Allen A. Bailey and H. Morris Caddell, Jr., for defendant appellant Town and Country Ford, Inc.

PER CURIAM.

Affirmed.

HOWARD N. ROBINSON, JR. v. NORTH CAROLINA FARM BUREAU INSURANCE COMPANY

No. 323PA87

(Filed 3 February 1988)

ON discretionary review of the decision of the Court of Appeals, 86 N.C. App. 44, 356 S.E. 2d 392 (1987), vacating an order of partial summary judgment entered by *Burroughs, J.*, on 12 February 1986 in Superior Court, GASTON County. Heard in the Supreme Court on 10 December 1987.

Whitesides, Robinson, Blue & Wilson, by Henry M. Whitesides, for plaintiff-appellee.

Caudle & Spears, P.A., by Harold C. Spears and Lloyd C. Caudle for defendant-appellant.

PER CURIAM.

After hearing oral argument and considering the new briefs, the Court concludes that discretionary review was improvidently allowed.

Discretionary review improvidently allowed.

STATE OF NORTH CAROLINA v. BOBBY WALKER

No. 422A87

(Filed 3 February 1988)

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from decision of the Court of Appeals, 86 N.C. App. 336, 357 S.E. 2d 384 (1987), finding no error in the trial and conviction of defendant before *Hight, J.*, at the 6 October 1986 Criminal Session of Superior Court, CUMBERLAND County. Heard in the Supreme Court on 8 December 1987.

Lacy H. Thornburg, Attorney General, by Guy A. Hamlin, Special Deputy Attorney General, and Doris J. Holton, Assistant Attorney General, for the state.

James R. Parish for defendant appellant.

PER CURIAM.

Affirmed.

STATE OF NORTH CAROLINA v. ALTON GARNER GREEN

No. 38A87

(Filed 9 March 1988)

1. **Criminal Law § 92.1— first degree murder—joinder of trial with that of codefendant—no denial of fair trial**

The trial court did not err in granting the State's motion for joinder and in denying defendant's motion to sever his first degree murder trial from that of his female codefendant on the ground that the codefendant's testimony was so antagonistic to defendant's plea of not guilty as to prejudice his right to a fair trial where the codefendant's testimony, while tending to show that defendant shot and killed three people, also suggested at least provocation and perhaps self-defense and supported defendant's denial that he acted with premeditation and deliberation; the State did not stand by and rely on the codefendant's testimony to prove its case but presented sufficient evidence independent of the codefendant's testimony from which a jury could conclude that defendant was guilty of first degree murder; and neither prosecutorial stratagem nor the operation of court rules impaired defendant's ability to defend himself. N.C.G.S. § 15A-926(b)(2); N.C.G.S. § 15A-927(c)(2).

2. **Criminal Law § 34.5— evidence of another crime—admissible to show identity**

In a prosecution for the first degree murder of three persons in a tavern, evidence concerning an incident in which defendant pistol-whipped one patron and shot a second patron in another tavern two weeks earlier was admissible to prove defendant's identity as the perpetrator of the murders in question where both incidents had the following similarities: a victim at each tavern was pistol-whipped; defendant jammed his gun into the ear of the man he pistol-whipped in the earlier incident, and one of the murder victims had a lacerated ear which may have been produced by the same procedure; a victim of the earlier incident and two of the murder victims were shot in the stomach at point-blank range; in both incidents the savagery of the violence toward the victims was never adequately accounted for by any legitimate or criminal motive; and in both incidents, defendant dispatched a female companion to fetch his guns and to ready the van in which he fled the scene. N.C.G.S. § 8C-1, Rule 404(b).

3. **Homicide §§ 1.6, 32.1— felony murder—sufficient evidence of armed robbery—harmless error in submission**

There was sufficient evidence of armed robbery to submit felony murder to the jury even if defendant's intent to take the victims' wallets was formed after he shot the victims. Had the evidence of armed robbery been insufficient, defendant was not prejudiced by the submission of felony murder because the jury did not find him guilty of any charge based on a felony murder theory.

4. **Criminal Law § 46.1— instruction on flight—sufficient evidence**

There was sufficient evidence in this first degree murder case to support the trial court's instruction on flight as evidence of guilt where the evidence

tended to show that immediately after the three victims were shot, defendant and his female companion went to Virginia to collect money owed to the companion and to get personal belongings; defendant told his companion's uncle in Virginia that he couldn't return to Durham to straighten out charges pending against him there because he had "killed three people"; defendant and his companion then went to Florida where defendant asked the companion's father to help him get a car that would not be registered in defendant's name; and when police entered the hotel suite where defendant was staying in Florida, he was discovered hiding in a closet with a sawed-off shotgun. Whether there was any plausibility in defendant's alternative explanation that he and his female companion had no fixed address and were merely traveling from town to town had no bearing on the propriety of an instruction on flight.

5. **Criminal Law § 135.8— first degree murder—avoiding arrest aggravating circumstance**

In this prosecution for three first degree murders committed in a tavern, the State presented sufficient evidence that one victim was killed to eliminate him as a witness to support the court's submission of the aggravating factor that such murder was committed for the purpose of avoiding or preventing a lawful arrest, N.C.G.S. § 15A-2000(e)(4), where the State's evidence tended to show that the victim was sitting at the tavern bar, alternately drinking beer and falling asleep or passing out with his head on his arms, waking, and falling asleep again; the victim was shot in the back while asleep or while immobilized with fear at the bar; such victim had not resisted the killer as had a second victim; and, unlike the third victim, such victim was not armed and could not have presented a threat to the killer.

6. **Criminal Law § 135.8— witness elimination—violent course of conduct—aggravating factors not based on same evidence**

The trial court's findings of witness elimination and violent course of conduct aggravating factors for a first degree murder were not based on the same evidence since the violent course of conduct factor directs the jury's attention to the factual circumstances of defendant's crimes while the witness elimination factor requires the jury to consider defendant's motive rather than his actions in shooting a man in defenseless posture.

7. **Criminal Law § 135.8— prior conviction aggravating circumstance—proof permitted**

In a prosecution for three first degree murders, the State was not limited to the introduction of the court record of defendant's prior armed robbery conviction in establishing the aggravating circumstance that defendant had previously been convicted of a felony involving the use or threat of violence to the person, and the trial court did not err in allowing the State to present the testimony of a former police officer who had investigated the armed robbery and who had arrested defendant for the crime.

8. **Constitutional Law § 63; Jury § 7.11— death qualified jury—constitutionality**

The trial court's exclusion for cause of certain jurors who expressed an unwillingness to impose the death penalty did not produce a jury biased in

favor of conviction and prone to find defendant guilty in violation of defendant's constitutional rights.

9. **Criminal Law § 135.8— especially heinous aggravating circumstance—sufficient evidence**

There was sufficient evidence to support the trial court's submission of the "especially heinous, atrocious or cruel" aggravating circumstance in a first degree murder case. Even if the evidence of this aggravating circumstance was insufficient, defendant was not prejudiced as a result of its submission because the jury found that this aggravating circumstance was not present.

10. **Constitutional Law § 80; Criminal Law § 135.4— constitutionality of death penalty statute**

There is no merit to defendant's contention that the North Carolina death penalty statute, N.C.G.S. § 15A-2000, is unconstitutional on grounds that it is applied in a discriminatory manner, is vague and overbroad, and involves subjective discretion. Eighth and Fourteenth Amendments to the U. S. Constitution; Art. I, §§ 19 and 27 of the N. C. Constitution.

11. **Criminal Law § 135.10— death sentences not disproportionate**

Sentences of death imposed on defendant for three first degree murders committed with premeditation and deliberation are not disproportionate to the punishment imposed in similar cases considering the crimes and the defendant where three men were shot, one was beaten, and all were then dispatched, execution style, by multiple close-range shots to the head, and there was no evidence of any motive of the sort which is usually powerful enough to cause one human being to destroy another.

APPEAL by defendant from judgments sentencing defendant to death for each of three convictions of murder in the first degree, said judgments imposed by *Stephens, J.*, on 14 November 1985, Superior Court, WAKE County. Heard in the Supreme Court 10 November 1987.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the state.

James L. Blackburn for defendant.

MARTIN, Justice.

For the reasons stated below, we find the defendant's assignments of error to be without merit and hold that he received a fair trial, free of prejudicial error.

Viewed in the light most favorable to the state, the evidence presented at trial tended to show the following: On the morning of 12 February 1985, Callie Grimes went to look for her husband,

Jimmy, who had not come home the previous night. She sought him at a local bar, the Chief's Club, located on Highway 55 near the town of Apex. Arriving at approximately 8:15 a.m., she found the door unlocked and, upon entering, found her husband lying dead on the barroom floor. The body of Garland Williams was lying beside her husband. When Callie Grimes went behind the bar to telephone for help, she discovered the body of the third victim, the bar's owner, Charlie Ray Johnson.

Forensic evidence tended to show that the men had died no later than 5:00 a.m. Crime scene investigators determined that the wallets of the victims had been taken from them. However, they also found $9,000 in a blue bank bag belonging to Charlie Johnson and an additional $7,500 in hundred dollar bills in Johnson's coat pocket.

The autopsy of Jimmy Ray Grimes revealed four gunshot wounds. He was shot in the head three times at close range with a small-caliber gun. There was also a contact wound in the pit of his stomach where he had been shot with a large-caliber bullet. Grimes had a blood alcohol level of 0.20 percent.

Charlie Ray Johnson had been shot four times. Two large-caliber bullets had struck his trunk while two small-caliber bullets had been fired into his forehead and ear at close range. Charlie Johnson had a blood alcohol level of 0.31 percent.

Garland Williams was shot three times. A large-caliber bullet entered his back. He had two close-range head wounds, one caused by a large-caliber and one by a small-caliber bullet. His blood alcohol level was 0.19 percent.

According to the testimony of several of the bar's patrons, defendant arrived at the Chief's Club with Debra Blankenship on the afternoon of 11 February. During that afternoon and evening and into the early morning hours of 12 February, defendant and Blankenship played pool, drank beer, and used cocaine at the Chief's Club. Defendant also sold cocaine to a patron, who in turn sold it to several others at the club, and Charlie Johnson used cocaine given to him by defendant. Patrons testified that defendant had in his possession both his own .38-caliber pistol and Blankenship's .22-caliber pistol. Charlie Johnson kept a .38-caliber pistol under the bar. These guns were displayed several times in the

hours preceding the shootings. Both defendant and Johnson displayed their .38s when a man assaulted his girlfriend. Defendant followed the violent patron outside the bar to remonstrate with him, having first armed himself with a pistol. Defendant also made a display of his .38 when he went upstairs with a group of bar patrons to inject cocaine. Defendant and Johnson were observed displaying and discussing their guns, including Blankenship's .22, in the early morning hours.

J. C. Sandy was the last patron, other than defendant and Blankenship, to leave the Chief's Club. At about 2:30 a.m., he had a brief conversation with Jimmy Grimes, who came and spoke to him as he sat in his parked Jeep outside the club. Grimes told him that Charlie Johnson, who was preparing to close, was permitting defendant, Blankenship, and Garland Williams to remain in the bar but would not allow him to stay. There had been some tension between the two men because Grimes had wanted Johnson to intervene more forcefully in the boyfriend/girlfriend quarrel that had left the girlfriend with a badly bruised face. Grimes told Sandy that he would sleep in his parked car until it was time for him to go to work. He also told Sandy that he believed defendant was going to rob Charlie Johnson. Grimes and Sandy knocked on the club door and gained admittance for a brief period of time, after which they left the club. Sandy drove home. Grimes went to his car.

Debra Blankenship testified that while Sandy and Grimes were making their brief entrance into the bar, she, at defendant's request, went outside to warm up her van in preparation for their departure. Sandy saw her reenter the bar as he drove away. Blankenship testified that soon after reentering the bar she told defendant she was ready to leave and returned to the van. After waiting for him with the motor running for a little time, she turned off the engine and went to sleep in the back of the van.

When Debra Blankenship woke in the van, early on the morning of 12 February, she found that defendant was driving towards Virginia on N.C. 86. Blankenship was born and partly raised in Glade Hill, Virginia, where she had numerous kin with whom she and her immediate family had close ties. The couple drove to Glade Hill, where they picked up several cartons of stored belongings. They then drove to Daytona Beach, Florida, where

Blankenship's parents were attending the races. According to Blankenship's testimony and that of her family and kin, she sought the aid and protection of her parents because, although she loved defendant, she feared him.

Debra Blankenship testified that when she woke in the van defendant told her that he was in trouble because he had "blowed three people away." As they were driving to Glade Hill, defendant asked her to throw a package out the window of the van. It felt smooth to Blankenship and may have contained the wallets of the murder victims. He later handed her a towel and three guns —her .22, his .38, and a gun that looked to her like Charlie Johnson's .38—and asked her to wipe them. Later he got out of the van and disposed of them. Defendant also cut up the clothes and boots he had worn at the Chief's Club and disposed of them in the woods. Blankenship had observed stains on the dungarees he had been wearing, on the pants' legs below the knees.

While in Glade Hill, defendant told Blankenship's uncle, aunt, and cousin that he had killed three people and that Debra had no part in the killings. When the couple reached Florida, defendant made the same statement to each of Blankenship's parents and to her father's niece, who had accompanied them to Daytona. Defendant asked Debra's father to help him get a car in which to flee. L. B. Blankenship refused him.

On the evening of the couple's arrival in Daytona Beach, 14 February, a man from Durham, North Carolina, who knew defendant was wanted for murder in North Carolina, saw defendant, recognized him, and informed Daytona Beach police as to his whereabouts. In the early morning hours of 15 February, Daytona Beach police entered the Blankenship hotel suite and found defendant hiding in a closet with a sawed-off shotgun. When he was advised by police to drop the gun, he neither complied nor resisted. The gun was wrested from his hands by police and he was placed under arrest.

Defendant and Debra Blankenship were jointly tried for the first-degree murders of the Chief's Club victims. Defendant was convicted of murder in the first degree based on premeditation and deliberation in all three cases. Blankenship was acquitted.

The jury found the following circumstances in aggravation in all three cases: defendant had previously been convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3), and the murder for which defendant stands convicted was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). In the case of the murder of Garland Williams the jury also found the circumstance in aggravation that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. N.C.G.S. § 15A-2000(e)(4) (1983).

The jury rejected each of the four mitigating circumstances submitted. Upon unanimously finding beyond a reasonable doubt that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, the jury recommended that defendant be sentenced to death in each case. Judgments of execution were entered on 14 November 1985. Defendant appealed the sentences of death to this Court as a matter of right.

I. Guilt-Innocence Phase

[1] Defendant first contends that the trial court erred in granting the state's motion for joinder and in denying defendant's motions to sever his trial from that of Debra Blankenship. N.C.G.S. § 15A-926(b)(2) permits joinder where the state seeks to hold each defendant accountable for the same crimes. Joinder is not permitted, however, if severance is necessary for a fair determination of guilt or innocence. N.C.G.S. § 15A-927(c)(2) (1983). Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial court's discretionary ruling on the question will not be disturbed. *State v. Nelson*, 298 N.C. 573, 586, 260 S.E. 2d 629, 640 (1979), *cert. denied*, 446 U.S. 929, 64 L.Ed. 2d 282 (1980). The state argues that the defendant waived joinder because he made his motions during rather than before trial. We do not find it necessary to discuss the waiver issue because, after examining the entire record, we hold that defendant has failed to show that the trial court abused its discretion in permitting joinder or that he was deprived of a fair trial.

This Court stated in *Nelson* the test to be applied in determining whether the trial court erred in denying a defendant's mo-

tion for severance under N.C.G.S. § 15A-927(c)(2). The test is whether the conflict in the defendants' respective positions at trial is of such a nature that, considering all of the evidence in the case, defendant was denied a fair trial. 298 N.C. at 587, 260 S.E. 2d at 640. The test is not merely whether defendants have conflicting or antagonistic defenses but whether this defendant's case has been prejudiced. The *Nelson* analysis of joinder law has recently been reaffirmed in *State v. Rasor*, 319 N.C. 577, 356 S.E. 2d 328 (1987). It is defendant's contention that Blankenship's testimony was so antagonistic to his plea of not guilty as to prejudice his right to a fair trial. In *Nelson* we explained the nature of the circumstances in which defenses were to be deemed so antagonistic as to prejudice one or more of the defendants. Severance should be granted to avoid an evidentiary contest between the defendants "where the state simply stands by and witnesses 'a combat in which the defendants [attempt] to destroy each other.' " 298 N.C. at 587, 260 S.E. 2d at 640 (quoting *People v. Braune*, 363 Ill. 551, 557, 2 N.E. 2d 839, 842 (1936)). We cannot agree with defendant that he and his codefendant were pitted against each other in this fashion at his trial.

Unquestionably, Blankenship's testimony was inimical to defendant's defense in important respects. Blankenship testified to defendant's admission that he had killed three people, to his destruction of evidence, to his having stains on his dungarees which may have been blood, and to his flight to evade arrest. But Blankenship's testimony was not entirely antagonistic to defendant. She testified that he told her that he had been attacked, taken by surprise by a blow to the head by a bottle or a gun, and that this attack began the fight in which he shot three people. Her testimony suggested at least provocation and perhaps self-defense and supported defendant's denial that he was guilty of murder with premeditation and deliberation.

Nor did the state stand by and rely on Blankenship's testimony to prove its case. Various patrons of the Chief's Club contributed to the state's being able to show, independently of Blankenship's testimony, that defendant was at the club in the early morning hours of 12 February, that he was armed with two guns, and that he and Blankenship remained at the bar after all others save the murdered three had left. Forensic evidence established that the guns these witnesses saw in defendant's posses-

sion could have fired the murderous bullets. A Daytona Beach law enforcement officer testified that defendant's response to the Florida's officers' early morning appearance was to hide in a closet with a sawed-off shotgun at the ready. Relatives of Debra Blankenship testified that defendant had admitted to each of them that he, not Debra, had been responsible for the deaths. Independent of Blankenship's testimony, the state presented sufficient evidence from which a jury could have concluded that defendant was guilty of murder in the first degree.

Finally, neither prosecutorial stratagem nor the operation of court rules impaired defendant's ability to defend himself. Defendant had the opportunity, and availed himself of it, to fully cross-examine Blankenship. *State v. Lake*, 305 N.C. 143, 286 S.E. 2d 541 (1982). Nor was this a case in which defendant was prevented from giving exculpatory testimony or deprived of the opportunity to present the inculpatory testimony of his codefendant. *See State v. Boykin*, 307 N.C. 87, 296 S.E. 2d 258 (1982); *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death penalty vacated sub nom. Carter v. North Carolina*, 429 U.S. 809, 50 L.Ed. 2d 69 (1976).

[2] Defendant next challenges the trial court's admission of evidence concerning the so-called "Durham incident" at the B&D Tavern in Durham on 28 December 1984, some two weeks before the Chief's Club murders for which defendant was tried. The state's evidence tended to show that the defendant and Debra Blankenship went to the B&D Tavern to shoot pool and drink beer on the night in question. While they were there, a fight broke out between two other patrons. Defendant intervened to halt the argument, but when profanely told to mind his own business by one of the men, defendant responded by pistol-whipping him. When another patron attempted to stop the beating, defendant turned on him and shot him in the stomach at point-blank range. He then made his departure with Debra Blankenship in her van, which she had warmed and readied outside the door of the bar.

The state contended that the evidence was admissible against defendant to prove his identity as the perpetrator of the Chief's Club murders. After a hearing outside the presence of the jury, the trial judge allowed the state to present the Durham incident evidence. The trial judge admitted this evidence under Rule

404(b) of the North Carolina Rules of Evidence, which lists certain permissible exceptions to the general rule that evidence of past crimes is inadmissible. The trial judge then gave a limiting instruction to the jurors, permitting them to consider this evidence solely for the purposes of establishing the identity, motive, intent, or knowledge of the person or persons responsible for the Chief's Club killings.

The general rule on the admissibility of evidence of other crimes is well stated in an often-quoted passage in Dean Brandis' treatise on evidence:

> Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to be guilty of an independent crime.

1 Brandis on North Carolina Evidence § 91 (1982). The law in North Carolina on admissibility of evidence of other crimes was set forth in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), and codified in N.C.G.S. § 8C-1, Rule 404. Rule 404(b) lists identity, motive, intent, and knowledge, the four purposes for which the trial judge allowed the jury to consider the Durham incident evidence, as among the exceptions which may permit evidence of other crimes to be admitted. The state's interest in the admission of this evidence with respect to defendant was principally to prove identity; for whether the killings were the work of defendant, Debra Blankenship, the two codefendants acting together, or person or persons unknown, was at the heart of this case.

As we stated in *State v. Riddick*, 316 N.C. 127, 340 S.E. 2d 422 (1986), "[t]he application of this exception requires 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes.' " *Id.* at 133, 340 S.E. 2d at 426 (quoting *State v. Moore*, 309 N.C. 102, 106, 305 S.E. 2d 542, 545 (1983)). *See also State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982); *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976). Defendant protests the admission of the Durham incident evidence on the grounds that the similarities the state alleges between the Chief's Club murders and the B&D Tavern incident are insufficiently striking or bizarre

to permit the Durham evidence to fall under the Rule 404(b) exception. Both incidents, defendant insists, are devoid of any singular or signature elements that mark them off from the common run of barroom fights. Therefore, defendant argues, the Durham crime could not be properly mined for evidence probative of the identity of the Chief's Club murderer. We disagree and hold that the Durham incident testimony was properly admitted to prove that defendant committed the Chief's Club murders.

Defendant misapprehends the nature of the standard imposed by Rule 404(b) for the admission of similar crimes as evidence of identity. It is not necessary that the modus operandi of the crime the state seeks to have admitted rise to the level of the unique and bizarre. In the *Riddick* case we did have bizarre and unique signature elements common to the past crimes and the crimes the state sought to prove the defendant had committed; for example, the criminal wore a toboggan hat and also stole fresh fruit from his victims' kitchens. *Riddick*, 316 N.C. 127, 340 S.E. 2d 422. The proper application of the Rule 404(b) exception requires not the bizarre but, as the quotation from *Riddick* above makes clear, that the similarities support the reasonable inference that the same person committed both the earlier and the later crimes. 316 N.C. at 133, 340 S.E. 2d at 426. The Durham incident was sufficiently similar to the Chief's Club killings to be probative of defendant's guilt, not because of the bizarre or unique nature of the elements, but because of the repetition or reenactment in the Apex barroom of so many of the elements played out in the Durham barroom.

At both the B&D Tavern and the Chief's Club there was evidence that one of the victims was pistol-whipped. At the B&D Tavern defendant jammed his gun into the ear of the man he pistol-whipped. Jimmy Grimes, one of the Chief's Club victims, had a lacerated ear which may have been produced by the same procedure. In Durham, Randall Perry was shot in the stomach at point-blank range; this same fate befell Grimes and Charlie Johnson at the Chief's Club. In both the Durham and Apex crimes the savagery of the violence visited upon the victims was never adequately accounted for by any motive, legitimate or criminal. In both incidents the defendant employed Debra Blankenship in a supporting role, dispatching her to fetch him guns and to ready the van in which he fled the scene. Evidence of such similarities

could assist the jury in determining whether defendant was responsible for the Apex murders. There was no error in allowing the jury to hear the Durham incident evidence for the limited purposes for which it was admitted.

[3] Defendant next contends that the trial court committed prejudicial error in ruling that there was sufficient evidence to go to the jury on the felony murder theory based on armed robbery. Each of the three cases was submitted to the jury on the felony murder theory as well as murder in the first degree with premeditation and deliberation. The jury did not find the defendant guilty of felony murder but, rather, based its verdicts solely on premeditation and deliberation. We hold that there was sufficient evidence to submit felony murder to the jury, but even if there were not, defendant could have suffered no prejudice because the jury did not find him guilty of any charges based on a felony murder theory.

In support of its contention that armed robbery had been committed, the state presented evidence that the victims' wallets had been taken from them. Additionally, Blankenship testified that while driving to Glade Hill, defendant had asked her to throw a package, which may have contained the wallets, out of the van window. Defendant protests that robbery could not have been the principal motive of these crimes because a blue bank bag which defendant knew contained a large sum of cash was left behind. Defendant argues that the likely explanation of the removal of the wallets is that they were taken to conceal the identities of the murder victims, an afterthought following the commission of the crimes. Defendant is mistaken about the nature of armed robbery. The commission of armed robbery as defined by N.C.G.S. § 14-87(a) does not depend upon whether the threat or use of violence precedes or follows the taking of the victims' property. Where there is a continuous transaction, the temporal order of the threat or use of a dangerous weapon and the takings is immaterial. *State v. Rasor*, 319 N.C. 577, 587, 356 S.E. 2d 328, 335; *State v. Hope*, 317 N.C. 302, 306, 345 S.E. 2d 361, 364 (1986). Further, provided that the theft and the force are aspects of a single transaction, it is immaterial whether the intention to commit the theft was formed before or after force was used upon the victims. *State v. Fields*, 315 N.C. 191, 337 S.E. 2d 518 (1985).

Even had the evidence of armed robbery been insufficient to support the submission of the felony murder theory to the jury, the defendant could not have suffered prejudice as a result. The jury declined to find the defendant guilty of any charges grounded on a felony murder theory. Where the jury has rejected an erroneously submitted charge, the error is rendered harmless. In *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. denied*, 410 U.S. 958, 35 L.Ed. 2d 691, *cert. denied*, 410 U.S. 987, 36 L.Ed. 2d 184 (1973), we held there was no prejudice to defendant despite the trial court's erroneous submission of the death penalty as a possible verdict to the jury because the jury returned a verdict recommending life imprisonment. Similarly, in *State v. Daniels*, 300 N.C. 105, 265 S.E. 2d 217 (1980), we vacated an involuntary manslaughter verdict because there was insufficient evidence linking the defendant to the killing, but held the defendant was properly convicted of armed robbery. The improper submission of the manslaughter verdict did not infect the armed robbery conviction with prejudice, because the defendant was properly convicted of armed robbery and because the penalty imposed exceeded the penalty for involuntary manslaughter.

[4] Defendant next contends that it was prejudicial error for the trial court to instruct the jury on flight as evidence of guilt because there was insufficient evidence to support the instruction. We hold that the instruction on flight was properly given.

The trial judge provided the jury with the following instruction on flight:

> Ladies and Gentlemen, the State contends that both defendants fled North Carolina after February the 12th of 1985.
>
> I instruct you that evidence of flight may be considered by you together with all other facts and circumstances in these cases in determining whether the combined circumstances amount to an omission or show a consciousness of guilt.
>
> However, proof of this circumstance is not sufficient in itself to establish the defendants' guilt.
>
> . . . .

> Therefore, it must not be considered by you as evidence of premeditation or deliberation.

A review of the evidence in the record reveals that there was sufficient evidence of flight to support this instruction. Defendant and Blankenship drove from Apex to Glade Hill, Virginia, arranging en route to get $3,400 owed Blankenship from her brother. While in Glade Hill, defendant responded to urging by Blankenship's uncle that he return to Durham to straighten out the charges arising from the Durham incident by saying, "I can't, I've killed three people." They stayed in Glade Hill for little more time than it took to gather up some stored personal belongings and to learn that roads to the north and west were impassable because of snow. They then headed south to Florida, where Blankenship's father testified defendant asked him to help get a car that would not be registered in defendant's name. Defendant told L. B. Blankenship that if he would help him get a car, he would sign a notarized statement that Debra had not had a hand in the crimes. When the Daytona Beach police entered the Blankenship hotel suite where defendant was staying, he was discovered hiding in a closet with a sawed-off shotgun at the ready. While defendant did not actively resist arrest, he did not comply with police orders to drop the gun. Police had to wrest the weapon from his hands to place him under arrest.

We stated the law in this jurisdiction in *State v. Irick*, 291 N.C. 480, 494, 231 S.E. 2d 833, 842 (1977), where we said: "So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given." Defendant insists that there is another reasonable explanation for his course of action. He argues that what the state presented as flight was simply the continuation of the pattern of behavior that defendant and Blankenship had exhibited prior to the Chief's Club incident: having no fixed address, they had been travelling from town to town. But, as we made clear in *Irick*, whether or not there is any plausibility in this alternative explanation can have no bearing on the propriety of the challenged instruction. "The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." 291 N.C. at 494, 231 S.E. 2d at 842.

We find no prejudicial error in the guilt phase of defendant's trial.

II. SENTENCING PHASE

[5] The defendant contends that the trial court committed prejudicial error in the sentencing proceedings in submitting to the jury the aggravating circumstance that the murder of Garland Williams was committed for the purpose of avoiding or preventing lawful arrest. The defense contends that the state did not present sufficient competent evidence to justify the submission of this factor. We hold to the contrary.

N.C.G.S. § 15A-2000(e)(4) states that the jury may consider as an aggravating circumstance that "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest." This Court has upheld the submission of this circumstance in aggravation in two types of situations. It has been upheld in circumstances where a murder was committed to prevent the murder victim from capturing the defendant. Such was the case in *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981), where a state trooper was shot to prevent arrest of the defendant. The submission of this factor has also been upheld where a purpose of the killing was to eliminate a witness. Such was the case in *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). The issue before us is whether the state presented sufficient evidence that Garland Williams was murdered so that he could not bear witness against defendant to justify the submission of this aggravating circumstance to the jury.

In *Goodman*, we made clear that the aggravating circumstance of witness elimination may be presented to the jury only when evidence in addition to the mere fact of death is presented in support of it. We stated as a requirement in *Goodman* that "there must be evidence from which the jury can infer that at least one of the purposes motivating the killing was defendant's desire to avoid subsequent detection and apprehension for his crime." 298 N.C. at 27, 257 S.E. 2d at 586. Such evidence was presented at defendant's trial. Chief's Club regulars testified that Garland Williams habitually spent his evenings sitting at the bar, alternately drinking beer and falling asleep or passing out with his head on his arms, sleeping and waking, only to fall asleep again. On the night of the Chief's Club murders, Garland Williams had embarked upon a typical evening of drinking and dozing at the bar. Another habitue of the Chief's Club testified that he

observed Williams passed out at the bar, with his head on his arms, at approximately 1:30 a.m. on the morning of 12 February. When J. C. Sandy, the last patron to leave the bar, went briefly back inside with Jimmy Grimes shortly before 3:00 a.m., Williams was once more awake.

The state also presented evidence which tended to show that Williams was sitting facing the bar, either asleep or immobilized with fear, when he was shot. Forensic evidence was presented which suggested that Williams was shot from behind. The trajectory of all three bullets which hit him, one in the back and two in the head, was upward, lending support to the hypothesis that he was shot in the back while asleep or while simply arrested in fear at the bar, in the position in which he had been when wakened. There was no evidence of any struggle preceding his death. Apparently he had not been engaged in any active resistance to his killer, as had Jimmy Grimes who had defensive wounds on his right hand and arm. Unlike Charlie Johnson, who had weapons behind the bar, there was no evidence that Garland Williams was armed and could have presented a threat to his killer. On the basis of this evidence the state argued that Williams was killed while in a defenseless position, to eliminate him as a witness to the killings of Grimes and Johnson.

Defendant contends that the *Goodman* requirement—that evidence in addition to the mere fact of death must be presented if witness elimination is to be legitimately submitted as a circumstance in aggravation—can only be satisfied by a statement made by the defendant prior to the shooting to the effect that fear of arrest was a motivating factor. While it is true that such statements have been adduced in evidence to support the factor of witness elimination in the few witness-elimination cases that have come before this Court, we have nowhere held that such statements are essential to establish this aggravating circumstance. *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); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983); *State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981), *cert. denied*, 456 U.S. 932, 72 L.Ed. 2d 450 (1982); *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569. In the case before us, the physical evidence, coupled with testimony about the drinking habits of Garland Williams and his behavior on the night he was murdered, is sufficient to put the aggravating circumstance before the jury.

[6] Defendant also protests the propriety of the submission of witness elimination as an aggravating circumstance on the grounds that the jury was asked to consider two aggravating circumstances based on the same evidence. Defendant argues that the same evidence with which the state supports witness elimination is also presented to establish that Garland Williams was killed in a course of violent conduct in which Jimmy Grimes and Charlie Johnson were killed. In *Goodman*, we held that the submission of two issues on the same evidence is improper because it is "an unnecessary duplication of the circumstances enumerated in the statute, resulting in an automatic cumulation of aggravating circumstances against the defendant." 298 N.C. at 29, 257 S.E. 2d at 587. However, the *Goodman* case does not exhaust the learning that this Court brings to bear on the question of whether the submission of both witness elimination and violent course of conduct was proper in defendant's case.

In *Hutchins*, 303 N.C. 321, 279 S.E. 2d 788, we elucidated the rule stated in *Goodman*. There we said that "there is no error in submitting multiple aggravating circumstances provided that the inquiry prompted by their submission is directed at distinct aspects of the defendant's character or the crime for which he is to be punished." 303 N.C. at 354, 279 S.E. 2d at 808. In *Hutchins*, we upheld the submission of the aggravating circumstances of committing murder against an officer performing his lawful duties and of resisting lawful arrest. Justice Britt explained that while the first-mentioned circumstance looked to the underlying factual basis of the crime, the second forced the jury to consider the defendant's motivation. 303 N.C. at 355, 279 S.E. 2d at 809. Such is the case here. The circumstance of violent course of conduct directs the jury's attention to the factual circumstances of defendant's crimes. The circumstance of witness elimination requires the jury to consider not defendant's actions but his motive in shooting a man in a defenseless posture. There was no error in submitting both of these aggravating circumstances to the jury.

[7] Defendant next contends that the trial court committed prejudicial error in allowing the state to present excessively in-depth testimony to establish the aggravating circumstance "that the defendant had previously been convicted of a felony involving the use or threat of violence to the person." Defendant protests that the challenged testimony, which concerned a prior armed robbery

conviction, led the jury to focus on the defendant's guilt for this past crime to the detriment of its proper task of determining the sentences for the Chief's Club murders. Defendant argues that because there can be no cavil that armed robbery involves the threat or use of force, the state did not need to, and should not have been permitted to, go beyond the simple admission of the court record of his prior conviction.

The issue of the propriety of limiting the state in these circumstances to the introduction of the defendant's record has been settled in this jurisdiction. 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), we reaffirmed the rule in *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398 (1983), holding that the state may not be limited to the introduction of a record of prior conviction when attempting to prove a circumstance in aggravation, whether or not the defendant has stipulated to the record of conviction. In *McDougall* we noted "the state's duty [under N.C.G.S. § 15A-2000(c)(1)] to prove each aggravating circumstance beyond a reasonable doubt. . . . [T]he state cannot be deprived of an opportunity to carry its burden of proof by the use of competent, relevant evidence." 308 N.C. at 22, 301 S.E. 2d at 321. *See also 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).

Nor do we find any evidence in the record to support defendant's claim that the testimony to which he objects was excessively in-depth or prejudicial. The testimony in question was that of a retired Durham police officer who had investigated the armed robbery for which defendant was convicted and who had arrested defendant for the crime. Retired Officer King read from the police report he made at the time of the investigation and arrest eighteen years prior to defendant's trial for the Chief's Club murders. The trial judge provided adequate supervision of the examination and cross-examination of this witness. *Greer v. Whittington*, 251 N.C. 630, 111 S.E. 2d 912 (1960). Indeed, the cross-examination of Officer King allowed defendant to bring certain facts to the attention of the jury which were likely to induce it to form a more favorable impression of defendant's character than would have been the case if it had learned nothing more than that he had a previous conviction for armed robbery. From the cross-examination the jury learned that defendant injured no one in the

armed robbery committed eighteen years before, that he did not fire his gun, that he confessed his crime, and that he gave officers no trouble whatsoever when escorted from Philadelphia, where he was arrested, back to this state.

[8] Defendant next argues that the trial court committed reversible error in excusing for cause certain jurors who expressed an unwillingness to impose the death penalty, because this procedure produces a jury biased in favor of conviction and prone to find the defendant guilty. Defendant concedes that his constitutional challenge has been considered and rejected by this Court on several recent occasions. *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 166 (1986); *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985); *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980). The United States Supreme Court has also rejected the position taken by defendant. *Lockhart v. McCree*, 476 U.S. 162, 90 L.Ed. 2d 137 (1986). Defendant has not presented us with reasons which would compel us to review our position, and we decline to do so.

[9] Defendant next protests that the submission of the aggravating circumstance that the murder of Jimmy Ray Grimes was "especially heinous, atrocious or cruel" was prejudicial error. He contends that there was insufficient evidence to support the submission of this circumstance in aggravation to the jury. We hold that there was sufficient evidence to submit this circumstance to the jury, but even if there were not, defendant could have suffered no prejudice as a result of the submission because the jury answered that this aggravating circumstance was not present.

[10] Defendant next contends that the North Carolina death penalty statute, N.C.G.S. § 15A-2000, is unconstitutional, is applied in a discriminatory manner, is vague and overbroad, and involves subjective discretion, and thus violates the eighth and fourteenth amendments to the United States Constitution and article I, sections 19 and 27 of the Constitution of North Carolina. As defendant concedes, we have repeatedly upheld the constitutionality of the statute against these challenges. *E.g., State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673; *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808; *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L.Ed. 2d 1181 (1980). The discrimination issue has also recently

been decided against defendant by the United States Supreme Court in *McClesky v. Kemp*, 481 U.S. ---, 95 L.Ed. 2d 262 (1987). We overrule this assignment of error.

III. PROPORTIONALITY

[11] Finally, we turn to the solemn duty which devolves upon us under N.C.G.S. § 15A-2000(d)(2) to carefully review the record in every capital case to determine whether the death sentence has been properly imposed. The statute requires us to review (1) whether the record supports the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. After a careful review of the entire record, we find that the evidence supports the three aggravating circumstances that were found by the jury. We further conclude that there is nothing in the record which indicates that the sentences of death were influenced by passion, prejudice, or any other arbitrary factor. We must now discharge our last statutory duty: the review of whether the sentences imposed on the defendant are disproportionate to the punishment imposed in similar cases.

To make our determination, we employ the methodology established 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), which mandates that we compare the case under review to "similar cases" as defined in the *Williams* opinion:

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

Id. at 79, 301 S.E. 2d at 355. The pool includes only those cases which have been affirmed by this Court. *State v. Jackson*, 309 N.C. 26, 45, 305 S.E. 2d 703, 717 (1983). In making our determination we do not "necessarily feel bound . . . to give a citation to every case in the pool of 'similar cases' used for comparison." *Williams*, 308 N.C. at 81, 301 S.E. 2d at 356. Our task has been well described in *State v. Lawson*, 310 N.C. 632, 648, 314 S.E. 2d 493, 503:

> 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.

The jury found defendant guilty of three first-degree murders committed with premeditation and deliberation. In each case the jury concluded that the victim's murder was aggravated by being part of a violent course of conduct in which two other men were killed. In the case of the murder of Garland Williams, the jury also concluded the purpose of avoiding or preventing lawful arrest was an additional aggravating circumstance. The jury found no mitigating circumstances. Two qualities suffuse these crimes. They are especially cold-blooded because of the absence of any motive of the sort which is usually powerful enough to cause one human being to destroy another. Without any indication that the interests or passions of defendant were very deeply engaged, three men were shot, one of them beaten, and then all were dispatched, executioner style, by multiple close-range shots to the head. Further, the Durham incident evidence, as well as evidence of defendant's quick gun-toting involvement in a lover's quarrel at the Chief's Club which became an assault, paints a picture of defendant as a man shockingly ready to impose himself as an armed

arbiter, to convert others' quarrels into quarrels of his own, and to go the ultimate length to dominate a situation.

We cannot find as a matter of law that the death sentences meted out to defendant are disproportionate to the penalty imposed in similar first-degree murder cases. For comparison purposes we turn to the other cases in the *Williams* pool which involved multiple first-degree murders. There are nine such cases. In each case the jury recommended death and this Court affirmed the sentence. *State v. Robbins*, 319 N.C. 465, 356 S.E. 2d 279, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 226 (1987); *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. Gardner*, 311 N.C. 489, 319 S.E. 2d 591 (1984), *cert. denied*, 469 U.S. 1230, 84 L.Ed. 2d 369 (1985); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304; *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983); *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983); *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788; *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510. The record discloses no reason to treat this defendant differently than those multiple killers who have preceded him before the bar of justice.

We hold as a matter of law that the death sentences imposed against defendant are not disproportionate within the meaning of N.C.G.S. § 15A-2000(d)(2). Upon this holding, the sentences of death are affirmed. *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703.

No error.

STATE OF NORTH CAROLINA v. MACK LEE NICHOLS

No. 385A86

(Filed 9 March 1988)

1. **Criminal Law § 73.2— unavailable witness—statement admitted—no error**

The trial court did not err in a first degree murder prosecution by introducing the statement of an absent witness where the State's evidence showed that defendant had a copy of the statement well in advance of trial; defendant ascertained the witness's identity on or about the day trial began, five weeks before the statement's introduction; the trial court gave defendant an additional day to prepare to meet the statement and to frame a defense against its admission; defendant, after a lengthy and sensitive *voir dire*, did not request additional time to prepare to meet the statement; and defendant's counsel admitted that he was prepared to cross-examine the witness regarding the statement, indicating his familiarity with its substance. Defendant was provided with a fair opportunity to meet the witness's statement and therefore the notice given by the prosecutor was sufficient under N.C.G.S. § 8C-1, Rule 804(b)(5); moreover, the record reveals that the trial court took into account and made provision for the lack of time defendant had to locate the witness.

2. **Criminal Law § 73.2— statement of unavailable witness—sufficient guarantees of trustworthiness**

The statement of an unavailable witness contained sufficient guarantees of trustworthiness to be admitted in a murder prosecution under N.C.G.S. § 8C-1, Rule 804(b)(5) where the statement resembled a declaration against penal interest, there was extensive corroborating evidence, the witness manifested his personal knowledge of underlying events, there was a discernible motivation to speak the truth, and the witness never recanted his testimony. Although the reason for the witness's unavailability detracts from the truthworthiness of the statement, on balance the other indications of trustworthiness were sufficient.

3. **Constitutional Law § 30— failure of prosecutor to disclose impeachment material—no error**

The prosecutor in a first degree murder prosecution did not intentionally fail to inform defense counsel of material which could have been used to impeach the testimony of a State's witness, even though the State dismissed a charge of felony possession of marijuana immediately after the witness's testimony, where the lab report revealed only 13 grams of marijuana, an insufficient amount to constitute a felony. The witness's pleas of guilty to two other drug related charges and the State's decision to dismiss a charge it could not prove do not establish a plea bargain. N.C.G.S. § 15A-1054(c).

4. **Constitutional Law § 56— murder—sentencing phase—incapacitated juror—inquiry into fitness of juror on guilt phase denied—no error**

The trial court in a murder prosecution did not deprive defendant of his Sixth Amendment right to an impartial jury by failing to allow an inquiry into the fitness of a juror who participated in the guilt phase of the case where a

mistrial was declared during the penalty phase of the trial due to incapacity of a juror based on the juror's failure to return from an evening recess and a letter from the Wake County Alcoholism Treatment Center. Defendant did not bring forward the letter for review and there was not the slightest suggestion in the evidence before the court that the excused juror suffered from any mental or emotional condition that could have affected his deliberations during the guilt phase.

5. Conspiracy § 5.1; Criminal Law § 73.2— murder—hearsay statements of co-conspirator—admissible

The trial court did not err in a murder prosecution by admitting the testimony of two witnesses concerning their conversations with defendant's alleged co-conspirator concerning their plans to rob the victim and their willingness to shoot the victim if necessary. Defendant's own declarations served to establish a *prima facie* case of conspiracy and the court therefore did not err by admitting the hearsay statements of a co-conspirator against defendant. N.C.G.S. § 8C-1, Rule 801(d)(E).

6. Homicide § 21.5— first degree murder—evidence sufficient

The trial court did not err in a first degree murder prosecution by denying defendant's motions to dismiss all charges on the grounds of insufficient evidence where the State demonstrated that defendant admitted to his cousin the day before the killing took place that he intended to rob and, if necessary, kill the victim; the day before the murder defendant discussed with an accomplice how to use and hide a shotgun; defendant was positively identified as wearing a green Army jacket under which he hid a shotgun on his way to the victim's store moments before the murder; all of the witnesses at the time of the murder described one of the killers as wearing an Army jacket and carrying a shotgun; the assailants took the victim's briefcase, which contained an undetermined amount of money and shot the attending clerk; defendant left Raleigh immediately after the murder for Fayetteville where he registered under an alias; defendant spent money freely and admitted that the police were searching for him in connection with the victim's murder; and defendant was in possession of money marked with handwriting identified as the victim's. The same facts support convictions for armed robbery, assault with a deadly weapon with intent to kill inflicting serious injury, and conspiracy.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered on 14 February 1986 by *Stephens, J.*, upon defendant's conviction of first degree murder after a trial at the 5 August 1985 Criminal Session of Superior Court, WAKE County, *Lee, J.*, presiding. Defendant's petition to bypass the Court of Appeals for review of his convictions for which lesser sentences were imposed was allowed. Heard in the Supreme Court on 9 November 1987.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, Special Deputy Attorney General, and Linda Anne Morris, Associate Attorney General, for the state.

Thomas C. Manning and L. Michael Dodd for defendant appellant.

EXUM, Chief Justice.

This appeal raises questions involving (1) the admissibility of an unavailable witness's statement under North Carolina Evidence Rule 804(b)(5)[1]; (2) whether the prosecutor intentionally failed to provide defendant with requested impeachment evidence; (3) whether the trial court should have ordered an inquiry into the fitness of a juror during the sentencing phase of this proceeding; (4) whether the state made a *prima facie* showing of a conspiracy independent of a co-conspirator's declarations; and (5) the sufficiency of the evidence to support the convictions of the crimes charged. We find no error in the trial.

I.

Defendant was tried upon indictments charging murder, assault with a deadly weapon with intent to kill inflicting serious injury, conspiracy to commit robbery with a dangerous weapon, and robbery with a dangerous weapon.

At trial the state's evidence tended to show that on 29 January 1985 two black men entered the Capital Variety and Video Store in Raleigh and killed Roy Leonzia "Pete" Collins. Collins died as a result of a shotgun blast to the chest fired by one of the men. Gregory Council, a clerk in the store, was shot and seriously injured. The assailants took a briefcase containing an undetermined amount of money.

In addition to Council, four young adults were in the video store at the time of the killing. None of these witnesses could positively identify defendant as one of the assailants. They testified that they were unable to see the face of either man. They did, however, describe a man fitting defendant's general

1. North Carolina Rules of Evidence are codified in N.C.G.S. § 8C-1 (1986).

characteristics. They declared this man was wearing a green Army jacket and carrying a shotgun when he entered the store.

James Cooley testified that he saw defendant heading in the direction of the video store immediately before Collins was murdered. Cooley declared that defendant wore a green Army jacket and that a shotgun protruded from the jacket.

Alvin Banks, defendant's first cousin, testified that defendant visited him on two occasions shortly before the victim was killed. On both occasions defendant talked about a plan to rob and, if necessary, kill Pete Collins. Defendant was accompanied by Douglas Black both times. Defendant and Black discussed the ways they could utilize a shotgun in the course of the robbery. Banks' testimony was corroborated in substantial part by Dani Gail Isom, Black's former girlfriend, who testified concerning Black's stated intentions to rob Collins with defendant.

The state demonstrated that defendant went to Fayetteville on 1 February 1985 and registered at the Executive Hotel under the name of "David Brown." While there he encountered a former police informant, Nathaniel Ray. Officers from the Fayetteville and Raleigh Police Departments testified that Ray told them he purchased drugs for defendant over a period of days with money given him by defendant. When the officers asked Ray to produce any money defendant had given him, Ray showed them several twenty dollar bills, stating that he did not know which ones came from defendant. One of the bills had writing on it. The writing was identified at trial as the victim's by Jackie Humphries, a personal friend of the victim. Humphries also identified writing on another bill as the victim's. This bill had been in Douglas Black's possession shortly after the victim was killed.

Defendant offered no evidence.

The jury found defendant guilty as charged.

II.

[1] Defendant contends the trial court erred in permitting the state to introduce the statement of Nathaniel Ray under North Carolina Evidence Rule 804(b)(5). We disagree.

On 4 September 1985 the state served notice of its intention to offer Nathaniel Ray's statement into evidence under Rule

804(b)(5). Defendant objected on the grounds that the prosecutor did not comply with the notice provisions of the rule and that the statement lacked the required circumstantial guarantees of trustworthiness. The trial court sustained defendant's objection, without making a final ruling, in order to give him additional time to prepare for and contest the admission of Ray's statement into evidence.

On 6 September 1985 the court conducted an extensive voir dire concerning the statement's admissibility. The state called Sergeant Linwood McNair of the Fayetteville Sheriff's Department and Detective A. C. Munday of the Raleigh Police Department to testify regarding Ray's statement. According to these witnesses, Ray told them he met defendant four days after the murder. Ray stated he purchased drugs for defendant in Fayetteville over a three-day period. According to Ray, defendant spent money freely during this time, giving him $1,200 to $1,500 to purchase cocaine and heroin. Ray stated that defendant gave him this cash in small amounts so that he could purchase only one gram of cocaine at a time. Defendant also gave him cash to pay for the taxicabs he took to complete the deals. Ray said that on some nights he made seven or eight trips within a four-hour period. Ray declared defendant said the police were looking for him in connection with the murder of Pete Collins, and that they had searched for him at his parents' home in connection with breaking or entering and larceny charges.

During voir dire the state demonstrated that most of the information communicated by Ray was verified independently. The police located defendant precisely where Ray declared he was staying. Ray's physical description of defendant matched him perfectly. Police records indicated defendant was, in fact, a suspect in the murder of Pete Collins, and that the Raleigh Police Department had conducted a search for defendant at his parents' home in connection with breaking or entering and larceny charges. Finally, the hotel manager testified that defendant always paid his bills in cash. The portion of Ray's statement regarding his nightly taxicab rides could not be verified.

The state outlined its efforts to locate Ray before and during trial. The state demonstrated that on or about 26 July 1985 it issued a subpoena for Ray. Sergeant McNair described how he

and others in the Fayetteville police department tried to locate Ray and serve the subpoena. According to Sergeant McNair, Ray was difficult to find because he did not reside at a permanent address. When Ray was utilized in the past the officers had to find him on the street or at one of the motels where he occasionally stayed. Sergeant McNair testified that he, and others involved with law enforcement in Fayetteville, attempted to find Ray at these locations before and during trial. The prosecutor declared that throughout the trial he had the expectation that Ray would be produced. According to the prosecutor, it was not until 3 September 1986 that he was informed Ray could not be found.

The state put on evidence demonstrating that defendant had obtained a copy of Ray's statement well before trial pursuant to a discovery request. The state showed further that defendant learned Ray's identity on or about the day of trial. Defense counsel admitted that he had been prepared to cross-examine Ray on the basis of this statement.

In argument to the court defendant's counsel called attention to Ray's extensive police record. He documented Ray's convictions of common law robbery, assault, and armed robbery. He also demonstrated numerous occasions when Ray had been charged with committing violent crimes.

At the close of the voir dire the court overruled defendant's objection to the admission of Ray's statement under Rule 804(b)(5). The court concluded that defendant was not deprived of a fair opportunity to prepare to meet the statement because he knew the statement's substance well in advance of trial and because he ascertained Ray's identity on the day trial began. The court also concluded that the statement possessed "a reasonable probability of truthfulness," and supported this conclusion by noting that many of the statement's details were independently verified.

Defendant argues on appeal that the trial court erred in admitting Ray's statement under Rule 804(b)(5), advancing the same contentions he made at trial—that is, Ray's statement should not have been admitted because the prosecutor failed to comply with the notice provisions of Rule 804(b)(5) and because the statement lacked the necessary guarantees of trustworthiness. We disagree with both contentions.

Rule 804(b)(5) provides in pertinent part:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (5) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C.G.S. § 8C-1, Rule 804(b)(5) (1986). We have recently interpreted this rule as it applies to both contentions defendant raises. *See State v. McLaughlin*, 316 N.C. 175, 340 S.E. 2d 102 (1986); *State v. Triplett*, 316 N.C. 1, 340 S.E. 2d 736 (1986). We look now to these opinions for guidance.

In *State v. Triplett* we discussed the rule's notice requirement. We declared that this requirement should be construed flexibly, "in light of the express policy of providing a party with a fair opportunity to meet the proffered evidence." *Triplett*, 316 N.C. at 13-14, 340 S.E. 2d at 43. In arriving at this interpretation we noted that a majority of the federal circuits take a flexible approach toward the identically worded federal notice provision. *Id.; see Furtado v. Bishop*, 604 F. 2d 80, 92 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980); *United States v. Bailey*, 581 F. 2d 341, 348 (3d Cir. 1978); *United States v. Carlson*, 547 F. 2d 1346, 1355 (9th Cir. 1976).

We conclude defendant was provided with a fair opportunity to meet Nathaniel Ray's statement; therefore, the notice given by the prosecutor of his intention to admit Ray's statement was sufficient under Rule 804(b)(5). The state's evidence showed that defendant had a copy of Ray's statement well in advance of trial. The state also demonstrated that defendant ascertained Ray's identity on or about the day trial began—five weeks before its introduction into evidence. The trial court gave defendant an additional day to prepare to meet the statement and to frame a defense against its admission into evidence. After a lengthy and sensitive voir dire, defendant did not request additional time to prepare to meet the statement before the state sought admission during trial. Finally, defendant's counsel admitted that he was prepared to cross-examine Ray regarding the statement, thus indicating his familiarity with its substance.

Defendant argues that even if he had a fair opportunity to meet the statement itself he lacked an adequate opportunity to locate Nathaniel Ray. Defendant points out that the addresses listed in the notice served by the prosecutor provided no help in locating Ray and suggests that additional time would have enabled his court-appointed investigator to find Ray. Defendant characterizes the prosecutor's delay in sending his notice and the inadequacy of the addresses provided as "sandbagging" and asserts "the court did not take this 'sandbagging' into account whatsoever when it ruled on the admissibility of the statement on notice grounds."

The record reveals the trial court both took into account, and made provision for, the lack of time defendant had to locate Ray. The following exchange took place between the court and defendant's counsel after the state made its initial motion for the admission of Ray's statement under Rule 804(b)(5):

> COURT: I take it one of the first things you said, even if otherwise admissible, you have not had time to prepare and try to find the witness yourself, is that correct?
>
> MR. MANNING: That's correct . . . . That's our second objection.
>
> COURT: Have you ever had your private investigator look for the witness?

MR. MANNING: No, sir. I have been prepared to cross-examine this man ever since we got his statement.

COURT: You did not know until when that he would not be here?

MR. MANNING: Until just before lunch, Your Honor . . . .

After this colloquy, which occurred on 4 September 1985, the court concluded:

COURT: At the very least, I don't believe the defendant has had enough notice.

The court then decided to give defendant until 6 September 1985 to locate Ray through his court-appointed investigator. This exchange, and the trial court's decision to postpone the hearing on the admissibility of Ray's statement, evinces the court's concern that defendant be given not only an opportunity to meet the statement's substance but to locate the declarant as well. By giving defendant additional time to prepare to meet Ray's statement, and to locate him if possible, the court ensured that notice provisions of Rule 804(b)(5) were met.

[2] With regard to defendant's contention that Ray's statement lacked circumstantial guarantees of trustworthiness, we look to our recent *McLaughlin* decision for guidance. In *McLaughlin* we stated that "[t]o be admissible under the residual exception to the hearsay rule, the hearsay statement must possess 'guarantees of trustworthiness' that are equivalent to the other exceptions contained in Rule 804(b)." *McLaughlin*, 316 N.C. at 179, 340 S.E. 2d at 104. The other exceptions of Rule 804(b) are former testimony, dying declarations, statements against interest, and statements of personal or family history.

A trial judge should consider a number of factors in determining whether a hearsay statement possesses sufficient indicia of trustworthiness to be admitted under Rule 804(b)(5). Among these factors are: (1) the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason, within the meaning of Rule 804(a), for the declarant's unavailability. *State v. Triplett*, 316 N.C. at 10-11, 340 S.E. 2d at 742; *State v.*

Smith, 315 N.C. 76, 93-94, 337 S.E. 2d 833, 845 (1985).[2] In *McLaughlin* we noted this list is not inclusive and suggested that other factors may be considered when appropriate. *McLaughlin*, 316 N.C. at 179, 340 S.E. 2d at 105. Among the many factors which courts have considered are the existence of corroborating evidence, *see, e.g., United States v. Bailey*, 581 F. 2d 341 (3d Cir. 1978), and the degree to which the proffered testimony has elements of enumerated exceptions to the hearsay rule. *See, e.g., Karme v. Commissioner*, 673 F. 2d 1062 (9th Cir. 1982); *United States v. McPartlin*, 595 F. 2d 1321 (7th Cir. 1979), *cert. denied*, 444 U.S. 833 (1980); *see generally* Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U.L. Rev. 867 (1982).

Based on our assessment of these factors in the present case we hold that Ray's statement contained sufficient circumstantial guarantees of trustworthiness to be admitted under Rule 804(b)(5). One of the factors which we find persuasive in upholding the trial court's decision to admit Ray's statement under Rule 804(b)(5) is the extent to which Ray's statement resembles a declaration against penal interest. Ray admitted to the purchase and delivery of cocaine and heroin, crimes for which he could have been charged, convicted, and sentenced. The lack of corroborating evidence as to this portion of his statement rendered it inadmissible under Rule 804(b)(3). N.C.G.S. § 8C-1, Rule 804(b)(3) (1986). Nonetheless, Ray's admission to law enforcement officers that he committed felonies provides that sort of indicia of reliability underlying the declaration against penal interest exception. This is not to say that were this the only indication of reliability we would admit Ray's statement under the catchall exception of Rule 804. To do so would vitiate the safeguards built into Rule

2. In *Triplett* we suggested that trial courts should consider as a fourth factor "the practical availability of the declarant to be present at trial for meaningful cross-examination." *Triplett*, 316 N.C. at 11, 340 S.E. 2d at 742. We have reworded this factor in the present case in order to clarify its purpose. The purpose is to encourage trial courts to assess *the reason* for the declarant's unavailability. Rule 804(a) lists five ways in which a declarant may be considered "unavailable." In some cases the reason a declarant is found to be unavailable under the rule might influence the court's determination regarding the trustworthiness of his statement. For instance, if the declarant is unavailable under Rule 804(a)(2) because he "[p]ersists in refusing to testify concerning the subject matter of his statement despite a court order to do so" the court might weigh this as a factor against admitting declarant's statement.

804(b)(3). It is merely to acknowledge that when a statement nearly fits an enumerated exception it has a degree of circumstantial trustworthiness which is relevant to the ultimate determination the trial court must make.

Another factor which supports our decision to uphold the trial court is the extensive evidence corroborating Ray's statement. As the trial court noted in assessing the statement's admissibility, "there are matters contained in the statement which could not have been known to the out of court declarant . . . if the statement did not have a reasonable probability of truthfulness." We have already noted the ways in which the state demonstrated Ray's statement was independently verified. We believe that this independent verification, while not alone sufficient to enable the trial court to admit Ray's statement under Rule 804(b)(5), provided a useful basis for evaluating its trustworthiness.

Finally, an assessment of three of the factors specified in *Triplett* contributes to our decision that the trial court correctly admitted Ray's statement under Rule 804(b)(5). (1) Ray manifested his personal knowledge of the underlying events in many ways: the accuracy with which he described defendant's physical characteristics, his precise identification of the room defendant was staying in, and the personal statements he declared defendant made to him. (2) Ray's motivation to speak the truth is discernible in his willingness to include in his statement what amounts to declarations against his penal interests. (3) Ray never recanted his testimony.

Assessment of the fourth *Triplett* factor—the reason for Ray's unavailability—weighs against admission of his statement. Ray was unavailable under Rule 804(a)(5) because the state was unable to locate him "by process or other reasonable means." The evidence indicated that Ray had no permanent home and could be found only on the street or at one of the motels where he often stayed. This manifests an instability in Ray's character and lifestyle which detracts, in some measure, from the trustworthiness of his statement. We do not believe, however, that this factor is sufficient to overcome the evidence favoring admission of the statement. On balance, the other indications of the trustworthi-

ness of Ray's statement were sufficient to enable the trial court to admit it under 804(b)(5).

III.

[3] Defendant next contends that he should be awarded a new trial because the prosecutor intentionally failed to inform his counsel of the existence of material which could have been used to impeach the testimony of James Cooley. The record reveals no such intentional failure by the prosecutor; therefore, defendant's contention is unfounded.

Before trial defendant's counsel moved the court to compel the prosecutor to comply with discovery requests for specified items as well as for disclosure of impeaching information. The motions were heard by Judge Donald L. Stephens. Judge Stephens denied the motions on the basis of the prosecutor's acknowledgment of his obligation to provide requested discovery items and impeaching evidence under both N.C.G.S. § 15A-1054(c) and *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215 (1963).

One of the state's principal witnesses, James Cooley, testified that he witnessed defendant approach the Capital Variety and Video store, where the victim was murdered, just before the crime occurred. Cooley saw part of a shotgun protruding from defendant's green Army jacket. Cooley, at the time he testified, was under indictment for misdemeanor possession of phenmetrazine, felony possession of marijuana, and possession with intent to sell and deliver marijuana. On direct Cooley testified that no promises, threats or any other kind of inducement had been given him in exchange for his testimony.

Immediately after Cooley's testimony, he and the prosecutor went to another courtroom where Cooley entered pleas of guilty to misdemeanor possession of phenmetrazine and possession with intent to sell and deliver marijuana. The state dismissed the charge of felony possession of marijuana. A review of the transcript reveals the state dismissed this charge because the lab report indicated that Cooley possessed only 13 grams of marijuana—an amount insufficient as a matter of law to constitute a felony.

Defendant argues that the state's decision to dismiss the charge of felony possession indicates that it entered into a plea

bargain arrangement with Cooley in exchange for his testimony in the present case. Defendant contends the prosecutor was under a constitutional and statutory duty to communicate this bargain to him and that his intentional failure to do so must result in a new trial.

The record simply fails to sustain defendant's contention that there was a plea bargain. It reveals only that the state dismissed a felony possession charge against Cooley because, as a matter of law, the evidence was insufficient to support a conviction. The fact that this occurred immediately after Cooley testified in the present case does not, standing alone, warrant the inference that the prosecutor entered into an undisclosed deal with Cooley. Cooley pled guilty to two charges, and the state dismissed one it could not prosecute successfully. The state's decision to dismiss a charge it could not prove, and Cooley's decision to plead guilty to the only charges of which he could be convicted, does not establish a bargained-for exchange. Therefore, we decline to infer any violation by the prosecutor of his duty to disclose evidence which defendant could utilize for impeachment purposes.

IV.

[4] Defendant next contends he deserves a new trial because the court deprived him of his sixth amendment right to an impartial jury by failing to allow inquiry into the fitness of a juror who participated in the guilt phase of the case.

On 17 September 1985, during the penalty phase of the case, a mistrial was declared due to the incapacity of a juror. This juror did not return from the evening recess taken on 16 September. The trial court considered a letter from John S. Howie, M.D., Wake County Alcoholism Treatment Center, which concerned "the medical condition of the juror." Based on the contents of this letter the trial court concluded that the juror "due to medical reasons is incapacitated and will be unable to complete the trial." This letter is not before us. It was sealed by the trial court and placed "with all of the other evidence in this case and shall not be released . . . to anyone, except by order of the Court or for the purposes of appellate review." Defendant has not brought forward the letter for us to examine and has not suggested that this Court review its contents.

On 19 September 1985 defendant made a motion for appropriate relief in which he requested an evidentiary hearing into the excused juror's competence to serve as a juror during the guilt phase. He also requested a new trial "on the basis of the incapacity of the juror." The motion states: "It is apparent that the [excused juror] has been suffering from a medical disturbance of some magnitude for some time. The pressures of this trial have obviously caused him to become incapacitated to the point where the Court has excused him from further service. . . . [I]t has become apparent that [this juror] was unbalanced, to a degree of which it is not certain at present." Defendant moved that he be given time to obtain all of the juror's medical records and that a psychiatrist be appointed to examine the juror to make a determination regarding the juror's "competence and sanity which existed at the time he was empanelled as a juror, and what his mental state was during deliberations on guilt-innocence . . . ." The motion was not verified. Judge Lee denied defendant's motion on 2 December 1985. On 14 February 1986, after a full sentencing hearing, Judge J. Donald Stephens entered the sentences imposed in the present case.

Defendant, without citing any authority, argues that the trial court's denial of his motion for appropriate relief violated his sixth amendment right to an impartial jury. He asks this Court to remand the matter and direct the trial court to "reopen the inquiry into [the juror's] fitness to determine what effect, if any, his emotional and psychological condition had upon his fitness to serve and deliberate, or, . . . to order a new trial."

We find no basis in the record for granting the relief defendant seeks. There is not the slightest suggestion in the evidence before us that the excused juror suffered from any mental or emotional condition that could have affected his deliberations during the guilt phase. When he was excused the trial court referred only to "medical reasons" which *at that time* rendered the juror incapacitated. Defendant's motion for appropriate relief contains no factual allegations concerning the juror's mental or emotional condition. Insofar as it refers to these things it consists entirely of assumptions and suppositions which, in turn, are based on nothing more than the juror's having been excused as a result of a letter from the Wake County Alcoholism Treatment Center.

We find no error, therefore, in the trial court's refusal to make further inquiry as to the excused juror's fitness to serve during the guilt phase and decline to grant the relief requested by defendant.

V.

[5] Defendant next argues the trial court erred in admitting the testimony of Alvin Banks and Dani Gail Isom concerning their conversations with Douglas Black, defendant's alleged co-conspirator. Defendant contends the state failed to show by independent evidence that he conspired with Black; therefore, Black's statements were not admissible against him.

Alvin Banks, defendant's first cousin, testified concerning conversations he had with defendant and Douglas Black regarding their plan to rob the victim. Banks declared that defendant and Black visited him on two occasions in order to acquire a gun. The first visit occurred several days before the victim was murdered. During this visit defendant told Banks that he intended to rob the victim and that he would shoot him if necessary. Defendant and Black discussed the planned robbery in Banks' presence. The second visit occurred the day before the victim was murdered. On this occasion defendant and Black repeated their request for a gun. Defendant again stated his intention to shoot the victim if necessary, but complained to Black that he was unfamiliar with shotguns. Defendant and Black discussed ways to hide a shotgun.

Dani Gail Isom, Douglas Black's girlfriend, testified under a grant of immunity concerning Black's statements regarding his intent to rob the victim. Black told Isom that he and defendant planned to take the victim's briefcase which they believed to be full of money. Isom testified that she purchased a pump shotgun for Black. She bought the gun on 22 January 1985. The victim was murdered one week later.

The acts and declarations of conspirators are admissible against other members of the conspiracy provided that the state establishes a *prima facie* case of the conspiracy independently of the declarations sought to be admitted. *State v. Tilley*, 292 N.C. 132, 138, 232 S.E. 2d 433, 438 (1977); N.C.G.S. § 8C-1, Rule 801(d)(E) (1986). In order to make a *prima facie* case, the state must produce sufficient evidence to authorize the jury to find

that a conspiracy existed. *State v. Polk*, 309 N.C. 559, 565, 308 S.E. 2d 296, 299 (1983). Ideally, the state should make the *prima facie* showing before tendering the co-conspirator's declarations; however, in its discretionary control of the presentation of evidence the court may admit the declarations subject to subsequent proof of the conspiracy. *State v. Albert*, 312 N.C. 567, 576, 324 S.E. 2d 233, 238 (1985); *State v. Tilley*, 292 N.C. at 138-39, 232 S.E. 2d at 438-39.

In the present case defendant's own declarations to Alvin Banks and Douglas Black serve to establish a *prima facie* case of a conspiracy between Black and defendant to rob and, if necessary, kill the victim. Defendant's statements amount to party admissions and are therefore admissible under N.C.G.S. § 8C-1, Rule 801(d)(A). This rule codifies our established practice of admitting party admissions as exceptions to the hearsay rule. *See generally* 2 Brandis on North Carolina Evidence § 167 (2d rev. ed. 1982). Based on defendant's admissions a jury could find that defendant conspired with Black to commit armed robbery. Therefore, the trial court did not err in admitting Black's hearsay statements against defendant.

VI.

[6] Defendant contends finally that the trial court erred in denying his motions to dismiss all charges on grounds of insufficiency of the evidence.

The rule in North Carolina is that a guilty verdict will be upheld if the state presents substantial evidence of each element of the offense charged. *State v. Brown*, 310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion that defendant committed the offense. *Id.* When ruling on a motion to dismiss in a criminal case the trial judge must consider the evidence in the light most favorable to the state, giving the state the benefit of every reasonable inference that might be drawn therefrom. Any contradictions or discrepancies are for resolution by the jury. *Id.*

The state presented substantial evidence that defendant was guilty of first degree murder under both a premeditation and deliberation theory and a felony murder theory. The state demon-

strated that defendant admitted to his cousin the day before the killing took place that he intended to rob and, if necessary, kill the victim. The day before the murder defendant discussed with Douglas Black how to use, and hide, a shotgun. Defendant was positively identified as wearing a green Army jacket, under which he hid a shotgun, on his way to the victim's store moments before the murder. All of the witnesses at the store at the time of the murder described one of the killers as wearing a green Army jacket and carrying a shotgun. The assailants took the victim's briefcase, which contained an undetermined amount of money, and shot the attending clerk. Defendant left Raleigh immediately after the murder and registered in a Fayetteville hotel under an alias. There he spent money freely and admitted that the police were searching for him in connection with the victim's murder. At that time he possessed money marked with handwriting identified at trial as the victim's. Taken together, we believe this constitutes substantial evidence that defendant murdered the victim.

The same facts serve to support the trial court's decision not to dismiss the charges of armed robbery, conspiracy to commit armed robbery, and assault with a deadly weapon with intent to kill inflicting serious injury. The state's evidence indicates that whoever murdered the victim also robbed him and shot Gregory Council. Hence, the evidence implicating defendant as the victim's murderer also serves to support convictions of armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant's discussions with Douglas Black concerning their scheme to rob the victim, and their efforts to obtain a gun to carry out their plan, justify submitting the conspiracy charge to the jury. Thus, defendant's argument that these charges should not have gone to the jury is meritless.

In summary, we hold that in defendant's trial there was

No error.

STATE OF NORTH CAROLINA v. RUBY LAWLESS LAMB

No. 136PA87

(Filed 9 March 1988)

1. **Criminal Law § 99.7— warnings concerning perjury—no error**

In a second degree murder prosecution, the trial court and the district attorney did not improperly stifle the free presentation of testimony by warning a witness that she could be subject to perjury and contempt of court where the judge reminded the witness of the oath's significance and the consequences of perjury only after the witness had several times admitted that she had lied and the judge gave the warning in a judicious and nonthreatening manner. Nothing in the D.A.'s colloquy with the witness demonstrated reversible error and the record does not reveal that the other two witnesses were intimidated into changing their testimony.

2. **Criminal Law § 91.6— Speedy Trial Act—period between dismissal of first indictment and second indictment—properly excluded**

The trial court did not abuse its discretion in a murder prosecution by denying defendant's motion to dismiss for speedy trial violations where 342 days between dismissal of the first indictment and reindictment were excluded. The dismissal of the first indictment was under N.C.G.S. § 15A-931, so that the speedy trial exclusion of N.C.G.S. § 15A-701(b)(5) is applicable, even though the notice of dismissal was with leave, because defendant had appeared and the "with leave" language was mere surplusage. The fact that the investigation continued rendered the dismissal no less final because prosecution could not resume without a new indictment and, although defendant's bail bond should have been discharged, there was no prejudice since defendant was not required to appear or render herself amenable to the orders and processes of the court during that period. N.C.G.S. § 15A-932.

3. **Criminal Law § 91.9— Speedy Trial Act—findings and conclusions**

The trial court did not abuse its discretion in a murder prosecution by denying defendant's renewed motion to dismiss on speedy trial grounds without findings or conclusions where the court had orally entered the findings of fact and conclusions of law at the first hearing on defendant's motion to dismiss and defendant's renewed motion at trial merely renewed the original motion and added no new legal grounds.

4. **Criminal Law § 117— instructions—inconsistent statements of witnesses—no prejudice**

Although the trial court in a murder prosecution agreed to give defendant's requested instruction that the jury could consider witnesses' pretrial conflicting statements in determining truthfulness, but actually instructed the jury to consider consistent statements in determining truthfulness, there was no prejudice because the court had properly instructed the jurors about the consideration of prior statements at several points during the trial when the statements were introduced, the evidence at trial involved both consistent and

inconsistent prior statements of several different witnesses and much time was spent in attempts to discredit the statements, and the jury doubtless understood their duty as fact finders to consider consistencies and inconsistencies in deciding the veracity of a particular witness. N.C.G.S. § 15A-1443.

5. **Criminal Law § 86.4— murder prosecution—prior killings—motion in limine denied—prejudice**

The trial court erred in a murder prosecution by denying defendant's motion *in limine* to exclude evidence that she had been involved in other killings where the trial court deferred ruling on the motion until defendant renewed her motion near the close of her evidence but before she had rested or testified, and did not testify after her motion was denied. The statements were only available at that point as impeachment evidence and were inadmissible for that purpose under N.C.G.S. § 8C-1, Rule 608(b) because they showed specific instances of conduct relating to violence against other persons which would be relevant to defendant's veracity. That defendant was prejudiced was abundantly clear from the record that defendant intended to testify unless her motion *in limine* was denied and that defendant was justified in believing that if she took the stand, the district attorney intended to cross-examine her concerning the statements in question.

ON the State's petition for discretionary review of a unanimous decision of the Court of Appeals, 84 N.C. App. 569, 353 S.E. 2d 857 (1987), affirming in part, reversing in part and awarding defendant a new trial on her appeal from a judgment imposing a fifteen-year sentence following her conviction of second-degree murder, entered by *Bowen, J.*, at the 20 January 1986 Criminal Session of Superior Court, JOHNSTON County. Heard in the Supreme Court 12 October 1987.

Lacy H. Thornburg, Attorney General, by Laura E. Crumpler, Assistant Attorney General, for the State-appellant.

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant-appellee.

MEYER, Justice.

Defendant was convicted of the second-degree murder of her husband. Defendant reasserts before this Court four of the five arguments she made to the Court of Appeals, specifically that the trial court committed prejudicial error (1) in admonishing a witness, out of the presence of the jury but in the presence of other witnesses, that she could be subject to perjury and contempt of court because of her testimony; (2) in denying defendant's motion to dismiss on the grounds that her statutory right to

a speedy trial was violated; (3) in denying her motion *in limine* to exclude any evidence implicating her in other killings; and (4) in failing to give her requested jury instructions and in giving improper and prejudicial instructions. Believing that the trial court committed prejudicial error in denying defendant's motion *in limine*, the Court of Appeals awarded defendant a new trial. We affirm.

On the morning of 3 October 1983, David Lee Lamb's body was discovered lying in bed in his trailer in Clayton, North Carolina. Death had resulted from a single bullet wound in the chest. Lamb had a gun in his left hand and a gun-cleaning rod in his right. A beer can was propped against his body. There were several other beer cans in the kitchen and the television was on. There was a spent shell casing on the bathroom floor, another on the bedroom floor and a bullet hole in the bedroom ceiling. According to expert testimony, the gun was fired several feet from the victim so that the gunshot wound could not have been self-inflicted.

David Lee Lamb was married to defendant, Ruby Lawless Lamb, who was living in Cowpens, South Carolina with her three grandchildren at the time of the murder. Although the investigation revealed that defendant had been to visit her husband the weekend of the murder, her alibi was that she had returned to Cowpens prior to the shooting. Defendant's family members corroborated her story and denied any knowledge of the circumstances surrounding David Lamb's death. On 7 April 1984, defendant was indicted for the first-degree murder of her husband. However, due apparently to the lack of evidence against defendant, the district attorney on 14 August 1984 "enter[ed] a dismissal . . . [w]ith [l]eave [p]ending the completion of the investigation." In July 1985, three of defendant's relatives came forward with statements implicating her in her husband's murder. Her sister, nephew, and niece stated that defendant had told them that she had shot David Lamb and had set it up to look like an accident. Defendant was reindicted on 22 July 1985. On 14 October 1985 defendant's grandson, who lived with defendant, gave a statement to the authorities to the effect that he had been with defendant in Clayton the weekend of the murder and had witnessed defendant shooting her husband. At trial, defendant adhered to her alibi defense.

During pretrial discovery, defendant discovered that during investigation of the case, several of her relatives had told officers that she had made statements to them that she had participated in other killings. Defendant had never been indicted for these killings. Defendant filed a pretrial motion *in limine* to have any evidence relating to the alleged killings excluded. The trial court deferred ruling on the motion. Near the close of defendant's evidence, but before she had rested or taken the stand herself, defendant renewed her motion *in limine* and the trial court denied it. Defendant then declined to take the stand. She was convicted of the second-degree murder of David Lamb and sentenced to fifteen years in prison.

On appeal, the Court of Appeals agreed with defendant that the denial of the motion *in limine* was prejudicial error, reasoning that the challenged evidence was inadmissible under any rule of evidence and that the trial court's failure to exclude it effectively precluded defendant from taking the stand. The Court of Appeals disagreed with the State's position that the issue was not capable of review since defendant had failed to take the stand and therefore had failed to present the alleged error within a reviewable context. *Luce v. United States*, 469 U.S. 38, 83 L.Ed. 2d 443 (1984). The Court of Appeals concluded that *Luce* was not binding upon North Carolina courts and that it was distinguishable from defendant's case. We granted the State's petition for discretionary review.

I

[1] Defendant first contends that the trial court and the district attorney "improperly stifled the free presentation of testimony by warning and threatening witness . . . [defendant's sister] Crooks in the presence of [two other] witnesses . . . , that she could be subject to perjury and contempt of court because of her testimony." We find no merit in this contention.

The State called defendant's sister, who testified about conversations she had had with defendant after David Lamb's death. The district attorney asked the witness to state whether defendant had ever elaborated on how the deceased had died. The witness responded:

A. Your Honor, could I please not testify? I don't know anything.

The trial court instructed the witness to answer. Defense counsel asked to be heard and the jury was excused. Following arguments by counsel, the court permitted the district attorney to pursue his questions outside the jury's presence. The answers indicated that the witness was a reluctant witness. When questioned about a prior statement she had given to investigators, she responded:

A. Maybe I lied, maybe I was the one that lied.

Q. I didn't ask you that. I asked you didn't Ruby Lawless Lamb tell you that she shot David Lee Lamb and that Wesley Warlick [defendant's grandson] was present at the time in his trailer in Clayton?

A. I lied.

Q. Did you tell, did you make that statement to Detective Eatman?

A. If I made it, I lied.

Q. Well, a moment ago you said she may have been drinking. Were you lieing [sic] then?

A. Yes.

. . . .

Q. So you have lied since you have been on the witness stand?

A. I lied on it all the way.

. . . .

Q. You do not deny making a statement to Detective Eatman that Ruby Lawless Lamb told you that she shot David Lee Lamb at his trailer and Wesley Warlick was present and she set it up to look like an accident—you admit telling Detective Eatman that, do you not?

A. I said it, but I lied.

Q. Well, why would you lie to Detective Eatman?

A. I'm just a liar.

. . . .

Q. I want you to think about this real carefully—you were sworn before you took the witness stand?

A. That's right.

Q. And you are telling this Court you have lied while you have been on the witness stand—you understand the meaning of talking [sic] an oath, do you not?

A. Yes.

Q. And I am going to ask you again whether or not Ruby Lamb told you how she killed David Lee Lamb and if she didn't set it up to look like an accident?

A. No.

Q. Was that a lie?

A. That was a lie.

. . . .

Q. And since you have gotten on the stand you have changed your mind about testifying against your sister, haven't you?

A. I didn't want to testify to begin with.

Q. And you don't want to testify now?

A. That's right.

Q. But don't you think—strike that. Didn't you also tell me during the noon recess, just a moment before you got on the stand, that Wesley Warlick wasn't going to have to carry all the blame and all the responsibility, didn't you tell me that seated in this courtroom just—

A. I did not mention Wesley's name, you did.

Q. Well, didn't you say that he won't [sic] going to have to carry it all?

A. I told you it wasn't right for Wesley to have to be in the situation he's in, yes.

Q. Well, you also told me you didn't want to testify against your sister, but if you had to take the stand, you wanted to get up here and get it over with, did you not?

A. I said I wanted to get it over with.

Q. And now you don't want to tell the truth about it and you don't want to testify against her, is that true?

A. Would you testify against your sister?

COURT: Ma'am, that is not the question. The question is—you were subpoenaed to be here. You have taken an oath to tell the truth. You are under a duty to answer the lawyer's questions and I must respectfully inform you that if you refuse to answer the lawyer's question, I have no alternative except to hold you in contempt of court, and I must further inform you that if you intentionally lie on this stand, you are subjecting yourself to perjury. Do you understand that?

A. I understand.

. . . .

MR. TWISDALE: Your Honor, I would like to ask one other question out of the presence of the jury.

COURT: All right.

Q. I would like to ask you, Mrs. Crooks, if you understood the warning concerning contempt?

A. Yes, sir, I did.

Q. Well, now I would like to ask you at this time if you are willing to proceed to answer my questions under oath and tell the truth?

A. Yes, sir.

MR. TWISDALE: I am ready to proceed, Your Honor.

COURT: Bring the jury in, please.

Defendant contends that the trial court's warnings were improperly accusatory and threatening and reveal that the court had determined that the witness had lied during her testimony on

direct examination. In support of this contention, defendant relies on *State v. Rhodes*, 290 N.C. 16, 224 S.E. 2d 631 (1976), and *State v. Locklear*, 309 N.C. 428, 306 S.E. 2d 774 (1983). Defendant's reliance on these cases avails her naught. In *Rhodes*, the trial judge actually accused the witness of not telling the truth and in *Locklear*, the trial judge repeatedly admonished the witness for her failure to respond to questions and also accused her of not being truthful. Here, in contrast, the judge reminded the witness of the oath's significance and the consequences of perjury only after the witness had several times admitted that she had lied. Furthermore, the judge gave the warning in a judicious and nonthreatening manner. In *Rhodes*, we stated:

> [J]udicial warnings and admonitions to a witness [made in or out of the presence of the jury] with reference to perjury are not to be issued lightly or impulsively. Unless given discriminatively and in a careful manner they can upset the delicate balance of the scales which a judge must hold evenhandedly. Potential error is inherent in such warnings, and in a criminal case they create special hazards.

Rhodes, 290 N.C. at 23, 224 S.E. 2d at 636. While any remarks by a judge to a witness about the consequences of perjury must be carefully scrutinized, Judge Bowen's warning to the witness in this case did not upset the "delicate balance of the scales." Moreover, although warnings by a district attorney with reference to a witness' alleged perjured testimony can "likewise deprive defendant[s] of due process of law," *State v. Mackey*, 58 N.C. App. 385, 388, 293 S.E. 2d 617, 619, *disc. rev. denied, appeal dismissed*, 306 N.C. 748, 295 S.E. 2d 484 (1982), nothing in the colloquy with this witness demonstrates reversible error. Finally, although the other two witnesses present in the courtroom during this exchange had apparently told a different story prior to trial and in spite of defendant's contention to the contrary, the record does not reveal that they were *intimidated* into changing their trial testimony because of the warning given to witness Crooks.

II

[2] Defendant next contends that the hearing court abused its discretion in denying her motions to dismiss her indictment on the grounds that the State had violated the Speedy Trial Act,

N.C.G.S. §§ 15A-701 to -704 (1983), particularly N.C.G.S. § 15A-701(a1)(1). We disagree.

The original indictment for first-degree murder against defendant was obtained on 2 April 1984. On 14 August 1984, the district attorney filed a notice of dismissal. Defendant was reindicted for the same offense on 22 July 1985. In its 15 November 1985 ruling on defendant's original motion to dismiss the indictment, the trial court included 10 days and excluded 590 days of the 609-day time period from the 2 April 1984 original indictment to the 2 December 1985 scheduled session of court. Defendant's sole basis for her contention that her statutory speedy trial rights were violated is that the trial judge improperly excluded the 342-day time period between the dismissal of the first indictment on 14 August 1984 and the reindictment on 22 July 1985.

The district attorney may dismiss an indictment under either N.C.G.S. § 15A-931 or § 15A-932. Section 15A-931 provides that he may so dismiss "by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time." This is a simple and final dismissal which terminates the criminal proceedings under that indictment. Section 15A-931 does not bar the bringing of the same charges upon a new indictment. *See* Commentary.

Section 15A-932 provides for a dismissal "with leave" when the defendant fails to appear and cannot be readily found. Under subsection (b) of section 15A-932, this dismissal results in removal of the case from the court's docket, but the criminal proceeding under the indictment is *not* terminated. All outstanding process retains its validity and the prosecutor may reinstitute the proceedings by filing written notice with the clerk without the necessity of a new indictment.

N.C.G.S. § 15A-701(a1)(1), upon which defendant relies, provides that a criminal defendant shall be brought to trial "[w]ithin 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last." However, where the district attorney dismisses an indictment under the authority of N.C.G.S. § 15A-931 and then reinstates charges by a new indictment, section 15A-701(b)(5) specifically excludes from computation of the 120-day time period "any period of delay from the date the initial charge was dis-

missed to the date the time limits for trials under this section would have commenced to run as to the subsequent charge." Defendant argues that the section 15A-701(b)(5) exclusion is inapplicable to her because the 2 April 1984 indictment was not dismissed under N.C.G.S. § 15A-931 since the notice of dismissal stated that the "prosecutor enters a dismissal . . . [w]ith [l]eave." She also argues that the indictment was still pending after the dismissal with leave because she remained on secured bail bond and the authorities continued to investigate the case. Defendant's arguments are unpersuasive.

The State argues that since defendant appeared, the dismissal "with leave" language was mere surplusage which added nothing to the notice of dismissal and took nothing away. We agree. Defendant relies on *State v. Herald*, 65 N.C. App. 692, 309 S.E. 2d 546 (1983), *cert. denied*, 310 N.C. 479, 312 S.E. 2d 887 (1984), in which the Court of Appeals stated that "[u]nder the present system of voluntary dismissals, no indictment is left pending. G.S. 15A-931." *Id.* at 693, 309 S.E. 2d at 548. This language appears to support the State's argument rather than defendant's. That the authorities continued to investigate the unsolved murder lends no assistance to defendant's argument. The fact that investigation continues after a section 15A-931 dismissal renders that dismissal no less final because the prosecutor may not resume criminal proceedings against a suspect unless and until a new indictment is obtained. In this case, no criminal proceedings occurred during the period from 14 August 1984 until the new indictment on 22 July 1985. The defendant appeared for trial, and in spite of the "with leave" language, the dismissal was proper. Defendant's bail bond should have been discharged, but since she was not required to appear or render herself amenable to the orders and processes of the court during that period, she has failed to show prejudice.

[3] Finally, defendant contends that the trial court abused its discretion when it denied her renewed motion to dismiss on speedy trial grounds because it failed to make factual findings or conclusions of law in support of its ruling. This argument is without merit. At the first hearing on defendant's motion to dismiss, the judge orally entered his findings of fact and conclusions of law into the record, to each of which defense counsel specifically objected. At trial, the trial judge inquired about the

motion for a speedy trial. Defense counsel simply referred the trial judge to the file, stating, "[T]he file speaks for itself and I will not offer any argument." Defendant's motion to the trial court merely renewed the original motion and added no new legal grounds. Since defendant relied upon the record motion, we find no error in the trial judge's denial of the motion on the same grounds and for the same reasons.

III

[4] Defendant next argues that the trial court abused its discretion by failing to give defendant's requested special jury instruction and by giving instead an improper and prejudicial instruction. The Court of Appeals did not address this issue. We find error, but conclude that it was harmless.

During the charge conference, defendant requested in writing the following special jury instruction based on N.C.P.I.—Crim. 105.20:

> Evidence has been received tending to show that at an earlier time the witness, (name witness), made a statement which conflicts with his testimony at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made, *and that it does conflict with the testimony of the witness at this trial,* then you may consider this, together with all other facts and circumstances bearing upon the witness's truthfulness, in deciding whether you will believe or disbelieve his testimony at this trial.

(Emphasis added.) The trial court agreed to give the instruction on conflicting statements as requested, but in fact gave the following charge:

> Evidence has been received tending to show that at an earlier time the witnesses may have made statements which may be consistent or may conflict with their testimony in this trial. You must not consider such earlier statement as evidence of the truth of what was said at the earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made *and that it is consistent or does not conflict with the testimony of the witness at*

> *this trial*, you may consider this, together with all other facts and circumstances bearing upon the witness' truthfulness in deciding whether you will believe or disbelieve his or her testimony at this trial.

(Emphasis added.) This Court has stated that if a "request be made for a special instruction, which is correct in itself and supported by evidence, the court must give the instruction at least in substance." *State v. Hooker*, 243 N.C. 429, 431, 90 S.E. 2d 690, 691 (1956). The emphasized portion of the *requested* instruction told the jury it might consider statements which conflicted with trial testimony, but the instruction as given told the jury that it might consider statements which did *not* so conflict. Defendant argues that the only reasonable effect of the trial court's instruction was to inform the jury not to consider prior *inconsistent* statements and that she was prejudiced thereby. In light of the circumstances of this case, we cannot agree. At several points during the trial when the witnesses' prior statements were introduced, the trial court properly instructed the jurors about their consideration of them. The evidence in defendant's trial involved both consistent and inconsistent prior statements of several different witnesses. Much time was spent in attempts to discredit the statements. Doubtless, the jury understood their duty as fact-finders to consider consistencies and inconsistencies of prior statements in deciding the veracity of a particular witness. It is not reasonably possible that, had the trial court given defendant's instruction verbatim, a different result would have occurred at trial. N.C.G.S. § 15A-1443 (1983).

IV

[5] Defendant's final argument is that the trial court erred in denying her motion *in limine* to exclude any evidence implicating her in other killings. Defendant contends that the rulings of a pretrial hearing judge and of the trial judge denying her motion *in limine* impermissibly chilled her right to testify in her own defense. As related above, during pretrial discovery, defendant discovered that during investigation of the case, several of her relatives had told officers that she had made statements to them that she had participated in other killings of family members: the 1958 killings of a nephew and the nephew's mother in Tennessee

and the 1967 killing of a man in Asheville, North Carolina. Defendant had never been indicted for these killings.

On 31 October 1985 defendant filed a written motion *in limine* to have the court instruct the district attorney to "refrain absolutely" from "introduc[ing] evidence, mak[ing] reference to, or otherwise leav[ing] the jury with the impression that this defendant is a hardened criminal who has committed prior homicides and other criminal activity." In her brief in support of her motion *in limine* defendant referred to the State's "possession of various extrajudicial statements allegedly made by the defendant inculpating the defendant in other criminal activity including homicides committed prior to the death of the victim in this cause, David Lamb," and argued that to permit the State's witnesses to inform the jury about the statements would inflame the jury's passions and create unfair prejudice to defendant in violation of Rule 403. She further argued that admission of the challenged evidence would serve to place the matter of her character before the jury in violation of Rule 404. The hearing judge elected to defer ruling on this motion so that it might be determined by the trial judge.

Defendant's case was called for trial several months later on 20 January 1986. After jury selection, but before the trial itself had begun, defendant asked the trial court to consider her motion *in limine*. This time her argument was twofold: first, that the State should not be allowed to introduce the evidence during its case-in-chief in violation of Rules 403 and 404 and, second, that the State should not be permitted to question defendant herself as to any of the alleged crimes. The prosecutor argued that the evidence would show common plan, design or scheme and would shed light on why those relatives who had finally come forward were previously so reluctant to testify:

> MR. TWISDALE: Your Honor, I would ask the Court to delay its ruling until such time as it appears this evidence may be presented. But this evidence, if it could be brought out, would show, in answer to questions why these relatives, brothers and sisters, or brothers-in laws [sic] and sisters of this defendant came forward, it's on account of the prior assaults and murders and perhaps another one that was planned in the near future, is the reason that they came forward and agreed to testify against her, and so they may be

> very relevant or become more relevant, depending on what the witnesses say.

The trial court deferred ruling on the motion. The trial proceeded, but the prosecutor did not introduce any evidence as to these statements of defendant during the State's case-in-chief. Near the close of defendant's evidence, but before she had rested or taken the stand herself, defendant renewed her motion *in limine* "concerning the request that the state not be allowed to go into any prior activities allegedly done by Mrs. Lamb." The trial court responded:

> COURT: I'm not going to put the muzzle on on [sic] cross-examination, if that is what the question is.

Defendant asked for a ruling on the motion. The prosecutor argued that he did not "think [he] should be limited, depending upon what she [(defendant) said] on the witness stand." Upon defendant's insistence on a ruling, the trial court denied the motion. At that, defendant declined to testify and rested her case.

Defendant now argues that the trial court abused its discretion in denying her motion *in limine* because the challenged evidence was inadmissible and prejudicial and because she had no assurance that she would not be cross-examined concerning those statements. She argues that because of this error she was impermissibly discouraged from taking the stand. The State, on the other hand, argues that the issue is not capable of review because defendant failed to take the stand and thus failed to present the error within a reviewable context. *Luce v. United States*, 469 U.S. 38, 83 L.Ed. 2d 443 (1984). We express no opinion on the applicability of *Luce* to the denial of a motion *in limine* made pursuant to Rule 608(b), but we conclude that defendant suffered prejudice from the bald denial of her motion and must therefore be awarded a new trial.

When defendant made her pretrial motion, she argued that the statements she made to her relatives concerning prior killings were inadmissible under Rule 404(b), which provides in part that evidence of other crimes is not admissible to prove the character of a person in order to show that she acted in conformity therewith. Defendant also relied on Rule 403, which provides in part that relevant evidence may be excluded if its probative value is

substantially outweighed by the danger of unfair prejudice. The State thereafter chose not to introduce the evidence during its case-in-chief, even though it had argued that the statements were admissible to prove motive, scheme or common plan. When defendant made her motion for the third time near the close of her evidence, she was at the point in the trial where she had to decide whether to take the stand and testify in person. By that time, the statements in question were only available as impeachment evidence in the hands of the State and their admissibility was governed by Rule 608(b).

Rule 608(b) provides in part that specific instances of conduct, if probative of truthfulness or untruthfulness, may be inquired into on cross-examination of the witness concerning her character for veracity. In *State v. Morgan*, 315 N.C. 626, 340 S.E. 2d 84 (1986), we noted that "Rule 608(b) represents a drastic departure from the former traditional North Carolina practice which allowed . . . cross-examin[ation] for impeachment purposes regarding *any* prior act of misconduct" if the question was asked in good faith. *Morgan*, 315 N.C. at 634, 340 S.E. 2d at 89. Under Rule 608(b), evidence of a specific instance of conduct is not admissible for impeachment purposes unless it "*is in fact probative* of truthfulness." *Id.* We stated that " 'evidence routinely disapproved of as irrelevant to the question of a witness' . . . veracity . . . includes specific instances of conduct relating to . . . *violence against other persons.*' " *Morgan*, 315 N.C. at 635, 340 S.E. 2d at 90 (quoting 3 D. Louisell & C. Mueller, Federal Evidence § 305 (1979)). We note that in the case *sub judice* the actual statements defendant is alleged to have made to her relatives about her involvement in other killings were apparently not made available to the trial judge and are not part of the record before this Court. We have only a summary statement of their content. Nevertheless, the evidence appears to be inadmissible under Rule 608(b) because it shows specific instances of conduct relating to violence against other persons which would be irrelevant to defendant's veracity.

In this case, the court did not err in deferring its ruling upon defendant's motion *in limine* either at the pretrial hearing or later at the beginning of the trial. Neither the statements defendant's relatives were alleged to have made to the authorities nor the affidavits given by those same relatives to defense counsel

recanting their statements were before the judge hearing the pretrial motion or the trial judge. The trial court, at these early stages, had no factual context in which to make a decision and properly deferred its ruling. The Rules of Evidence are not to be applied in a vacuum; they are to be applied in a factual context. A trial court makes its decisions as that factual context unfolds and as the circumstances warrant.

Not every denial of a defendant's motion *in limine* results in a chilling of defendant's right to testify. Whether this result occurs depends on the peculiar facts of each case. However, it is abundantly clear from the record before us in this case that defendant intended to testify unless her motion *in limine* was denied. At one point in the proceedings, the district attorney stated that "[throughout the trial] I had been led to believe that the defendant was going to testify . . . ." Defendant evidenced her intention to testify by pressing the court throughout the trial to rule on her motion so that she would know if she could testify without being impeached by the statements in question. When the point came when she had either to testify or to rest her case, she insisted that the trial judge rule on her motion. We agree with the Court of Appeals that "[defendant's] intent to testify, were it not for the ruling, seems clear." *State v. Lamb*, 84 N.C. App. 569, 583, 353 S.E. 2d 857, 865. While the State contends that the district attorney never asserted that he absolutely intended to cross-examine defendant with the statements in question, we conclude that defendant was justified in believing that if she took the stand, he would do so. During the course of a hearing just before the trial started, the district attorney said:

> [I]f she takes the stand I can certainly ask her about any crime she ever committed or any assault of this nature she ever committed, or any person she has ever killed, as long as I have a basis therefor.

Again, when defendant renewed her motion near the close of her case, the trial judge asked the district attorney what his position would be on cross-examination should the defendant testify. The district attorney's reply was:

> Your Honor, as to any prior acts of violence, the Oscar Davis matter in Asheville, the victim having been shot in bed with her placing a pillow over his head, I think would be highly

> competent and subject to cross-examination, as well as any other act of violence resulting in the death of anyone.

Here, the State's case was dependent on the testimony of defendant's relatives, who had come forward late in the game so to speak, who had changed their accounts of events often, and who in fact had attempted to retract their accounts concerning the very statements in question. Because the case rested so completely on these witnesses' testimony, any undue discouragement of defendant's right to take the stand in her own defense to refute that testimony was fraught with prejudice.

We should not be understood as saying that evidence such as defendant's statements here would *never* be admissible. Had defendant taken the stand and had the prosecutor decided to pursue his questioning of defendant in an impermissible manner, the trial court could have changed its ruling on defendant's motion. A ruling on a motion *in limine* is a preliminary or interlocutory decision which the trial court can change if circumstances develop which make it necessary. Or, had defendant taken the stand and testified that she had never made such statements or had never been involved in any prior acts of violence to the person, she would have "opened the door." Although the statements appeared inadmissible under Rule 608(b), had defendant thus opened the door, the prosecutor would then have been at liberty to use the statements to impeach defendant.

Here, however, in spite of her repeated renewals of her motion *in limine*, defendant never received any assurance that, should she testify, provided she did not open the door, she would be protected from impermissible evidence being used to impeach her. She received only a bald denial of her motion.

In the context of the facts presented here, we are unable to conclude that defendant's right to testify in her own behalf was not impermissibly chilled. Defendant is entitled to a new trial. The decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. LARRY RAY MITCHELL

No. 273A86

(Filed 9 March 1988)

1. **Constitutional Law § 60; Jury § 7.14— peremptory challenges—failure to show racial basis**

Defendant failed to present an adequate record on appeal from which to determine whether jurors were improperly excused by peremptory challenges on the basis of race in this first degree murder and armed robbery prosecution.

2. **Jury § 7.14— motion to prohibit peremptory challenges of blacks—denial proper**

The trial court properly denied defendant's motion to prohibit the State from peremptorily challenging black jurors since the State is not prohibited from peremptorily excusing black jurors for reasons other than race.

3. **Jury § 7.14— motion for court reporter to note race of potential jurors—denial proper**

The trial court properly denied defendant's motion to require the court reporter to note the race of every potential juror examined since an individual's race is not always easily discernible, and the potential for error by a court reporter acting alone is great. If a defendant believes a prospective juror to be of a particular race, he can bring this fact to the trial court's attention and ensure that it is made a part of the record, and if there is any question as to the prospective juror's race, this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence.

4. **Criminal Law § 102— capital case—guilt-innocence and sentencing phases—refusal to allow final arguments by both defense counsel—prejudicial error per se—effect on noncapital charges**

The trial court's refusal to permit both counsel for defendant to address the jury during defendant's final arguments in the guilt-innocence and sentencing phases of a capital case constituted prejudicial error per se in both phases, and such error in the guilt-innocence phase entitles defendant to a new trial as to the capital felony. Further, in cases in which a capital felony has been joined for trial with noncapital charges, failure of the trial judge to allow both of defendant's attorneys to make the closing argument is also prejudicial error in the noncapital cases. N.C.G.S. § 84-14; N.C.G.S. § 15A-2000(a)(4); Rule 10, General Rules of Practice for the Superior and District Courts.

Justice MARTIN dissenting.

Justice MEYER joins in this dissenting opinion.

APPEAL of right by the defendant from a judgment sentencing him to death for murder in the first degree entered by *Hob-*

good (Hamilton H.), J., at the 17 March 1986 Criminal Session of Superior Court for SURRY County. Heard in the Supreme Court on 13 October 1987.

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

James L. Dellinger, Jr. and Terry L. Collins for the defendant appellant.

MITCHELL, Justice.

The defendant was tried upon proper indictments and convicted of murder in the first degree, armed robbery, aiding and abetting in armed robbery, and felonious conspiracy. In the murder case the jury found the defendant guilty on both the theory of felony murder and the theory of premeditation and deliberation. At the sentencing hearing the jury found that the aggravating circumstances outweighed the mitigating circumstances and that the aggravating circumstances were "sufficiently substantial to call for the imposition of the death penalty." N.C.G.S. § 15A-2000(c)(2) (1983). The trial court entered judgments on 28 March 1986 sentencing the defendant to death for murder in the first degree and to imprisonment in each of the other cases. The defendant appealed his murder conviction and death sentence to this Court as of right pursuant to N.C.G.S. § 7A-27(a). We allowed the defendant's motion to bypass the Court of Appeals as to the appeals of the other convictions in an order entered 26 May 1987.

On appeal the defendant makes numerous assignments of error relative to the guilt-innocence phase and the sentencing phase of his trial. We conclude that one assignment has merit. The trial court's refusal at each phase of this capital trial to permit both counsel for the defendant to address the jury in the defendant's final argument constituted prejudicial error per se. Accordingly, the defendant is awarded a new trial.

The State's evidence at trial tended to show that on 30 January 1985, the defendant was with Don Love and Davie Reynolds in a car driving along U.S. 52 and Cook School Road in Surry County near Pilot Mountain, North Carolina. The defendant told the driver of the vehicle, Reynolds, to pull the car over to the side of Cook School Road within view of Arnold's Amoco Store.

The defendant then asked whether Arnold's Amoco Store would be a good place to "hit." The defendant asked Reynolds if he was "game" for robbing the store. Reynolds said that he was not. The defendant then asked Love if he was "game" to rob the store. Love said that he was. The defendant asked Love if he had his "piece" (referring to his gun) with him and told Reynolds to drive by Arnold's Amoco so he could look at the store. As the car drove past the store, the defendant slid down in his seat and told Reynolds to pull off on the next road past the store and stop. The defendant then asked Reynolds to go down to the Arnold's Amoco and see if there was a back door and also see how many people were in the store. After Reynolds returned from the store, the defendant said he would "handle" the cash register in the store. Love said he would "handle" the people. The defendant pulled out the gun he was carrying and placed it in an outside pocket. The defendant and Love then proceeded toward Arnold's Amoco on foot.

As the defendant and Love walked toward the store, the defendant took out his pistol, a .25 caliber automatic, and pulled back on the weapon to place a bullet in the chamber. The defendant said that he "wouldn't leave nobody talking." Inside the store were Howard Bryant, Frank Jones, and Charlie Hunter. The defendant and Love entered the store with their guns concealed. The defendant asked Bryant if the store sold beer. Bryant said that they did not. Subsequently, the defendant drew his gun, grabbed Hunter around the neck, pointed the gun at Bryant and told him to open the cash register. The defendant said that he had "killed two the night before and it don't make no difference if I kill any more." After the cash register was open, the defendant forced Bryant and Hunter to lie face down on the floor. The defendant took approximately $1,000 from the store's cash register. The defendant then put his gun to the back of Bryant's head, searched his pockets, and took five silver dollars from him. Love also drew his pistol, a .22 revolver, and forced Jones to give him his wallet containing $270 in cash.

During the course of the robbery, Danny Hall drove into the parking lot of Arnold's Amoco with his wife, intending to cash a check. Hall opened the front door of the store and started to enter. As Hall was entering the store, he noticed the robbery in progress. The defendant ordered Hall to "get in here," but Hall

turned and started to run. The defendant grabbed him, but Hall broke loose and continued to run. Hall said, "Don't shoot me." The defendant said, "No you don't, come back here." The defendant then fired his gun at Hall twice, and one of the shots struck Hall killing him. The defendant then left, firing another shot toward the store. He and Love got into the car and were driven away by Reynolds. The defendant later told George France and Craig Simmons that he had killed someone and showed Simmons how he had shot Hall in the back.

The defendant offered no evidence at the guilt-innocence phase of the trial. During the sentencing phase, he offered the testimony of his sister as to his bad family life. The State presented as aggravating circumstances that the defendant had a previous conviction for second degree murder in 1971, and one for assault with a deadly weapon with intent to kill inflicting serious bodily injury in 1985.

The defendant, a thirty-three-year-old black male, first assigns as error the exclusion of black jurors on the basis of race. On 27 February 1986 the defendant filed a motion to prohibit the State from peremptorily challenging black jurors. This motion was denied. The defendant also filed a motion to require the court reporter to note the race of every potential juror examined to perfect the record and determine if there was a substantial likelihood that any jurors were challenged on the basis of race. This motion was also denied. The defendant argues that in denying his motion to prohibit the State from peremptorily challenging black jurors, the trial court set no limits concerning the basis upon which the prosecutor could peremptorily challenge any juror. He contends that the denial of this motion violated his right to trial by an impartial jury under the sixth amendment and article 1, section 24 of the Constitution of North Carolina.

It is now a well-settled principle that the use of peremptory challenges to exclude potential jurors solely on account of their race is unconstitutional. *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed. 2d 69 (1986); *State v. Belton*, 318 N.C. 141, 347 S.E. 2d 755 (1986). Indeed, this principle is so fundamental that it extends to discrimination in the selection of grand jury foremen, *State v. Cofield*, 320 N.C. 297, 357 S.E. 2d 622 (1987), and to the selection of jurors

in civil cases, *Jackson v. Housing Authority*, 321 N.C. 584, 364 S.E. 2d 416 (1988).

In *Batson* the Supreme Court of the United States held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race." *Batson*, 476 U.S. at 89, 90 L.Ed. 2d at 83. The Court established a three-part test for a defendant to establish a prima facie case of purposeful discrimination:

> 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.' (Citations omitted.) Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Id. at 96, 90 L.Ed. 2d at 87-88. Thus, the burden is on a criminal defendant who alleges racial discrimination in the selection of the jury to establish an inference of purposeful discrimination. The defendant must provide the appellate court with an adequate record from which to determine whether jurors were improperly excused by peremptory challenges at trial. Statements of counsel alone are insufficient to support a finding of discriminatory use of peremptory challenges. *Jackson v. Housing Authority*, 321 N.C. at 585, 364 S.E. 2d at 417.

[1] The defendant here, however, does not rely on *Batson* for relief. He relies instead on an argument based upon rights emanating from the sixth amendment's guarantee of an impartial jury as expounded in *McCray v. Abrams*, 750 F. 2d 1113 (2d Cir. 1984). In *McCray* the United States Court of Appeals for the Second Circuit interpreted the sixth amendment's guarantee of an impartial jury to mean that a criminal defendant is entitled to a jury from which distinctive groups of persons have not been systematically excluded, to ensure insofar as practicable that the jury represents a fair cross-section of the community. The Second Circuit recog-

nized that the sixth amendment does not guarantee a jury fairly representative of the community, but concluded that it does guarantee a defendant a fair chance at such a jury. The *McCray* Court went on to hold that a defendant could establish a prima facie violation of his right to the possibility of a representative jury by showing: (1) that the group excluded is a "cognizable group in the community"; and (2) that there is a "substantial likelihood" that jurors were peremptorily challenged solely because of their race. *Id.* at 1131-32. As in *State v. Belton*, 318 N.C. 141, 347 S.E. 2d 755, however, we need not decide today whether to employ, under either the sixth amendment or article I, section 24 of the Constitution of North Carolina, the fair cross-section analysis used by the Second Circuit in *McCray*. The defendant has failed to present an adequate record on appeal from which to determine whether jurors were improperly excused by peremptory challenges on the basis of race.

[2] Here, the defendant first filed a motion to prohibit the State from peremptorily challenging black jurors. The trial court properly denied the motion. To have allowed the motion would have entirely prohibited the State from exercising peremptory challenges to excuse blacks, regardless of motive. Such a ruling is contrary to the holdings in both *Batson* and *McCray*. The State is not prohibited from peremptorily excusing black jurors for reasons other than race. These cases only prohibit the exclusion of potential black jurors *solely on the basis of race*. Moreover, this Court upheld the use of peremptory challenges to excuse blacks for nondiscriminatory purposes in *Belton*.

[3] After the first motion was denied, the defendant filed a motion to require the court reporter to note the race of every potential juror examined, which was also denied. Although this approach *might* have preserved a proper record from which an appellate court could determine if any potential jurors were challenged solely on the basis of race, we find it inappropriate. To have a court reporter note the race of every potential juror examined would require a reporter alone to make that determination without the benefit of questioning by counsel or any other evidence that might tend to establish the prospective juror's race. The court reporter, however, is in no better position to determine the race of each prospective juror than the defendant, the court, or counsel. An individual's race is not always easily discernible,

and the potential for error by a court reporter acting alone is great. As the trial court noted, "[The clerk] might note the race as being one race and in fact that person is another race. . . . [M]y observation has been you can look at some people and you cannot really tell what race they are." The approach suggested by the defendant would denigrate the task of preventing peremptory challenges of jurors on the basis of race to the reporter's "subjective impressions as to what race they spring from." *See Batson*, 476 U.S. at 130 n. 10, 90 L.Ed. 2d at 109 n. 10 (Burger, C.J., dissenting).

If a defendant in cases such as this believes a prospective juror to be of a particular race, he can bring this fact to the trial court's attention and ensure that it is made a part of the record. Further, if there is any question as to the prospective juror's race, this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence, as opposed to leaving the issue to the court reporter who may not make counsel aware of the doubt. In the present case the defendant did not avail himself of this opportunity, despite the trial court's suggestion at the pre-trial hearing that he might wish to do so during jury selection.

> THE COURT: Well, who knows what the race is of some of them? You want to ask all of them whether they are of white or negroid race? or Asian or something?
>
> MR. DELLINGER: I would like to have the right to ask that. And I think I do. About ten days away from trial, I don't know if I'm going to ask it or not.

For whatever reason, counsel chose not to make any such inquiry at trial. Thus, the defendant has failed to demonstrate that the prosecutor exercised peremptory challenges solely to remove members of any particular race from the jury. This assignment of error is overruled.

[4] In another assignment of error, the defendant argues that the trial court erred during the final arguments of counsel, in both the guilt-innocence and penalty phases of the trial, by refusing to allow more than one of his counsel to address the jury in

his final arguments* during closing. We find merit in this assignment.

As the defendant presented no evidence during the guilt-innocence phase of the trial, he was entitled to present both the opening and final arguments to the jury during the closing arguments for that phase. *State v. Gladden*, 315 N.C. 398, 421, 340 S.E. 2d 673, 688, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 166 (1986); Rule 10, General Rules of Practice for the Superior and District Courts. Further, the defendant always has a statutory right to present the last or final argument during the closing arguments at the sentencing phase, without regard to whether he has presented evidence during that phase. N.C.G.S. § 15A-2000(a)(4) (1983). Therefore, the defendant in the present case was entitled to the last or final argument at both the guilt-innocence phase and sentencing phase of his trial.

The defendant requested that both of his counsel be allowed to address the jury during the final argument in the guilt-innocence phase and the final argument in the sentencing phase. The trial court recognized that the defendant was entitled to make the first argument and the final argument during the closing arguments in the guilt-innocence phase, because the defendant had offered no evidence. The trial court, however, ruled that during the closing arguments of counsel in that phase, only one counsel for the defendant could speak during his first argument and only one could speak during his final argument. The trial court also ruled that only one counsel for the defendant could address the jury during the defendant's final argument in the sentencing phase.

N.C.G.S. § 84-14 provides:

> In all trials in the superior court there shall be allowed two addresses to the jury for the State or plaintiff and two for the defendant, *except in capital felonies*, when there *shall be no limit as to number*. The judges of the superior court are authorized to limit the time of argument of counsel to the jury on the trial of actions, civil and criminal as follows: to

*Throughout this discussion we use the term "final argument" to refer to the last argument made during the series of closing arguments at the end of the trial or sentencing proceeding.

> not less than one hour on each side in misdemeanors and appeals from justices of the peace; to not less than two hours on each side in all other civil actions and in felonies less than capital; *in capital felonies, the time of argument of counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three counsel on each side.* Where any greater number of addresses or any extension of time are desired, motion shall be made, and it shall be in the discretion of the judge to allow the same or not, as the interests of justice may require. In jury trials the whole case as well of law as of fact may be argued to the jury.

N.C.G.S. § 84-14 (1985) (emphasis added).

In *Gladden* we indicated that in capital cases N.C.G.S. § 84-14 allows the trial court to limit the defendant to three counsel, but that at each point at which the defendant has the right to present an argument to 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.

315 N.C. at 421, 340 S.E. 2d at 688 (emphasis added).

We indicated in *State v. Eury*, 317 N.C. 511, 346 S.E. 2d 447 (1986), that when a defendant is entitled to the final or last jury argument, during the closing arguments in a capital case,

> his attorneys may each address the jury as many times as they desire during the closing phase of the arguments. 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.

Id. at 516-17, 346 S.E. 2d at 450. Because only one of his counsel had been allowed to address the jury during his final argument in the guilt-innocence phase of his trial, we awarded the defendant a new trial in that case.

Finally, in *State v. Simpson*, 320 N.C. 313, 357 S.E. 2d 332 (1987), we held that the trial court's refusal to permit both counsel for the defendant to address the jury during the defendant's statutorily guaranteed final argument in the sentencing phase of his capital case "deprived the defendant of a substantial right and amounted to prejudicial error." *Id.* at 327, 357 S.E. 2d at 340. The defendant was awarded a new sentencing hearing.

In the present case the State concedes that the trial court erred during the defendant's final argument at the guilt-innocence phase, and again at the sentencing phase, by refusing to permit both of the defendant's counsel to address the jury. The State, however, argues that this Court applied a harmless error analysis in *Eury*, and that these errors were harmless in the present case in light of the compelling evidence against the defendant. We find the State's arguments unpersuasive.

In *Eury* it was unnecessary to decide whether such error was prejudicial per se, because on the specific facts before us we concluded that "one can only speculate as to how the jury would have reacted had defendant not been deprived of her substantial right to have both counsel make closing argument." 317 N.C. at 517, 346 S.E. 2d at 450. We now conclude that these concerns expressed in *Eury* are common to all cases in which defendants are deprived of their right to have all of their counsel address the jury during each argument that they are entitled to make at the conclusion of either phase of a capital case. Therefore, we hold that the trial court's refusal to permit both counsel to address the jury during the defendant's final arguments constituted prejudicial error per se in both the guilt-innocence and sentencing phases. Such error in the guilt-innocence phase entitles the defendant to a new trial as to the capital felony. Further, the foregoing principles of law require us to hold in cases where a capital felony has been joined for trial with noncapital charges "that the failure of the trial judge to allow both of defendant's counsel to make the closing argument was prejudicial error in the noncapital as well as the capital charges." *State v. Eury*, 317 N.C. at 518, 346 S.E. 2d at 451. Therefore, the defendant is also entitled to a new trial as to the noncapital charges in the present case.

In fairness to the trial court, we note that *Gladden*, *Eury*, and *Simpson* were not available to provide the trial court

guidance in the present case. The judgments were entered against this defendant prior to our decisions in those cases.

We need not address the defendant's remaining assignments of error, as the alleged errors are unlikely to arise again at a new trial.

New trial.

Justice MARTIN dissenting.

The majority awards a new trial to the defendant because the trial judge failed to allow both of defendant's counsel to participate in the closing arguments to the jury. I dissent for the failure of the majority to apply a harmless error analysis to the error to determine whether prejudice resulted.

This Court first addressed this issue in *State v. Eury*, 317 N.C. 511, 346 S.E. 2d 447 (1986), where the Court held that it was error to refuse to allow both of defendant's counsel to participate in the closing argument. The Court then determined whether the ruling constituted prejudicial error, applying a harmless error analysis. *Eury* does not establish a per se prejudicial error rule.

Nevertheless, the majority of this Court in *State v. Simpson*, 320 N.C. 313, 357 S.E. 2d 332 (1987), relied upon *Eury* for the statement that the error "deprived the defendant of a substantial right and amounted to prejudicial error." 320 N.C. at 327, 357 S.E. 2d at 340. The two dissenters in *Simpson* demonstrated the fallacy of this statement.

The majority here seeks to avoid the holding of *Eury*, stating that in *Eury* it was unnecessary for the Court to decide whether the error was prejudicial per se. At no place in *Eury* do we find the words "per se"; the Court did not decline to determine the per se issue in *Eury*. Whether the error was per se prejudicial was simply not involved in *Eury*.

This is not the kind of error which automatically results in prejudice—it is to be remembered that this issue does not involve constitutional rights. *Cf. State v. Bindyke*, 288 N.C. 608, 220 S.E. 2d 521 (1975) (presence of alternate juror during deliberations violated state constitutional guarantees and was prejudicial per se). Rather, it is a matter of statutory construction of N.C.G.S.

§ 84-14. The statute itself does not provide that violations of it are per se prejudicial error. The rule of this jurisdiction is that unless otherwise provided the defendant has the burden to show not only error but prejudice as well. *State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982); *State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979). The test for harmless error is whether there is a reasonable possibility that had the error not been committed a different result would have been reached at trial. N.C.G.S. § 15A-1443 (a) (1983).

I find the majority erred in holding that the failure of the trial court to allow both counsel to make the closing arguments constitutes prejudicial error per se. Not one single case or authority from any jurisdiction is cited for this holding.

This case demonstrates exactly why this Court established a harmless error rule in *Eury*. Here the state's evidence was overwhelming and compelling. Eyewitnesses testified to defendant's participation in the robbery and murder of an innocent bystander. The defendant planned the armed robbery, recruited his accomplices, and approached the store with a bullet in the firing chamber of his pistol with the purpose that he "wouldn't leave nobody talking." The victim Hall was shot in the back.

Moreover, the jury found the following aggravating circumstances: the murder was committed while defendant was engaged in an armed robbery; the murder was a part of a course of conduct by defendant including additional crimes of violence against others; the murder was for pecuniary gain. As mitigating circumstances the jury found: the defendant loved, respected, and provided financial assistance to his mother, father, and siblings; defendant was one of seven children and his mother and father died before he was fourteen years old; defendant was raised in poverty and left home before he was eighteen years old; defendant was first sent to prison before he was nineteen years old. Upon weighing these findings the jury concluded that the aggravating circumstances outweighed the mitigating circumstances and that the aggravating circumstances were sufficiently substantial to call for the death penalty.

Can it be said that had both counsel taken part in the final arguments and argued "until blue in the face," there is a reasonable possibility that a different result would have been reached? I

think not. As Justice Huskins said in his dissenting opinion in *Hatcheries, Inc. v. Coble*, "the law does not require judges to be more ignorant than other people." 286 N.C. 518, 524, 212 S.E. 2d 150, 154 (1975).

Furthermore, the majority erred in finding that the failure of the trial court to allow both of defendant's counsel to make the closing argument in the felony cases resulted in prejudicial error per se. Different considerations apply to noncapital felony cases. N.C.G.S. § 84-14 does not establish a right for defendant to have two different lawyers argue on his behalf at any stage of the proceedings. The statute only guarantees the defendant the right to make two *addresses* to the jury, not to have two *lawyers* make the addresses. In capital cases defendant has a right to have as many as three *lawyers* to argue and the number of addresses is unlimited. *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 166 (1986).

Here, defendant was provided with his two statutory addresses to the jury in the trial of the felony charges. His counsel made the opening and closing arguments. The sentencing hearing was only for the capital charge, and the arguments of counsel at that time were completely irrelevant to the felony charges. The trial judge did not err with respect to the jury arguments in the trial of the felony cases. The determination of error in the felony cases and the capital charge must be made separately as different rules of law apply. The majority erred in sweeping the felony cases in with the capital charge.

There was no error with respect to the arguments in the felony charges and no prejudicial error in the capital case.

Justice MEYER joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. WILLIAM RICHARD BRAY

No. 501A86

(Filed 9 March 1988)

1. **Weapons and Firearms § 3— discharging gun into occupied property—gun inside vehicle when fired**

Defendant discharged a gun "into" an occupied vehicle within the meaning of N.C.G.S. § 14-34.1 where he was standing outside the vehicle when he fired shots from a pistol even though the pistol itself was inside the vehicle when the shots were fired.

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

There was sufficient evidence of premeditation and deliberation to support defendant's conviction of first degree murder of a highway patrolman where the evidence tended to show: when the patrolman stopped the truck in which defendant was riding, the driver threw a .25 caliber pistol to defendant; before defendant got out of the truck to go over to the patrol car, he put the pistol in his jacket pocket; when defendant was standing outside the passenger window of the patrol car, he heard "armed and dangerous" and then "armed" over the patrolman's radio; and after the driver of the truck yelled for him to shoot the patrolman, defendant reached into his pocket, pulled out the pistol, and shot through the window of the patrol car into the patrolman's head.

3. **Criminal Law § 9.3; Robbery § 4.6— armed robbery—acting in concert theory**

The State's evidence was sufficient to support defendant's conviction for armed robbery of a highway patrolman's revolver under a theory of acting in concert where it tended to show that defendant and his companion escaped together from an Arkansas jail; they broke into an Arkansas home and stole a rifle and a truck; they were carrying a .25 caliber pistol when the patrolman stopped their truck; defendant shot the patrolman with the .25 caliber pistol, the companion shot the patrolman with his own revolver, and the companion took the patrolman's revolver when he and defendant fled the scene; and two days later defendant and his companion broke into another home and stole another gun. Evidence that defendant ran back to the truck after shooting the patrolman and before his companion took the patrolman's revolver does not establish that defendant and his companion were not acting in concert in the armed robbery.

4. **Burglary and Unlawful Breakings § 1.2— second degree burglary—acting in concert—constructive breaking**

The State's evidence was sufficient for the jury on the issue of defendant's guilt of second degree burglary under a constructive breaking theory where it tended to show that defendant and a companion had escaped together from an Arkansas jail and were acting in concert to evade the authorities; the companion gained entrance to a house by breaking a stick which held a window down, raising the window, and tearing a hole in the

plastic covering inside the window; while the companion broke into the house, defendant hid in a tobacco barn; and defendant later went into the house with the companion where they stole food, blankets and a gun.

5. **Criminal Law § 33.4— evidence to gain sympathy—admission as harmless error**

In a prosecution for first degree murder of a highway patrolman, assuming, *arguendo*, that the court erred in allowing the patrolman's parents and fiancee to raise their hands and identify themselves in the courtroom and in allowing the patrolman's mother to testify when she last saw her son alive, where her son was buried, and whether her son was engaged, the error was harmless in light of defendant's admission that he shot the patrolman under the circumstances related in his statement. N.C.G.S. § 15A-1443(a).

6. **Criminal Law § 34.7— prior crimes—admissibility to show motive**

In a prosecution for the first degree murder of a highway patrolman, evidence that defendant and a companion assaulted a jailer with a pipe to escape from jail in Arkansas and that they broke into an Arkansas home and stole a rifle and a truck which they drove to North Carolina was admissible under N.C.G.S. § 8C-1, Rule 404(b) to show intent and motive for killing the patrolman.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) (1986) from a judgment imposing a sentence of life imprisonment entered by *Stephens, J.*, upon defendant's conviction of first degree murder at the 5 May 1986 Special Criminal Session of Superior Court, MADISON County. On 19 May 1987 we allowed defendant's petition to bypass the Court of Appeals in appeals from convictions of robbery with a firearm, discharging a firearm into occupied property, second degree burglary, and larceny of a firearm. Heard in the Supreme Court 8 December 1987.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Linda Anne Morris, Associate 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 the first degree murder of Bobby Lee Coggins, for which he received a life sentence. He was also convicted of armed robbery, for which he received a forty-year sentence (consecutive), discharging a firearm into occupied property, for which he received a ten-year sentence (consecutive), sec-

ond degree burglary, for which he received a forty-year sentence (consecutive), and larceny of a firearm, for which he received a three-year sentence (consecutive). We find no error.

The State's evidence, in pertinent summary, showed the following:

On 26 August 1985, defendant and Jimmy Dean Rios escaped from the Franklin County Jail in Ozark, Arkansas, by attacking the jailer, hitting him on the head with a metal pipe, and locking him in a cell. On 29 August, William Harriman, who lived seventeen miles from the jail, reported that his 1976 orange and white truck had been stolen. A window in his trailer had been broken; the truck keys and a .22 caliber rifle were missing from the trailer.

David Lavender, a South Carolina resident, testified that while he was in Tennessee in early September 1985, he noticed that the license plate (South Carolina "ULS 161") on his van was missing.

Jerry Richman testified that defendant and Rios lived with him in Asheville between 5 and 14 September 1985, and that they had a Chevrolet pickup truck with South Carolina license plate ULS 161. They left on the morning of 14 September.

Karen Haggar testified that she met defendant and Rios at a bar in Asheville in September 1985. Rios was driving a pickup truck and had an automatic handgun. Defendant and Rios drove to her house at noon on 14 September.

On 14 September 1985, Bobby Lee Coggins, a member of the North Carolina State Highway Patrol, was on duty in Madison County. Frank Huggins and Joe Rathbone were working at the Asheville Division Highway Patrol communications headquarters at that time. Coggins called headquarters around 4:25 p.m. and asked for a driver's license information check and a vehicle identification check on an orange and white pickup truck with a South Carolina tag. After running computer checks, Rathbone informed Coggins that the tag was registered to a van owned by a resident of South Carolina, that the truck had been stolen in Arkansas by escaped prisoners, and that the prisoners were considered armed. Coggins stated that everything was "10-4" or okay. When Rathbone and Huggins attempted to contact Coggins at 4:43 p.m., they could not get an answer.

Johnny Norton, Joey Moore, and Howard Holder testified that they were driving on Highway 209 sometime after 4:00 p.m. when they saw Coggins' patrol car pulled over at the Vann Cliff Overlook behind an orange and cream-colored truck. Coggins was at the truck with defendant and another man.

Billy Cantrell testified that he had stopped at the overlook at about 4:00 p.m. and had seen a patrol car and a Chevrolet pickup truck there. He drove up the road and after a few minutes drove back by. At that time, he saw that one man was squatting outside the passenger side of the patrol car, while the trooper and Rios were sitting inside the car.

Tom Fuhr and Homer Wilkins testified that they stopped at the overlook at about 4:25 to 4:30 p.m. They saw a pickup truck and a Highway Patrol car there. The trooper was in his car and appeared to be writing. Two other men were there; one was seated in the passenger's seat of the patrol car and the other was bending over outside the truck, looking under the seat, on the floor board, or behind the seat of the pickup truck. Wilkins asked the second man, "What's the cop unhappy about?" The man mumbled about there being something wrong with the driver's license, then leaned into the cab of the truck to look under the seat. Trooper Coggins told Fuhr that he was doing business there and requested that the men leave the area. They got in their car and drove south on Highway 209. After they had been driving for about three or four minutes, the pickup truck passed them, going very fast, and disappeared around a curve.

Around 4:30 to 4:45, Lee Phillips drove past Coggins' patrol car, then returned to the overlook after some of his passengers said that they had seen blood on the patrolman. The engine of the patrol car was running, the blue lights were on, and the doors were closed. The window on the driver's side was rolled all the way down and the window on the passenger's side was rolled about halfway down. Phillips testified that there was blood coming out of Coggins' ear, and that he had a clipboard in his hand with some writing on it, including a tag number and the word "Arkansas." Coggins' gun holster was unsnapped and his gun was missing. Phillips called the Asheville Highway Patrol on the patrol car's radio and told them that "a cop had been shot" outside Hot Springs. Another man who had stopped at the scene gave the

location to the people in Asheville and told them that Coggins was dead.

At about 6:30 p.m., the Madison County sheriff discovered the pickup truck, with South Carolina tag ULS 161, stuck in a bank 13.5 miles from Vann Cliff Overlook.

On 16 September 1985, around dusk, Rachel Gillespie, a 76 year-old woman who lived alone on a farm off Highway 209, left home to spend the night with a relative. She locked the doors; the windows were closed. When she returned to her house around 7:30 the next morning, she found that her .25-20 rifle was missing, as well as a quilt, a blanket, some clothes, a suitcase, a flashlight, and some food. A stick that had held a window down was broken, and a hole had been torn through plastic on the inside of the window.

At about 3:00 p.m. on 17 September, defendant and Rios were arrested. Before they were captured, Rios dropped Coggins' .357 Magnum revolver and kicked it away. When searched, defendant was found to have a .25 caliber automatic pistol.

State Medical Examiner Page Hudson testified that he performed an autopsy on Trooper Coggins. He found that Coggins had three gunshot wounds on the right side of his head: one on the forehead, one near the ear, and one near the mouth. Dr. Hudson testified that a .25 caliber bullet caused the wound on the forehead; it entered the head at a downward angle, grazed the brain, then lodged in bone under the brain. Although this wound was very serious, it was "probably not fatal." The wound near the ear was caused by the bullet of a .357 Magnum revolver. The bullet had gone through much of the brain, slightly back and upward, then lodged in the skull. In Dr. Hudson's opinion, this was the most severe wound; it would have been immediately fatal. The wound near the mouth was caused by a .25 caliber bullet which went into the floor of the mouth, forward and somewhat downward. In Dr. Hudson's opinion, that wound would not have been fatal. Dr. Hudson also testified that in his opinion the wounds were "generally contemporaneous." He also testified that the muzzles of the guns were "within approximately a couple of feet from the face of Mr. Coggins" when they were fired. However, the mouth wound was probably caused by a shot from a greater distance, by a foot or so, than the forehead wound.

Fingerprints were taken from the patrol car and from the pickup truck. Rios' fingerprints were found on the front bumper of the truck and on the outside of the patrol car at the handle of the front passenger door. Defendant's fingerprints were found around the truck and on the exterior of the front passenger door of the patrol car.

At trial, an SBI agent testified that the .25 caliber pistol found on defendant fired the two .25 caliber bullets that hit Trooper Coggins and the two .25 caliber spent shells found in the patrol car. The agent also testified that the bullet that caused Coggins' ear wound had been fired from Coggins' .357 Magnum revolver, the gun that Rios had dropped before he was arrested.

Defendant's statement to police, made on 17 September 1985, was read into evidence at trial. In that statement, defendant said that he and Rios had arrived in Asheville in "the first part of September." They met Jerry Richman and told him that their money had been stolen. He let them stay at his apartment until the morning of the murder. On 13 September 1985, Rios borrowed a .25 caliber automatic pistol from Richman's roommate's girlfriend. On 14 September, Rios wanted to ride to Hot Springs to take some pictures. He and defendant left at about 2:30 p.m. The statement continued:

> Then we started up to Hot Springs and had some beer with us. On toward Hot Springs the trooper got behind us and followed us for about four or five miles. When he stopped us Jimmy threw me the automatic and said, "Here[,] I think I'm going to get searched." I shoved it under my seat. The Trooper came up to the door and asked Jimmy to come back to his car. I got out and just stood there smoking cigarettes while the Trooper had Jimmy walk a line and all that stuff to see if he was drunk. He then made Jimmy pour our beer out over the rail. The Trooper then asked Jimmy to get into his car, which he did. And I got back into the truck. The Trooper then walked up to the driver's side of the truck and looked under the seat. He then walked around . . . to come to my side and I put the gun in my right Levi jacket pocket.
>
> At that point Jimmy asked me to come back to the Patrol car and I did. The Trooper then came back to his car and started talking on his radio. I then heard on the radio a

code 10-30 something on the radio. The radio then said something about armed and dangerous and then just armed. Jimmy started yelling shoot him, shoot him, and I saw the Trooper reach for his gun through the passenger side door where I was standing. The Trooper then turned to face Jimmy and I stuck the gun in the window in front of Jimmy's face. I fired once, I remember, and it being an automatic I might have fired twice. I'm sure I hit him but he picked up his radio and was saying something like you can't do this. He was capable of talking and I felt sick at what I had done. I felt like the trooper would be all right if Jimmy hadn't shot him with his gun.

When I shot him I ran toward the front of the truck and Jimmy got out. I saw Jimmy kinda squat down and shoot him. We got into the truck and I told Jimmy he should not have done that. He said that he was calling for help and I told him that didn't matter he shouldn't have done it. Right when the trooper was stopping us Jimmy said, "I don't want to shoot him." And I said, "I don't either." I don't know why Jimmy told me to shoot him or why I did.

The Trooper had told Jimmy that he would have to go with him to Hot Springs, but he told me I did not have to. After we shot him we rode around some and Jimmy said he had shot the trooper in the ear and kinda grinned about it. After a while he turned left off the road and got the truck stuck. We then got out and started to run. I had the automatic and Jimmy had the Trooper's gun. As we started to cross the road a woman almost hit Jimmy and he dropped the gun. He picked it up and we ran.

On Monday night we came up on a house and Jimmy said he had to get some food so he went into a window of a house. He said he broke some stick and lifted a window. I was still hiding in a tobacco barn when he did that. About two or three hours later Jimmy brought me some eggs and coffee. He then told me to come with him and we fixed some more eggs. We also took two blankets and some canned food. We laid down on a hill and went to sleep and the next thing I knew Jimmy woke me up and said here comes the law, and we ran.

> Before we left the house, Jimmy loaded a rifle and I carried it out of the house. Later on while we were running I put the gun under a log and we kept running. We just kept running until they caught us.

At trial, the State relied in part on a premeditation and deliberation theory of first degree murder, and in part on a felony murder theory, with the offense of discharging a firearm into occupied property as the underlying felony. The court instructed the jury on both theories, and the jury found defendant guilty of first degree murder on the basis of both theories.

[1] Defendant first contends that his convictions for discharging a firearm into occupied property and for first degree murder based on the felony murder rule must be vacated because there is insufficient evidence that he discharged a firearm "into" Trooper Coggins' patrol car. Defendant argues that the evidence shows that the .25 caliber pistol was inside the patrol car when he fired, and that a firearm which is inside a vehicle when fired is not discharged *into* the vehicle. *See* N.C.G.S. § 14-34.1 (1986) ("[a]ny person who willfully or wantonly discharges . . . [a] firearm into any . . . vehicle . . . while it is occupied is guilty of a Class H felony.").

We recently resolved this issue against defendant's position. "[A] firearm can be discharged 'into' occupied property even if the firearm itself is inside the property, so long as the person discharging it is not inside the property." *State v. Mancuso*, 321 N.C. 464, 468, 364 S.E. 2d 359, 362 (1988). Here, the evidence shows that when defendant fired the shots from the pistol, he was standing outside the patrol car. Therefore, defendant discharged the gun "into" the car within the meaning and intent of "into" as used in N.C.G.S. § 14-34.1.

The trial court also properly refused to instruct the jury, as defendant requested, that "the felony of firing into [an] occupied automobile is not satisfied by a shot that's fired from within the automobile," because such an instruction would clearly be an incorrect statement of the law. *See id.; State v. Corn*, 307 N.C. 79, 86, 296 S.E. 2d 261, 266 (1982) (trial judge only required to give requested instruction "if it is a correct statement of the law and supported by the evidence").

[2] Defendant also contends that his conviction for first degree murder based on premeditation and deliberation must be vacated because there is insufficient evidence that he acted with premeditation and deliberation. To convict of first degree murder, the State must prove beyond a reasonable doubt that the defendant formed a specific intent to kill after premeditation and deliberation. *State v. Propst*, 274 N.C. 62, 70, 161 S.E. 2d 560, 566 (1968). Premeditation means that the defendant thought about killing the victim for some period of time, however short, before the killing. *State v. Fields*, 315 N.C. 191, 200, 337 S.E. 2d 518, 524 (1985). Deliberation means the execution of an intent to kill in a cool state of blood without legal provocation and in furtherance of a fixed design; it does not require reflection for any appreciable length of time. *State v. Britt*, 285 N.C. 256, 262, 204 S.E. 2d 817, 822 (1974). Among the circumstances to be considered to determine whether a defendant acted after premeditation and deliberation are the want of provocation by the victim, the defendant's conduct before and after the killing, and the nature and number of wounds. *State v. Myers*, 309 N.C. 78, 84, 305 S.E. 2d 506, 510 (1983).

Here, the evidence shows that when Trooper Coggins stopped the truck, Rios threw the .25 caliber pistol to defendant. Before defendant got out of the truck to go over to the patrol car, he put the pistol in his jacket pocket. When defendant was standing outside the passenger window of the patrol car, he heard "armed and dangerous," then "armed," over Coggins' radio. Defendant claims that after Rios yelled for him to shoot Coggins, he reached into his pocket, pulled out the pistol, and shot through the window of the patrol car into Coggins' head. This evidence is clearly sufficient to show that defendant acted with premeditation and deliberation when he shot Coggins.

[3] Defendant next contends that his conviction for the armed robbery of Coggins' revolver should be vacated because there is insufficient evidence that he acted in concert with Rios in the armed robbery. The State relied on the acting in concert theory to establish defendant's guilt because there was no evidence that defendant himself actually committed the taking and carrying away element of the offense. The trial court instructed the jury that in determining whether defendant committed the crime of armed robbery, it could consider whether defendant was acting in

concert with Rios. This Court has held that to be convicted under an acting in concert theory, a defendant must have been at the scene of the crime and the evidence must be "sufficient to show he [was] acting together with another who [did] the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Joyner*, 297 N.C. 349, 357, 255 S.E. 2d 390, 395 (1979).

Defendant's argument that he could not have been acting in concert to commit armed robbery because he personally did not have any intention of stealing Coggins' revolver, and because he had gone back to the truck by the time Rios took the gun, is without merit. The evidence shows the following:

After escaping from the Arkansas jail, defendant and Rios broke into Harriman's trailer and stole a .22 caliber rifle. On the morning of 14 September 1985, they were carrying a .25 caliber pistol. After shooting Trooper Coggins, Rios took Coggins' .357 Magnum revolver, and he and defendant fled the scene. Two days later, they broke into Gillespie's house and stole her .25-20 rifle. This is sufficient evidence to allow a jury to find that Rios and defendant were acting together pursuant to a common plan to obtain weapons and to do whatever else was necessary to avoid capture by the authorities, and that their armed robbery from, and murder of, Trooper Coggins was part of this plan.

Evidence that defendant ran back to the truck after shooting Coggins and before Rios took Coggins' revolver does not establish that defendant and Rios were not acting in concert. In *State v. Handsome*, 300 N.C. 313, 266 S.E. 2d 670 (1980), we upheld a conviction for armed robbery on an acting in concert theory where the victim was shot, then robbed. There, the defendant contended that the evidence was insufficient to convict him of armed robbery. He argued that although he may have participated in the assault on the victim, there was no evidence that he intended to steal the property or had possession of the property. We held that the evidence was sufficient because "[t]he elements of violence and taking were so joined in time and circumstances in one continuous transaction amounting to armed robbery as to be inseparable." *Id.* at 318, 266 S.E. 2d at 674. Here, the use of arms against Coggins and the actual taking away of his revolver were equally part of the same "continuous transaction amounting to armed robbery."

[4] Defendant assigns error to the trial court's denial of his motion to dismiss the burglary charge at the close of all the evidence, contending that there was insufficient evidence that he committed a breaking. When ruling on a defendant's motion to dismiss, the question for the court is whether there is substantial evidence of each element of the charged offense and that defendant was the perpetrator. *State v. Alston*, 310 N.C. 399, 404, 312 S.E. 2d 470, 473 (1984). The evidence must be considered in the light most favorable to the State. *Id.*

Second degree burglary is the breaking and entering during the nighttime of an unoccupied dwelling with the intent to commit a felony therein. N.C.G.S. § 14-51 (1986); *State v. Wilson*, 289 N.C. 531, 538, 223 S.E. 2d 311, 315 (1976). A "breaking" is "any act of force, however slight, 'employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed.' " *State v. Noland*, 312 N.C. 1, 13, 320 S.E. 2d 642, 650 (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) (quoting *State v. Jolly*, 297 N.C. 121, 127-28, 254 S.E. 2d 1, 5-6 (1979)). A breaking may be actual or constructive. *State v. Wilson*, 289 N.C. at 539, 223 S.E. 2d at 316. A defendant has made a constructive breaking when another person who is under the defendant's direction or who is acting in concert with the defendant actually makes the opening. *State v. Smith*, 311 N.C. 145, 149-50, 316 S.E. 2d 75, 78 (1984).

There is substantial evidence that Rios broke into the Gillespie house. He gained entrance by breaking a stick which held a window down, raising the window, and tearing a hole in the plastic covering inside the window. There is also substantial evidence that Rios and defendant were acting in concert to evade the authorities. While Rios broke into the house, defendant hid in a tobacco barn. Later, defendant went into the house with Rios and they stole some food, blankets and a gun. This evidence clearly permitted a finding that defendant and Rios were acting in concert to further their joint effort to evade the authorities when Rios committed the breaking on the Gillespie house. Therefore, under a constructive breaking theory, there is substantial evidence that defendant broke into the Gillespie house, sufficient to withstand defendant's motion to dismiss.*

* Defendant attempts to argue under this assignment of error certain errors in the trial court's charge to the jury. However, the assignment relates only to the

[5] Defendant contends that he is entitled to a new trial because the court admitted irrelevant, prejudicial evidence concerning Trooper Coggins' parents and fiancee. First, the court allowed Coggins' parents and fiancee to raise their hands to identify themselves in the courtroom. Second, the court allowed the District Attorney to call Coggins' mother as a witness and to ask her questions such as when she last saw her son alive, where her son was buried, and whether her son was engaged to Joe Justice's daughter. Defendant claims that this evidence is inadmissible under the Rules of Evidence because it is irrelevant and was offered only to create sympathy for Coggins and to inflame the jury. Assuming, *arguendo*, that the court erred in admitting this evidence, we hold that the error was harmless in light of defendant's admission that he shot Coggins under the circumstances related in his statement. N.C.G.S. § 15A-1443(a) (1983).

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trial court's refusal to dismiss the charge of second degree burglary. Rule 28(b)(5) of the Rules of Appellate Procedure states in part:

> (b) Content of Appellant's Brief. An appellant's brief in any appeal shall contain . . .:
>
> > (5) An argument to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error and exceptions by the pages at which they appear in the printed record on appeal, or the transcript of proceedings if one is filed pursuant to Rule 9(c)(2). Exceptions not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

N.C.R. App. P. 28(b)(5). Because defendant has not assigned error to or set forth in his brief any question concerning the court's charge to the jury on the burglary offense, and because defendant cannot argue errors in the charge under an assignment of error solely as to a motion to dismiss, the sole question before this Court is whether the trial court improperly denied defendant's motion to dismiss.

Further, defendant did not object at trial to the instructions on this offense, and did not request additional instructions thereon. We thus could find reversible error in the instructions only if "absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E. 2d 80, 83-84 (1986); *see also State v. Odom*, 307 N.C. 655, 661, 300 S.E. 2d 375, 378-79 (1983). In light of the substantial evidence that defendant and Rios in fact acted in concert in the commission of the burglary, and of the trial court's clear and repeated instructions on acting in concert with reference to the other offenses, we do not believe that absent any error in the instructions on the burglary offense, the jury probably would have reached a different result.

[6] Finally, defendant contends that he is entitled to a new trial because the trial court admitted inadmissible and prejudicial "other crimes" evidence. First, the court allowed Chris Vigil, the jailer from Ozark, Arkansas, to testify that defendant escaped from jail and to describe how defendant assaulted him with a pipe. Second, the court allowed William Harriman to testify that his truck and a .22 rifle were stolen on 28 or 29 August 1985. Defendant argues that this "other crimes" evidence is inadmissible under N.C.G.S. § 8C-1, Rule 404(b) as tending to show that defendant had a propensity to commit assaults and robberies.

While Rule 404(b) prohibits "[e]vidence of other crimes, wrongs or acts . . . to prove the character of a person in order to show that he acted in conformity therewith," it allows the admission of such evidence "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident." N.C.G.S. § 8C-1, Rule 404(b) (1986). The testimony of Vigil and Harriman was admissible to show intent and motive. Their testimony shows that defendant and Rios intended to escape from jail, then do whatever was necessary to avoid capture, and therefore that they had a motive for killing Trooper Coggins. The chain of events from the time of their escape demonstrates their attempt to avoid apprehension: they assaulted the jailer with a pipe to escape from jail; they broke into an Arkansas home and stole a rifle and a truck; they drove to North Carolina; they stole a South Carolina license plate for the truck; they borrowed a pistol; they shot a state trooper, stole his revolver, then fled the scene; they broke into another home, where they stole another gun. We therefore hold that Vigil's and Harriman's testimony was admissible under Rule 404(b). Moreover, because we find that the probative value of this testimony outweighs any possible unfair prejudice to defendant, we hold that the court properly admitted it into evidence. N.C.G.S. § 8C-1, Rule 403 (1986).

For the reasons above, we find that the defendant received a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. BILLY RAY JAMES

No. 93A87

(Filed 9 March 1988)

1. **Homicide § 12— indictment—defendant's county of residence not alleged—no error**

A murder indictment which omitted the county of defendant's residence was not fatally defective because defendant's county of residence need not be proven at trial and N.C.G.S. § 15-144 states that it is not necessary to allege matter not required to be proved at trial in indictments for murder and manslaughter.

2. **Homicide § 12— murder—indictment—with force and arms omitted—not defective**

A murder indictment which omitted the averment "with force and arms" was not fatally defective because N.C.G.S. § 15-144 does not prevail over the language of N.C.G.S. § 15-155.

3. **Indictment and Warrant § 7— assault and robbery—indictments—insufficient evidence—no grounds for quashing indictments**

The trial court did not err by refusing to quash indictments for assault with a deadly weapon with intent to kill inflicting serious injury and robbery with a firearm on the basis of insufficient evidence to support the charges. Insufficiency of the State's evidence at trial is not a proper ground for quashing an indictment.

4. **Criminal Law § 43.2— sketch of crime scene—not prepared by witness—admissible**

The trial court in a prosecution for first degree murder, assault, and robbery did not err by admitting for illustrative purposes a sketch of the crime area prepared by someone other than the testifying witness. As long as the witness is able to testify that an exhibit used for illustrative purposes is a fair and accurate representation of the scene it portrays, it is irrelevant that the witness did not prepare the exhibit; even assuming that the sketch was not properly authenticated and contained information beyond the witness's testimony, the State presented overwhelming evidence of defendant's guilt and defendant failed to show that there was a reasonable possibility that a different result would have been reached at trial had the error not been committed.

5. **Criminal Law § 43— photograph of victims—admissible for illustrative purposes**

The trial court did not err in a prosecution for murder, robbery, and assault by admitting for illustrative purposes a photograph of the victims taken more than one year before the crimes were committed where the surviving victim testified that the photograph of himself and the deceased represented the way they looked a year before the crimes; the victim used the photograph to illustrate his testimony concerning his health prior to being shot, where he kept a tobacco tin like the one stolen from him, where the

deceased kept money in his bib overalls, and where the deceased kept his wallet; and the witness testified that the deceased was dressed in bib overalls on the day of his murder which looked exactly like the ones in the photograph.

6. Constitutional Law § 30; Criminal Law § 43— discovery—photographs of victim—not furnished—admissible

The trial court did not err in a prosecution for murder, robbery, and assault by receiving into evidence photographs of one victim which had not been furnished to defendant upon his motion for discovery. The State advised defendant ten months before trial that photographs of the crime scene were available at the Sheriff's Department, the only photographs not available at the Sheriff's Department were photographs taken during the autopsy of the deceased victim, and the State informed defendant that the pathologist had those photographs and would be bringing them to court. The State made the photographs available to defendant and fulfilled its obligation under N.C.G.S. § 15A-903(d).

7. Criminal Law § 75.10— confession—voluntary

The trial court did not err in a prosecution for murder, robbery, and assault by denying defendant's motion to suppress his inculpatory statement where defendant contended he was faced with a situation in which he could not have given a voluntary confession and the court found that defendant was advised of his constitutional rights prior to questioning; that defendant signed a waiver of his rights; that he was asked if he wanted anything or anyone in the interrogation room; that defendant never asked to have anyone present; that defendant was eighteen years old and had quit school in the ninth grade; and that defendant could read and that no promises or threats were made to him. N.C.G.S. § 15A-977(f).

8. Robbery § 4.3— armed robbery—evidence sufficient

The evidence of robbery by the use of a dangerous weapon was sufficient to withstand defendant's motions to dismiss all charges and set aside the verdict where the evidence, when considered in the light most favorable to the State, tended to show that defendant shot Buster Powell and robbed him while he lay mortally wounded on the floor.

9. Assault and Battery § 14.4— assault—evidence sufficient

The evidence of assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death was sufficient to deny defendant's motions to dismiss all charges and set aside the verdict where defendant admitted that he carried a .22 caliber rifle into the building where the victims were working, that he fired the rifle at one victim, and that his accomplice was carrying a pistol in his pocket which he used to shoot the other victim; a medical doctor testified that victim Lowe suffered nine gunshot wounds and a firearms examiner testified that at least one bullet removed from Lowe was fired from the same semi-automatic rifle used to shoot the other victim; defendant admitted planning to shoot Powell because he did not want to be identified; other evidence of intent to kill included the viciousness of the assault and the deadly character of the weapon used; and there was evidence of

serious injury in that the victim Lowe was hospitalized as a result of the injuries received during the assault. N.C.G.S. § 14-32(a).

10. Homicide § 21.5— murder—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss the charge of first degree murder where defendant readily admitted that he planned the robbery and murder of Buster Powell, that he borrowed a .22 caliber rifle which he carried with him to Powell's house on the day of the shooting, that he shot and killed Powell to ensure that he would not be identified, that he reached into Powell's pocket and stole his money after he shot Powell, and an eyewitness tended to corroborate the confession. N.C.G.S. § 14-17.

APPEAL of right by the defendant from judgment imposing a life sentence for murder in the first degree entered by *Barefoot, J.*, at the 27 October 1986 Criminal Session of Superior Court, HALIFAX County. On 1 June 1987, the Supreme Court allowed the defendant's motion to bypass the Court of Appeals on his appeals of convictions for robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious bodily injury. Heard in the Supreme Court on 10 December 1987.

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

William F. Dickens, Jr., for the defendant-appellant.

MITCHELL, Justice.

The defendant, Billy Ray James, was tried upon separate bills of indictment charging him with murder, assault with a deadly weapon with intent to kill inflicting serious injury and armed robbery. The jury returned verdicts finding the defendant guilty of first-degree murder on the theories of premeditation and deliberation and felony murder, robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury. After a sentencing hearing, the jury recommended a sentence of life imprisonment for first-degree murder. The trial court entered judgments on 6 November 1986 sentencing the defendant to consecutive terms of life imprisonment for first-degree murder, twenty-five years for robbery with a firearm and ten years for assault with a deadly weapon with intent to kill inflicting serious injury.

The evidence presented by the State tended to show that the defendant and Bernard Taylor rode bicycles to William Buster Powell's house on 22 November 1985. The State's eyewitness, Robert Lowe, positively identified the defendant and testified that the defendant and Taylor first came to Powell's house around noon on the day in question. The two men left and returned about fifteen or twenty minutes later to ask Powell if he had seen the defendant's brother. They left again but returned a short time later. At that time they shot and killed Powell and severely wounded Lowe.

Lowe testified that after he had been shot, he felt one of the men go through his pockets. Lowe remained silent for fear that they might kill him if they discovered he was alive. Lowe identified photographs of Powell taken before Powell's death and photographs of the crime scene taken after the shooting.

The day after the murder State's witness David L. Allsbrook, Jr. discovered two bicycles about fifteen to twenty feet from the roadside. Allsbrook notified local law enforcement officials. A search of the vicinity revealed, among other things, a yellow coin pouch, a .22 caliber rifle and a toboggan hat containing a pistol. During his testimony Allsbrook used a sketch of the area around the crime scene, prepared by another witness, to illustrate his testimony as to where the evidence was found.

Deputy Sheriff Ernie Newsome testified that he saw the defendant and Bernard Taylor on bicycles approximately two miles from the crime scene around lunch time on 22 November 1985.

Deputy Sheriff Joe Williams testified that when he arrived at the crime scene on 22 November 1985, Powell's body was lying face down. Williams examined the body and could detect no vital signs. Lowe, who had been shot, gave Williams a description of the assailants. Lowe said that one was light skinned and one was dark skinned. One of the assailants asked for his (the assailant's) brother, Sammy. Based on this information, Williams began a search of the area. The defendant and Bernard Taylor were apprehended as a result. Both men were advised of their rights when arrested.

Chief Investigator E. C. Warren testified at trial regarding his interrogation of the defendant. Warren and Investigator Cloyd again advised the defendant of his *Miranda* rights. The defendant waived the right to remain silent and confessed to the shooting of Buster Powell. The interrogation lasted between forty minutes to one hour. Warren testified that he did not make any promises or threats to the defendant.

Investigator Chuck Ward testified that he took photographs of the crime scene and gathered other physical evidence during his investigation. He described several photographs of the crime scene and used them to illustrate his testimony as to where he found bullet casings, coins and pieces of clothing. Ward testified that he found no money in Powell's pockets.

Dr. George Clark testified about the injuries Lowe received during the shooting incident. He stated that Lowe suffered nine bullet wounds, a broken arm, internal bleeding and a collapsed lung.

Dr. Lewis D. Levy, a pathologist, testified that seven bullets were recovered from Powell's body. He opined that Powell died from injuries inflicted by the gunshot wounds.

Robert Cerwin, a firearms examiner, testified regarding ballistics tests performed on bullets taken from Lowe and Powell. He identified certain bullets taken from Lowe and Powell as being fired from State's Exhibit #5, a .22 caliber Winchester semi-automatic rifle.

During the guilt-innocence phase, the defendant offered no evidence. The jury returned guilty verdicts on all charges.

[1] At the conclusion of the evidence, the defendant moved to quash the indictments against him. The defendant first assigns as error the trial court's refusal to quash the murder indictment against him. He first argues that the murder indictment was fatally defective because it omitted the county of the defendant's residence.

"[A] bill of indictment may be quashed only for want of jurisdiction, irregularity in the selection of the grand jury, or for a fatal defect appearing on the face of the indictment." *State v. Allen*, 279 N.C. 492, 494, 183 S.E. 2d 659, 661 (1971). The general rule is

that an indictment for a statutory offense is facially sufficient if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words. *State v. Gregory*, 223 N.C. 415, 27 S.E. 2d 140 (1943). Further, the quashing of indictments is not favored. *State v. Flowers*, 109 N.C. 841, 13 S.E. 718 (1891).

In the present case, the omission of the county of the defendant's residence from the murder indictment does not make the indictment fatally defective. N.C.G.S. § 15-144 specifically states that "[i]n indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; . . . ." Since the county of the defendant's residence need not be proved, the omission of this fact does not make the indictment fatally defective. N.C.G.S. § 15-144 (1983); *see also State v. Carswell*, 40 N.C. App. 752, 253 S.E. 2d 635 (county of residence need not be alleged in indictment), *cert. denied*, 297 N.C. 613, 257 S.E. 2d 220 (1979).

[2] The defendant next argues that the indictment does not properly charge him with murder because the essential averment "with force and arms" does not appear on its face. He contends that such an averment is required by N.C.G.S. § 15-144 in bills of indictment for homicide. In *State v. Corbett*, 307 N.C. 169, 175, 297 S.E. 2d 553, 558 (1982), this Court considered and rejected a similar argument with regard to an indictment for rape. We stated that: "[w]e do not read the statute [G.S. § 15-144.1, essentials for bill of rape] as either *requiring* the averment [with force and arms] or as expressing a legislative intent that the language in G.S. § 15-144.1(a) prevail over the express language in G.S. § 15-155 which states in effect that no judgment shall be stayed or reversed because of the omission of the words 'with force and arms' from the indictment." *Corbett*, 307 N.C. at 175, 297 S.E. 2d at 558.

The language of N.C.G.S. § 15-144.1(a) construed in *Corbett* is identical to the portion of N.C.G.S. § 15-144 cited in support of the defendant's argument. For the same reasons stated in *Corbett*, we conclude that N.C.G.S. § 15-144 does not prevail over the language of N.C.G.S. § 15-155. The omission of the phrase "with force and arms" does not, therefore, render the defendant's indict-

ment for murder fatally defective. This assignment of error is overruled.

[3] The defendant next assigns as error the trial court's refusal to quash the indictments for assault with a deadly weapon with intent to kill inflicting serious injury and robbery with a firearm. The defendant made his motions in this regard at the close of the evidence, alleging insufficiency of the evidence to support the charges.

The challenged indictments are proper in form and nothing appears upon the face of either indictment indicating that it will not support a judgment. Insufficiency of the State's evidence at trial, even if established, is not a proper ground for quashing an indictment. *See State v. Allen*, 279 N.C. at 494, 183 S.E. 2d at 661. This assignment of error is overruled.

[4] The defendant by his next assignment of error contends that the trial court erred in admitting, for illustrative purposes, a sketch of the crime area prepared by someone other than the witness whose testimony is illustrated. During the State's case-in-chief David L. Allsbrook, Jr. used a sketch of the area surrounding the crime scene to illustrate his testimony. The sketch had been prepared by another State's witness. The defendant objected to the use of the exhibit because the testifying witness had not prepared it, because the sketch was never identified as being a true and accurate representation of the area and because the sketch contained other information which was beyond the witness' testimony.

A contention that an exhibit was inadmissible because it was not prepared by the testifying witness has been previously considered and rejected by this Court with regard to photographic evidence. In *State v. Rogers*, 316 N.C. 203, 223, 341 S.E. 2d 713, 725 (1986), this Court held that photographs were admissible for illustrative purposes even though they were authenticated by someone other than the photographer. *Id.; see also State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971) (authenticated photographs were properly introduced to illustrate the testimony of "various witnesses"). The touchstone for admissibility of all exhibits is proper authentication. *State v. Rogers*, 316 N.C. at 223, 341 S.E. 2d at 725. As long as the witness is able to testify that an exhibit used for illustrative purposes is a fair and accurate

representation of the scene it portrays, it is irrelevant that the witness did not prepare the exhibit. The defendant's argument that the sketch was not properly admitted because the testifying witness did not prepare it must fail.

The defendant next contends that the trial court erred in admitting the sketch because it was not properly authenticated and contained information beyond the witness' testimony. Even if a defendant can demonstrate that the trial court erred in such a ruling, relief will not be granted absent a showing of prejudice. N.C.G.S. § 15A-1443(a) (1983). Assuming, *arguendo*, that the introduction of the sketch was erroneous, we conclude that the defendant has failed to show that, had the error not been committed, there was a reasonable possibility that a different result would have been reached at trial. *Id.*

At trial the State presented overwhelming evidence of the defendant's guilt. The State's eyewitness, Robert Lowe, testified that the defendant and an accomplice came to the victim's house three times on the day of the murder. On the third occasion, the defendant came in with a rifle in his hand and began shooting Buster Powell. His accomplice began shooting Lowe. After Lowe fell wounded on the floor, one of the men went through his pockets.

Other evidence tended to show that one bullet which hit Lowe came from the rifle used by the defendant. The State also introduced the defendant's confession in which he acknowledged plotting the murder and robbery of Buster Powell. The defendant confessed to shooting Powell "five times with my .22 rifle," then shooting him two or three more times as he was kneeling. After Powell was lying on the floor, the defendant took his money. In light of the overwhelming evidence of the defendant's guilt, we conclude the defendant has failed to carry his burden under N.C.G.S. § 15A-1443(a) of showing a reasonable possibility that a different result would have been reached at trial had the error assigned not been committed. *See, e.g., State v. Morgan*, 315 N.C. 626, 640, 340 S.E. 2d 84, 93 (1986). The defendant's assignment of error is overruled.

[5] In the defendant's next assignment of error, he contends that the trial court erred in admitting, over his objection, a photograph of the victims taken more than one year before the crimes

were committed. Generally, photographs may be admitted for illustrative purposes as long as they portray a scene with sufficient accuracy, even though they were not made simultaneously with the event to which the testimony relates. 1 Brandis on North Carolina Evidence § 34 (2d ed. 1982); *see, e.g., State v. Taylor*, 280 N.C. 281, 185 S.E. 2d 698 (1972). The trial court has discretion to exclude an exhibit if evidence as to its accuracy is conflicting or if significant changes occurred between the time of the event and the time the exhibit was prepared. *See, e.g., Fleming v. Atlantic Coast R.R.*, 236 N.C. 568, 73 S.E. 2d 544 (1952).

At trial, Robert Lowe testified that a photograph taken of him with Buster Powell represented the way they looked a year before the crimes. Lowe used the photograph to illustrate his testimony concerning his health prior to being shot, where he kept a tobacco tin like the one stolen from him, where Powell kept money in his bib overalls and where Powell kept his wallet. Lowe testified that Powell was dressed in bib overalls on the day of his murder which looked "exactly like the same ones" in the photograph. We conclude that the photograph was properly authenticated as accurately illustrating portions of Lowe's testimony, and that it was within the trial court's discretion to admit the photograph for illustrative purposes.

[6] In the defendant's next assignment of error, he contends that the trial court erred in receiving into evidence photographs which had not been furnished the defendant upon his motion for discovery. These photographs were of Powell after he had been shot. The defendant contends that the trial court committed prejudicial error by admitting them into evidence. We disagree.

N.C.G.S. § 15A-903(d), which controls the disclosure of documents and tangible objects in criminal cases, provides:

> Upon motion of the defendant, the court must order the prosecutor to permit the defendant to *inspect and copy* . . . photographs . . . which are within the possession, custody, or control of the State and which are material to the preparation of his defense, are intended for use by the State as evidence at the trial or were obtained from or belong to the defendant.

N.C.G.S. § 15A-903(d) (1983) (emphasis added). The statute does not require the State to furnish the defendant copies of photographs.

In the present case, the record shows that the State advised the defendant ten months before trial that photographs of the crime scene were available for inspection at the Halifax County Sheriff's Department, Detective Division. The only photographs that were not at the sheriff's department prior to the week of trial were the photographs taken during the autopsy performed on Powell's body. The State informed the defendant that the pathologist had those photographs and would be bringing them to court with him. We conclude that the State made the photographs available to the defendant and, in so doing, fulfilled its obligation under N.C.G.S. § 15A-903(d). This assignment of error is overruled.

[7] The defendant next assigns as error the trial court's denial of his motion to suppress the inculpatory statement he made to law enforcement officers after his arrest. Prior to trial the defendant filed a written motion to suppress in which he contended that his inculpatory statement was not voluntarily and understandingly made. In support of this assignment, the defendant argues that he was eighteen years old at the time of the statement, his only formal education consisted of completing the ninth grade, he was laboring under severe emotional strain because of the recent death of his parents, and he was questioned without the benefit of having a friend or family member present. The defendant contends he was faced with a situation in which he could not have given a voluntary confession.

N.C.G.S. § 15A-977(f) requires that the trial court make findings of fact and conclusions of law when ruling upon a motion to suppress. Such findings and conclusions must be determinative on the issue of voluntariness. *State v. Barfield*, 298 N.C. 306, 339, 259 S.E. 2d 510, 535 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137 (1984). The trial court must determine whether the State has borne its burden of showing by a preponderance of the evidence that the defendant's confession was voluntary. The preponderance of the evidence test is not, however, to be applied by appellate courts in reviewing the findings of the trial court. *Id.* The find-

ings by the trial court are conclusive and binding upon appellate courts if supported by substantial competent evidence. *Id.*

In the present case, the trial court conducted a pre-trial *voir dire* hearing and made findings of fact and conclusions of law. The trial court found as facts that the defendant was advised of his constitutional rights prior to questioning, that the defendant signed a waiver of his rights, that he was asked if he wanted anything or anyone in the interrogation room, that the defendant never asked to have anyone present, that the defendant was eighteen years old, that he quit school in the ninth grade, that he could read and that no promises or threats were made to him. The record on appeal does not include the evidence presented during the *voir dire* hearing. Where the record is silent upon a particular point, the action of the trial court will be presumed correct. *London v. London*, 271 N.C. 568, 571, 157 S.E. 2d 90, 92 (1967); *State v. Dew*, 240 N.C. 595, 83 S.E. 2d 482 (1954). Therefore, we must assume that the trial court's findings of fact were supported by substantial competent evidence.

Based on its findings the trial court concluded, *inter alia*, that the defendant was fully advised of his constitutional rights, the defendant fully understood his rights before he made his confession, and that his confession was made freely, voluntarily and understandingly. The trial court's findings of fact support the conclusion that the defendant's confession was voluntary. This assignment of error is overruled.

By his next two assignments of error the defendant contends that the evidence was insufficient to withstand his motions to dismiss all charges and his motion to set aside the verdicts. In a criminal case the test of the sufficiency of the evidence is whether there is substantial evidence of each essential element of the crime charged and that the defendant was the perpetrator. *E.g., State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). In ruling upon a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *Id.*

[8] The defendant was charged with and convicted of the robbery of Powell by use of a dangerous weapon. The essential elements of robbery with a dangerous weapon are (1) the unlawful taking or attempted taking of personal property from a person or

in his presence (2) by use or threatened use of any firearms or other dangerous weapon, implement or means (3) whereby the life of a person is endangered or threatened. N.C.G.S. § 14-87 (1986); *State v. Allen*, 317 N.C. 119, 343 S.E. 2d 893 (1986); *State v. Beaty*, 306 N.C. 491, 293 S.E. 2d 760 (1982); *State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978).

In the present case the evidence, when considered in the light most favorable to the State, tended to show that the defendant shot Buster Powell and robbed him while he lay mortally wounded on the floor. One source of such evidence is the defendant's statement in which he admitted shooting Powell with a .22 caliber rifle and reaching into Powell's pocket and taking his money. The defendant's confession, without more, was substantial evidence of each of the essential elements to support his conviction for robbery of Powell with a dangerous weapon. The defendant's assignment of error as to robbery with a dangerous weapon is without merit and is overruled.

[9] The defendant also was charged with and convicted of an assault upon Lowe with a deadly weapon with intent to kill inflicting serious injury not resulting in death. In order to prove this crime under N.C.G.S. § 14-32(a), four essential elements must be shown: (1) assault; (2) with a deadly weapon; (3) with intent to kill; and (4) serious injury not resulting in death. The defendant contends that the State failed to present substantial evidence tending to show that he "assaulted [Lowe] with a deadly weapon inflicting serious injury with intent to kill." We do not agree.

In his confession which was introduced at trial, the defendant admitted that he carried a .22 caliber rifle into the building where Powell and Lowe were working, and that he fired the rifle at Buster Powell. The defendant stated that his accomplice was carrying a pistol in his pocket which he used to shoot Lowe. Dr. George Clark testified that Lowe suffered nine gunshot wounds. Robert Cerwin, a firearms examiner with the State Bureau of Investigation, testified that at least one bullet removed from Lowe was fired from the same .22 caliber Winchester semi-automatic rifle used to shoot Buster Powell. Taking this evidence in the light most favorable to the State, it is reasonable to infer that one of the shots that wounded Robert Lowe was fired by the defendant.

The defendant's intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances. *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972). There is ample evidence in the record from which a jury could reasonably infer that the defendant intended to kill Robert Lowe. Such evidence includes the defendant's inculpatory statement in which he admitted planning to shoot Powell because he did not want to be identified. Taken in the light most favorable to the State, the evidence supported a reasonable inference of the defendant's intent to kill anyone who could identify him. Other evidence tending to show such intent included the viciousness of the assault and the deadly character of the weapon used. The State's evidence was substantial evidence tending to show the defendant's intent to kill.

The term "serious injury" as employed in N.C.G.S. § 14-32(a) means physical or bodily injury resulting from an assault with a deadly weapon. Whether a serious injury has been inflicted must be determined according to the facts of the particular case. *State v. Jones*, 258 N.C. 89, 128 S.E. 2d 1 (1962). In the present case, the evidence tended to show that Lowe was shot at least one time by the defendant with a .22 caliber rifle. Lowe was hospitalized as a result of injuries received during the assault. We conclude that this evidence was sufficient to go to the jury on the element of "serious injury."

The State's evidence was sufficient to support a reasonable jury in finding that the defendant committed each of the elements of assault with a deadly weapon with intent to kill inflicting serious bodily injury not resulting in death. This assignment of error is overruled.

[10] Finally, the defendant assigns as error the trial court's denial of his motion to dismiss the charge of first-degree murder of Powell. N.C.G.S. § 14-17 defines first-degree murder as:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with

the use of a deadly weapon shall be deemed to be murder in the first degree . . . .

N.C.G.S. § 14-17 (1986).

In the present case, the defendant was convicted of first-degree murder on the theories of premeditation and deliberation and felony-murder. We conclude that there was substantial evidence to support the defendant's conviction for first-degree murder under either theory. The defendant, by his own confession, readily admitted that he planned the robbery and murder of Buster Powell, that he borrowed a .22 caliber rifle which he carried with him to Powell's house on the day of the shooting and that he shot and killed Powell to ensure he would not be identified. After he shot Powell, the defendant reached into Powell's pocket and stole his money. The testimony of eyewitness Robert Lowe tended to corroborate the defendant's confession. The trial court properly denied the defendant's motions for dismissal.

Neither do we find any merit in the defendant's argument that the trial judge erred in denying his motion to set aside the verdicts. This motion was directed to the sound discretion of the trial court. *State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883 (1979), *cert. denied*, 446 U.S. 911, 64 L.Ed. 2d 264 (1980). For the reasons stated above, the defendant has failed to show abuse of discretion.

The defendant's trial was free from reversible error.

No error.

STATE OF NORTH CAROLINA v. SHELIA DIANE HOLDEN

No. 494A87

(Filed 9 March 1988)

1. Criminal Law § 138.27— murder—aggravating factor—position of trust or confidence—infant

The trial court did not err in sentencing defendant on a plea of guilty to second degree murder by finding as an aggravating factor that defendant took advantage of a position of trust or confidence where the victim was only three months old. This aggravating factor does not require evidence of a conscious

mental process on the part of an infant victim and may properly be grounded in the child's dependence on the defendant. N.C.G.S. § 15A-1340.4(a)(1)n (1983).

2. Criminal Law § 138.32— murder—mitigating factors—compulsion—not found

The trial court did not err in a prosecution for the second degree murder of an infant by her mother by failing to find the statutory mitigating factor that defendant committed the offense under duress, coercion, threat or compulsion insufficient to constitute a defense but significantly reducing her culpability where defendant presented only evidence of internal psychological forces which led her to take the life of her child. Although defendant's psychological condition was caused by external factors, it is clear that this mitigating factor was intended to apply to situations in which some type of external pressure is directly exerted upon defendant in an attempt to force commission of the offense; moreover, defendant's state of mind was properly considered by the judge when he found in mitigation that defendant was suffering from a mental condition. N.C.G.S. § 15A-1340.4(a)(2)b (1983).

3. Criminal Law § 138.35— murder—mitigating factor—immaturity or limited mental capacity—not found

The trial judge did not abuse his discretion when sentencing defendant for the second degree murder of her infant by failing to find the statutory mitigating factor that defendant's immaturity or limited mental capacity significantly reduced her culpability where defendant was seventeen years old at the time of the crime; had the emotional maturity of a twelve or thirteen year old; had diminished intellectual capacity; and had an IQ of 70. The State's summary of the evidence tended to show that defendant was aware of other options, such as leaving the baby with her cousin, but chose not to pursue them and began plotting murder; defendant had planned to put her baby in a trash can while her family slept on the night before the drowning; defendant briefly considered rescuing the baby during the drowning but rejected the notion and watched the child sink; and defendant had the presence of mind after the drowning to fabricate a story implicating someone else. N.C.G.S. § 15A-1340.4(a)(2)e (1983).

4. Criminal Law § 138.34— murder—mitigating factor—physical condition—not found—no error

The trial court did not err in sentencing defendant for the second degree murder of her own child by failing to find in mitigation that defendant suffered from a physical condition insufficient to constitute a defense but significantly reducing her culpability for the offense where defendant presented evidence of poor health and physical deterioration due to physical abuse, seizures, and inadequate recovery from childbirth, but the trial judge could properly have inferred from the State's evidence that defendant was aware of the nature of her conduct. N.C.G.S. § 15A-1340.4(a)(2)d.

5. Criminal Law § 138.42— second degree murder—nonstatutory mitigating factor—psychological condition—not found

The trial court did not err when sentencing defendant for the second degree murder of her infant by not finding as a non-statutory mitigating factor that defendant suffered from a psychological condition insufficient to con-

stitute a defense but significantly reducing her culpability where the trial judge found defendant's mental condition to be a statutory mitigating factor under N.C.G.S. § 15A-1340.4(a)(2)d. The term mental condition as used in that statute includes not only mental diseases and illnesses but also psychological disorders which are not necessarily categorized as diseases or illnesses, and the trial judge clearly considered the evidence relating to defendant's psychological paralysis in determining that she suffered from a mental condition at the time of the offense.

APPEAL by defendant pursuant to N.C.G.S. § 15A-1444(a1) and Rule 4(d) of the North Carolina Rules of Appellate Procedure from a judgment sentencing defendant to life imprisonment on her plea of guilty of murder in the second degree, said judgment imposed by *Hight, J.*, at the 21 May 1987 session of Superior Court, WAKE County. Heard in the Supreme Court 11 February 1988.

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

Gordon Widenhouse for defendant.

MARTIN, Justice.

Defendant entered a plea of guilty to the second-degree murder of her infant daughter. At the sentencing hearing the state summarized the evidence as follows:

On 6 August 1986, Deputy Kim Pierce of the Wake County Sheriff's Department responded to a call from a grocery store near Wake Forest. He met with defendant, aged seventeen, who reported that her three-month-old daughter, Dekavia, had been kidnapped. Defendant stated that she had been walking at a nearby pond with her two small children earlier that evening when she was approached by two men. These men snatched Dekavia from her arms and drove away in a large white automobile.

Defendant led Deputy Pierce down a dirt path to the pond. Pierce could find no tire tracks in the vicinity. As he beamed his flashlight across the water, Pierce spotted an object floating some twenty feet from the pond's edge. Moving closer, he discerned the feet and legs of a small person who was upside down in the water. Pierce waded into the pond and retrieved the body of Dekavia Holden.

Defendant gave a statement to Pierce describing the alleged assailants and their car. In subsequent interviews, investigating

officers noted some inconsistencies in defendant's account. Unable to confirm any of the details of the story, Detective Charles Young asked defendant to take a polygraph examination. On 8 September, during the pre-polygraph interview, defendant confessed that she had lied about the abduction and that she herself had cast the baby into the water.

Defendant explained that she threw Dekavia into the pond because the baby's father, David Johnson, and his family disliked Dekavia and acted as if she were "in the way." Defendant stated that

> something was just telling me that just throw her in the pond, maybe everything will be all right, maybe something will straighten up, maybe David will pay more attention to me then, you know, so I just chunked her in the pond, and I stood there, and then I started to, you know, jump in there and get her out, but I didn't, I said well, I'll just let her go, I said it will probably be for the best because didn't nobody act like they liked her, everybody ignored her.

Defendant indicated that she had first considered killing the baby on the night preceding the offense in question. On the day of the drowning she was washing dishes when she decided to go through with it; it was very hot in the house and Dekavia was crying a lot. When defendant realized what she had done she was afraid to tell anybody and quickly fabricated the kidnapping story.

The state's medical evidence indicated that the victim weighed eleven pounds and was a normally developed three-month-old infant. The cause of death was drowning. In the pathologist's opinion, the victim probably lived for several minutes after entering the water.

Defendant presented the following evidence concerning her troubled familial background through the expert testimony of Dr. Faye Sultan, clinical psychologist. Dr. Sultan testified that defendant's upbringing was marked by confused and distorted familial relationships. Defendant, who was conceived when her thirteen-year-old mother was raped by her stepfather, was constantly reminded of her incestuous origins and made to feel responsible for turmoil within the family. Defendant's mother often told defendant that she wished she had never been born, that she

wanted to kill her, and that she was in the way. Defendant's own complaints of sexual molestation by a family member were ignored.

Defendant began her relationship with David Johnson when she was thirteen. Johnson subjected her to constant physical and emotional abuse, beating her face and abdomen with his fists and threatening to molest the children. During both of defendant's pregnancies Johnson raped her repeatedly in an attempt to harm both her and the unborn child.

Defendant's mother and Johnson incessantly berated defendant for becoming pregnant a second time. They told her that no one wanted the baby yet refused to allow defendant to put Dekavia up for adoption. After Dekavia's birth, much verbal abuse within the family centered on defendant's parental inadequacies. She became convinced that she was not capable of caring for the children competently. During stressful periods, defendant would hear voices censuring her and talking about Dekavia. These auditory hallucinations were very active on the day of the drowning.

Defendant is mildly mentally retarded, with an IQ of 70. According to Dr. Sultan, defendant's limited intellectual capacity prevented her from overcoming her feelings of guilt about the circumstances of her own birth. Defendant came to believe that she was worthless and deserving of abuse. As a result, defendant felt vulnerable, helpless, and overwhelmed in her attempts to deal with the stresses of child-rearing and adult life. She became, in effect, psychologically paralyzed.

Based on this history and on psychological testing, Dr. Sultan concluded that defendant suffered from (1) abused spouse syndrome, (2) post-partum depression, (3) borderline intellectual functioning, and (4) mixed personality disorder with dependency and histrionic features. Dr. Sultan also noted that defendant had experienced seizures of undetermined origin and was in a deteriorated physical condition due to inadequate recovery from her Cesarean section. In Dr. Sultan's opinion, defendant was suffering from significant mental and physical impairment when she took the life of her child.

Because defendant's plea agreement did not include a sentence commitment, the trial judge was required to consider all aggravating and mitigating factors listed in N.C.G.S § 15A-1340.4(a). *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983). Accordingly, at the close of the evidence, the judge found as factors in aggravation that the victim was very young and that defendant had taken advantage of a position of trust and confidence to commit the offense. He found as factors in mitigation that defendant had no record of criminal convictions, that she was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced her culpability for the offense, and that she voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer at an early stage of the criminal process. After determining that the aggravating factors outweighed the mitigating factors, the trial judge sentenced defendant to a term of life imprisonment, to be served as a committed youthful offender. Defendant brings forth three assignments of error with respect to the sentencing.

[1] Defendant first contends that the trial judge erred in finding as an aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense. N.C.G.S. § 15A-1340.4(a)(1)(n) (1983). She argues that there was insufficient evidence to establish the factor in this case because the three-month-old victim was incapable of affirmatively reposing trust or confidence in defendant or anyone else.

We recently discussed the trust and confidence factor in the context of infanticide in *State v. Daniel*, 319 N.C. 308, 354 S.E. 2d 216 (1987). In that case we recognized that this aggravating factor does not require evidence of a conscious mental process on the part of an infant victim and may properly be grounded in the child's dependence upon the defendant:

> Such a finding depends instead upon the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other. A relationship of trust or confidence existed because defendant was the child's mother and because she was singularly responsible for its welfare. The abuse of her parental role relates to defendant's character and conduct and was reasonably related to the purposes of sentencing.

Id. at 311, 354 S.E. 2d at 218.

We find *Daniel* to be dispositive of this issue. Defendant's assignment of error is overruled.

Defendant next maintains that the trial judge erred in failing to find several of the statutory mitigating factors listed in N.C.G.S. § 15A-1340.4(a)(2). We examine each of her contentions separately, noting at the outset that defendant bears the burden of persuasion on mitigating factors. *State v. Taylor*, 309 N.C. 570, 308 S.E. 2d 302 (1983). The judge has a duty to find a statutory mitigating factor when the evidence in support of the factor is uncontradicted, substantial, and manifestly credible. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983).

[2] Defendant first argues that the trial judge erred in failing to find the statutory mitigating factor that defendant committed the offense under duress, coercion, threat, or compulsion which was insufficient to constitute a defense but significantly reduced her culpability. N.C.G.S. § 15A-1340.4(a)(2)(b) (1983). Specifically defendant argues that the emotional problems engendered by her deprived background and abusive environment created a "sense of compulsion" that drove her to commit the murderous deed.

Compulsion is defined as a "driving or urging by force or by physical or moral constraint" or the "forcible inducement to the commission of an act." Black's Law Dictionary 260 (5th ed. 1979). The statutory factor in question lists compulsion together with duress, coercion, and threat. Each of these terms implies some type of force. Thus, it is clear from the definition and the context that the mitigating factor is intended to apply to situations in which some type of *external* pressure is directly exerted upon the defendant in an attempt to force commission of the offense.

Here defendant presented only evidence of *internal*, psychological forces which led her to take the life of her child. (Although defendant's psychological condition was certainly caused by external factors, such as physical and emotional abuse, this abuse was not directed toward forcing defendant to commit the crime.) We believe that evidence of defendant's state of mind was properly considered by the judge when he found in mitigation that defendant was suffering from a mental condition. The judge did not ignore the evidence; instead he more appropriately labeled de-

fendant's action as one performed under the influence of mental suffering rather than one performed under compulsion. *See State v. Bolinger*, 320 N.C. 596, 359 S.E. 2d 459 (1987); *State v. Sullivan*, 86 N.C. App. 316, 357 S.E. 2d 414, *disc. rev. denied*, 321 N.C. 123, 361 S.E. 2d 602 (1987).

[3] Defendant next argues that the trial judge erred in failing to find the statutory mitigating factor that defendant's immaturity or limited mental capacity at the time of the commission of the offense significantly reduced her culpability for the offense. N.C.G.S. § 15A-1340.4(a)(2)(e) (1983). This factor includes two inquiries: one as to the immaturity or limited mental capacity and one as to the effect of such immaturity or limited mental capacity upon culpability. *State v. Moore*, 317 N.C. 275, 345 S.E. 2d 217 (1986).

There was uncontradicted evidence that defendant was seventeen years old at the time of the crime and had the emotional maturity of a twelve or thirteen year old. Likewise, there was uncontradicted evidence that defendant had diminished intellectual capacity and an IQ of 70. Defendant argues that this emotional immaturity and mild mental retardation lessened her culpability for the crime because it impaired her ability to interpret her situation at the time of the offense and to discern various other options available to her.

It is within the trial judge's discretion to assess the conditions and circumstances of the case in determining whether the defendant's immaturity or limited mental capacity significantly reduced culpability. *See State v. Smith*, 321 N.C. 290, 362 S.E. 2d 159 (1987); *State v. Moore*, 317 N.C. 275, 345 S.E. 2d 217.

The state's summary of the evidence tended to show that defendant was in fact aware of other options, such as leaving the baby with her cousin, but chose not to pursue them. Instead she began plotting the murder. On the night before the drowning, defendant had planned to put Dekavia in a trash can while her family slept. During the drowning, defendant briefly considered rescuing the baby but rejected this notion and watched the child sink. After the drowning, defendant had the presence of mind to fabricate a story implicating someone else. This evidence of planning, weighing of options, and covering her own tracks tended to negate defendant's claim that she was unable to appreciate her

situation or the nature of her conduct. We cannot say that the trial judge abused his discretion in failing to find that defendant's culpability was reduced by her immaturity or limited mental capacity in this case.

[4] Defendant next argues that the trial judge erred in failing to find that she suffered from a physical condition that was insufficient to constitute a defense but significantly reduced her culpability for the offense, pursuant to N.C.G.S. § 15A-1340.4(a)(2)(d). Defendant presented evidence of poor health and physical deterioration due to physical abuse, seizures, and inadequate recovery from childbirth. She argues that her physical condition impaired her ability to appreciate her own actions when she took the life of her child. As in the preceding issue, we note that the trial judge could properly have inferred from the state's evidence that defendant was aware of the nature of her conduct. The trial judge did not abuse his discretion in failing to find that defendant's physical condition significantly reduced her culpability for the offense.

[5] Finally, defendant contends that the trial judge erred in failing to find as a nonstatutory mitigating factor that defendant "suffered from a psychological condition insufficient to constitute a defense but significantly reducing her culpability." Consideration of nonstatutory factors is a matter within the sound discretion of the trial judge. Failure to find a nonstatutory mitigating factor, even when it is supported by uncontradicted, substantial, and manifestly credible evidence, will not be disturbed absent an abuse of that discretion. *State v. Spears*, 314 N.C. 319, 333 S.E. 2d 242 (1985).

As noted previously, the trial judge found defendant's mental condition to be a statutory mitigating factor under N.C.G.S. § 15A-1340.4(a)(2)(d). Because the thrust of the requested nonstatutory factor was essentially identical to that of the statutory factor found, we discern no abuse of the trial judge's discretion. The term "mental condition" as used in section 15A-1340.4(a)(2)(d) includes not only mental diseases and illnesses, such as schizophrenia, but also psychological disorders, such as abused spouse syndrome, which are not necessarily categorized as diseases or illnesses. In this case the trial judge clearly considered the evidence relating to defendant's psychological paralysis—including evi-

dence of abused spouse syndrome—in determining that she suffered from a mental condition at the time of the offense. In refusing to find the requested nonstatutory factor, the judge was simply avoiding duplication and acted well within the bounds of his discretion.

We conclude that defendant received a fair sentencing hearing, free of prejudicial error.

No error.

WILLIAM HOWARD WEST, JR., AND WIFE, CAROLYN SUE WEST v. KING'S DEPARTMENT STORE, INC.

No. 466A87

(Filed 9 March 1988)

1. **False Imprisonment § 2.1— restraint by department store manager—evidence sufficient**

A directed verdict for defendant on Mr. West's claim for false imprisonment was improper where the evidence supported the contention that Mr. West was intimidated into staying in the store for nearly an hour by the repeated threats of the manager to arrest him; that Mr. West could have reasonably concluded that such was within the manager's power because of the presence of a police officer during the encounter; and Mr. West made several offers of proof that his purchase was legitimate which were rebuffed by the store manager. Although Mr. West was allowed to walk outside to his jeep at one point during the confrontation, remained in the store for a short time after the confrontation, and realized upon reflection that he could not have been arrested at that time, the restraint requirement of this action requires no appreciable period of time, simply sufficient time for one to recognize his illegal restraint.

2. **False Imprisonment § 2.1— restraint by department store manager—evidence insufficient**

The trial court properly granted a directed verdict on Mrs. West's claim for false imprisonment where she was not accompanying her husband when he was confronted by the store manager and was not present when the manager, accompanied by a police officer, made several threats of prosecution and arrest.

3. **Libel and Slander § 16— slander—confrontation with department store manager—evidence insufficient**

In an action for slander arising from a confrontation with a department store manager in which plaintiffs were accused of stealing merchandise, plain-

tiffs' evidence was insufficient to show that anyone other than plaintiffs themselves heard the accusations made by defendant's store manager even though there was evidence that others gathered in front of the store during the course of the altercation. No evidence was presented that anyone actually heard the alleged slanderous remarks or that they were understood.

4. Trespass § 2— confrontation with department store manager—intentional infliction of emotional distress—evidence sufficient

The trial court improperly granted a directed verdict for defendant on an action for intentional infliction of emotional distress arising out of a confrontation with a store manager over allegedly stolen merchandise where the extreme and outrageous conduct of the store manager was manifest; Mr. West warned the manager that his wife was receiving out-patient care at a local hospital and could not withstand a confrontation such as this; notwithstanding that warning and Mr. West's offer of proof of purchase, the store manager confronted Mrs. West as soon as he saw her and made similar accusations against her; the store manager's remarks as plaintiffs left the store left plaintiffs under a continuing apprehension of prosecution for a year after the incident; both plaintiffs required medical treatment; and Mrs. West's previous condition was exacerbated.

APPEAL by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 86 N.C. App. 485, 358 S.E. 2d 386 (1987), affirming directed verdicts for defendant, entered by *Walker, J.*, on 17 September 1985, in Superior Court, FORSYTH County. Heard in the Supreme Court 8 February 1988.

Pfefferkorn, Pishko & Elliot, P.A., by Ellen R. Gelbin and William G. Pfefferkorn, for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, by Richard T. Rice and J. Daniel McNatt, for defendant-appellee.

FRYE, Justice.

Plaintiffs' evidence tends to show that on 7 November 1981, plaintiffs, William and Carolyn West, packed their three children and Mr. West's mother into their Ford Bronco and set out for the "Giant Liquidation Sale" held that day at King's Department Store. When they arrived, they found the store quite disorganized and the merchandise displaced and picked-over. Nonetheless, their search for bargains began.

Two dolly hand trucks caught the eye of Mr. West as he browsed through the store. Noticing that the hand trucks were

being "eyed" by another shopper, Mr. West decided to purchase them while they remained available. The trucks each apparently bore two or more price tags, all showing identical prices of $34.99 each. Mrs. West and her mother-in-law took money from Mr. West and purchased the dollies at the cashier's line. The cashier totalled the prices, added tax, and then discounted the sale by fifty percent. The cashier gave Mrs. West a receipt and Mrs. West left the store with her mother-in-law and locked the dollies in the Bronco. They both returned to the store and Mrs. West gave the receipt and change from the purchase to her husband.

The Wests soon realized that the store management was paging the owner of a Ford Bronco (jeep). Mr. West went to see if there was a problem. He left Mrs. West and his mother behind to watch the children and to continue their shopping. Upon reaching the front of the store, Mr. West saw a police officer and asked whether anyone had hit his jeep. There, the store manager accused him of stealing merchandise. The manager threatened him with arrest if he did not return the goods. Mr. West stated that he did not know to what the manager was referring. The manager repeated the accusation and threat of arrest and Mr. West, finally understanding that the goods in question were the dollies, showed the manager the receipt and change his wife received for the purchase of the goods.

The store manager disregarded the receipt as being "impossible" because the dollies were not for sale, but rather were for use by store employees for transporting merchandise within the store. Mr. West pleaded with the officer not to arrest him as he had indeed purchased the goods and was not a thief. The manager, however, continued his accusations of thievery while a number of customers formed small groups around the altercation that had now lasted some twenty minutes.

Attempting further to resolve this embarrassing matter, Mr. West explained that it had been his wife and mother who had purchased the dollies. The manager threatened to arrest them also. Mr. West asked the manager not to involve his wife because she was an outpatient at Forsyth Memorial Hospital and could not handle the aggravation and anxiety. Disregarding this warning, the manager, after spotting Mrs. West, confronted her and accused her of stealing the dollies. Mrs. West protested that she

had paid for them, received a receipt, and placed the goods in the jeep. The manager, however, continued his accusations.

Mrs. West located the cashier who had received payment for the dollies. The manager again ignored the proffer of the receipt and the verification by the cashier of the sale. At this time, the officer took the Wests out to their jeep to look at the dollies. By the time they had returned, the Wests had been detained for some seventy-five minutes. Mr. West then asked for the names of the police officer, the store manager, and the cashier. The manager refused to give the names, stating that if the Wests "got the names, then they would be arrested." Plaintiffs left the store without the requested names. Their last memory of this episode was the manager's reminder that they could be arrested for larceny anytime within the next year.

Plaintiffs sued for compensatory and punitive damages for false imprisonment, slander *per se*, and intentional infliction of emotional distress. At the close of plaintiffs' evidence, the trial court directed a verdict in favor of defendant on all three claims. The Court of Appeals affirmed the decision of the trial court finding that there was insufficient evidence upon which a reasonable jury could have returned a verdict in favor of the plaintiffs on any of the three causes of action. *West v. King's*, 86 N.C. App. 485, 358 S.E. 2d 386 (1987). Plaintiffs appealed to this Court on the basis of the dissenting opinion. N.C.G.S. § 7A-30(2) (1986).

In *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977), this Court held that a motion by a defendant for a directed verdict under N.C.G.S. § 1A-1, Rule 50(a), tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. Therefore, in determining the propriety of the trial judge's ruling on defendant's motion for a directed verdict, plaintiffs' evidence must be taken as true and all the evidence must be considered in the light most favorable to the plaintiffs, giving them the benefit of every reasonable inference. *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974). A directed verdict is improper unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish. *Id.*

With this standard as our guide, we shall determine whether the evidence introduced by plaintiffs, when viewed in a light most

favorable to them, is legally sufficient to withstand a motion for directed verdict. We shall address each claim in the order briefed by plaintiffs.

[1] Plaintiffs' first claim is that they were falsely imprisoned by defendant's agent. False imprisonment is the illegal restraint of a person. While actual force is not required, there must be an implied threat of force which compels a person to remain where he does not wish to remain or go where he does not wish to go. *Black v. Clark's Greensboro, Inc.*, 263 N.C. 226, 139 S.E. 2d 199 (1964). Indeed, we have specifically held that:

> [f]orce is essential only in the sense of imposing restraint . . . . If the words or conduct are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars.

Hales v. McCrory-McLellan Corp., 260 N.C. 568, 570, 133 S.E. 2d 225, 227 (1963).

The Court of Appeals found that neither Mr. West nor Mrs. West had been sufficiently restrained so as to support a claim of false imprisonment. We agree with the Court of Appeals' assessment as regarding Mrs. West, however, we find the record sufficiently supports Mr. West's claim of false imprisonment.

The evidence supports the contention, as observed by Judge Phillips in his dissent, that Mr. West was intimidated into staying in the store for nearly an hour, by the repeated threats to arrest him. Mr. West could have reasonably concluded that such was within the manager's power because of the presence of the officer during the encounter. Moreover, Mr. West made several offers of proof that his purchase of the dollies was in fact legitimate. Such offers, nonetheless, were rebuffed by the store manager.

Defendant argues that plaintiff husband is precluded from bringing this action because Mr. West was allowed to walk outside to his jeep at one point during the confrontation. Defendant further contends that because Mr. West remained in the store for a short time after the confrontation and because he realized, upon reflection, that he could not have been arrested at that time, his claim must fail. We disagree.

The restraint requirement of this action requires no appreciable period of time, simply sufficient time for one to recognize his illegal restraint. The tort is complete with even a brief restraint of the plaintiff's freedom. Prosser and Keaton, *Torts* § 11 (5th ed. 1984). Consequently, it is of little importance that Mr. West may have ventured out of the store at one time or even remained at the store after the altercation. What is important is that an illegal restraint occurred, however short, at some period during this confrontation. The period of the restraint will likely play upon the jury's award of damages but will not serve to defeat the action. *Id.*

When viewed in the light most favorable to plaintiff and giving to him all reasonable inferences, we find the facts surrounding Mr. West's detainment to be sufficient to take his case to the jury. A directed verdict on Mr. West's claim for false imprisonment was improper.

[2] The facts offered to support Mrs. West's claim for false imprisonment are not as persuasive. She was not accompanying her husband when he was confronted by the store manager. Nor was she present when the manager, accompanied by a police officer, made several threats of prosecution and arrest. It is the combination of such threats and the resulting apprehension that give rise to an action by the husband. Conversely, it is the lack of such facts that persuade us to agree with the courts below that plaintiff wife has not produced sufficient evidence to carry her claim to the jury.

[3] Plaintiffs, in their second assignment of error, contend that the Court of Appeals erred when it affirmed the granting of a directed verdict against them on their claim of slander *per se*. Because plaintiffs failed to prove publication, we affirm the decision of the Court of Appeals on this issue.

To establish a claim for slander *per se*, a plaintiff must prove: (1) defendant spoke base or defamatory words which tended to prejudice him in his reputation, office, trade, business or means of livelihood or hold him up to disgrace, ridicule or contempt; (2) the statement was false; and (3) the statement was published or communicated to and understood by a third person. *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979); *Morrow v. King's Depart-*

ment Stores, 57 N.C. App. 13, 290 S.E. 2d 732, *disc. rev. denied*, 306 N.C. 385, 294 S.E. 2d 210 (1982).

While there was sufficient evidence to meet the first two elements of the tort, the evidence was insufficient on the third element. Plaintiffs failed to produce any evidence that anyone, other than the plaintiffs themselves, heard the accusations made by defendant's manager. There is evidence that others gathered in the front of the store during the course of the altercation. However, no evidence was presented that anyone actually heard the alleged slanderous remarks or that they were understood. Though plaintiffs are to be given the benefit of all reasonable inferences which may be drawn from the evidence when determining the propriety of a motion for directed verdict granted against them, a mere possibility that someone might have heard the alleged conversation is not enough. *Tyer v. Leggett*, 246 N.C. 638, 99 S.E. 2d 779 (1957). For this reason, the directed verdicts were properly allowed on the claims for relief based on slander *per se*. Because we agree with the Court of Appeals that a directed verdict was properly granted on this issue, we need not address plaintiffs' claims for punitive damages.

[4] Plaintiffs further contend that the Court of Appeals erred in affirming the trial court's grant of defendant's motion for a directed verdict on plaintiffs' claim of intentional infliction of emotional distress. When considered in the light most favorable to plaintiffs, we find sufficient facts to support the claim of both Mr. and Mrs. West.

Defendant argues that plaintiffs failed to show sufficient evidence to prove that the store manager's conduct was "extreme and outrageous." Further, defendant contends that plaintiffs failed to show sufficient evidence that defendant intended to inflict such emotional distress. We find ample evidence to support the claim.

In *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979), this Court held that liability arises under the tort of intentional infliction of emotional distress when a defendant's conduct exceeds all bounds of decency tolerated by society and the conduct causes mental distress of a very serious kind. We reaffirmed the vitality of this tort in *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.

2d 325 (1981) and adopted the Restatement 2d of Torts § 46 definition as follows:

> [o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Id. at 447, 276 S.E. 2d at 332 (citing Restatement 2d of Torts § 46 (1965)).

The extreme and outrageous conduct of the store manager is manifest. Judge Phillips, in his dissent on the Court of Appeals, aptly wrote,

> [f]ew things are more outrageous and more calculated to inflict emotional distress on innocent store customers that have paid their good money for merchandise and have in hand a document to prove their purchase than for the seller or his agent, disdaining to even examine their receipt, to repeatedly tell them in a loud voice in the presence of others that they stole the merchandise and would be arrested if they did not return it.

West v. King's, 86 N.C. App. 485, 358 S.E. 2d 386 (Phillips, J., dissenting).

Furthermore, Mr. West warned the manager that his wife was receiving out-patient treatment at a local hospital and could not withstand a confrontation such as this. Notwithstanding this warning and Mr. West's offer of proof of purchase, the store manager confronted Mrs. West as soon as he saw her and made similar accusations against her. Though neither physical injury nor foreseeability of injury is required for intentional infliction of emotional distress, *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325, both of these factors go to the outrageousness of the store manager's conduct. Finally, the store manager's last remarks to the Wests as they left the store, a threat of prosecution in the future, left the Wests under a continuing apprehension of prosecution for a year after this incident. Both plaintiffs required medical treatment after the incident and Mrs. West's previous condition was exacerbated as a result of this sequence of events.

We find that these factors together constitute sufficient evidence upon which a reasonable jury could have returned a verdict in favor of the plaintiffs. His unrelenting attack, in the face of explanation, was both extreme and reckless under the circumstances. Since the intentional element of this tort may be accomplished through reckless behavior, we find this evidence sufficient to sustain a *prima facie* case of intentional infliction of emotional distress for both plaintiffs and the issue should have been sent to the jury. For that reason, we reverse the Court of Appeals on this point.

For the foregoing reasons, we reverse the decision of the Court of Appeals insofar as it affirms the trial court's directed verdict on the issues of Mr. West's false imprisonment claim and the claim of both plaintiffs for intentional infliction of emotional distress. We affirm the Court of Appeals on the claim of slander *per se* brought by both plaintiffs and on Mrs. West's claim for false imprisonment. This case is remanded to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

ABDULATI BOLKHIR, GAL, OF AHMED BOLKHIR, MINOR v. NORTH CAROLINA STATE UNIVERSITY

No. 329PA87

(Filed 9 March 1988)

1. Negligence § 57.1— repair of screen door—use of glass panel—injury to child

The Court of Appeals erred by reversing the Industrial Commission's award of damages to plaintiffs where defendant's employee replaced a screen panel in a storm door with a glass panel because children kept pushing out the screen panel. The Commission's findings established that defendant's employee had actual knowledge that plaintiff's children habitually opened the door in question by pushing forcefully on the middle panel, and it cannot be said as a matter of law that a reasonable person under these circumstances could not have foreseen that these children would continue to engage in their habitual behavior once the screen was replaced with glass.

2. Parent and Child § 5.1— medical expenses of child—father as guardian ad litem—parents' claim for medical expenses waived in favor of child

The Industrial Commission erred in an action under the State Tort Claims Act by awarding medical expenses to the parents of an injured child where the father had participated in the action as a guardian ad litem. By that participation, the father had waived his separate cause of action for his son's medical expenses in favor of the son.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals reported at 85 N.C. App. 521, 355 S.E. 2d 786 (1987), which reversed a decision and order of the North Carolina Industrial Commission that awarded plaintiff's son damages under the Tort Claims Act. Heard in the Supreme Court 8 February 1988.

Michael E. Mauney for plaintiff, appellant.

Lacy H. Thornburg, Attorney General, by Randy Meares, Assistant Attorney General, and Meg Scott Phipps, Associate Attorney General, for the State, appellee.

WHICHARD, Justice.

Plaintiff's son, Ahmed Bolkhir, was injured when he pushed out a glass panel in a storm door while attempting to enter an apartment rented from defendant, an institution of the State of North Carolina. The Industrial Commission concluded that defendant's employee was negligent in creating an unsafe condition by switching the door's screen panel with its glass panel when he knew or should have known that children might push on the glass when opening the door. It thus awarded damages pursuant to the Tort Claims Act.

On appeal, the Court of Appeals concluded that there was no evidence of negligence. It accordingly reversed. *Bolkhir v. N.C. State Univ.*, 85 N.C. App. 521, 355 S.E. 2d 786 (1987). We now hold that it erred in doing so.

In August 1982, plaintiff and his family resided in an apartment in the married student housing complex operated by defendant, North Carolina State University. Plaintiff's apartment had one entrance which was equipped with an exterior storm door consisting of three horizontal panels. The immovable lower panel was constructed of aluminum. At the beginning of plaintiff's

tenancy, the door had a middle panel made of wire mesh screen and an upper panel made of glass. During the year and a half prior to the accident, plaintiff's children had frequently pushed on the screen when opening the door, and thus defendant's maintenance staff had to repair the screen three or four times. The maintenance staff considered these repeated repairs to be a problem, so one of defendant's employees switched the middle screen panel with the upper glass panel.

On 28 August 1982, three year old Ahmed was playing hide-and-seek with his four year old brother Wesam and a neighbor. Wesam and the neighbor entered plaintiff's apartment and locked Ahmed out. Ahmed knocked on the door and yelled for someone to open it. As his mother approached the door, she saw Ahmed "come through the glass." The glass panel shattered, and Ahmed fell through the door. As a result of the fall, Ahmed suffered cuts on both wrists and his left foot. After two operations, Ahmed's left foot has a ten percent permanent partial disability.

Plaintiff brought this action as guardian ad litem for his injured son. Since the defendant is a state institution, plaintiff brought the action before the Industrial Commission pursuant to the Tort Claims Act, N.C.G.S. § 143-291 *et seq.* The Commission concluded that defendant's employee negligently created an unsafe condition by switching the screen panel with the glass panel. The Commission further concluded that defendant's employee's actions were the proximate cause of Ahmed's injuries. After adding the parents as "necessary and proper" parties, the Commission awarded the parents $4,741.38 for Ahmed's medical expenses, and it awarded Ahmed $35,000.00 for pain and suffering, scarring, and permanent disability.

Defendant appealed to the Court of Appeals, which reversed the Commission's decision and order. The Court of Appeals held that "the mere 'switching' of the panels in the door did not create an unsafe condition, and the findings made by the Commission do not support the ultimate finding and conclusion that defendant was negligent in maintaining the leased premises." *Bolkhir v. N.C. State Univ.*, 85 N.C. App. 521, 524, 355 S.E. 2d 786, 787. We granted plaintiff's petition for discretionary review.

[1] A finding of fact by the Industrial Commission in a proceeding under the Tort Claims Act is binding if there is any com-

petent evidence to support it. *Barney v. Highway Comm.*, 282 N.C. 278, 283-84, 192 S.E. 2d 273, 277 (1972). Negligence is a mixed question of law and fact, and the reviewing court must determine whether the Commission's findings support its conclusions. *Id.*

To recover under the Tort Claims Act, plaintiff must show that the injuries sustained by his son were the proximate result of a negligent act of a state employee acting within the course and scope of his employment. N.C.G.S. § 143-291 (1979 & Supp. 1981); *Davis v. Highway Commission*, 271 N.C. 405, 408, 156 S.E. 2d 685, 687 (1967). The parties stipulated that the maintenance persons who repaired the door were state employees acting within the course and scope of their employment. Thus, the alleged negligence is the only disputed issue. Under the Act, negligence is determined by the same rules as those applicable to private parties. *MacFarlane v. Wildlife Resources Com.*, 244 N.C. 385, 387, 93 S.E. 2d 557, 559 (1956).

The essence of negligence is behavior creating an unreasonable danger to others. W. Prosser, *Handbook of the Law of Torts* § 31 (5th ed. 1984). To establish actionable negligence, plaintiff must show that: (1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury. *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 232, 311 S.E. 2d 559, 564 (1984).

With regard to the first element, a landlord has a duty to exercise due care in making repairs to leased premises.[1] *Livingston v. Investment Co.*, 219 N.C. 416, 422-23, 14 S.E. 2d 489, 492 (1941); *Carson v. Cloninger*, 23 N.C. App. 699, 701, 209 S.E. 2d 522, 524 (1974). The standard of due care is always the conduct of a reasonably prudent person under the circumstances. *Watson v. Stallings*, 270 N.C. 187, 193, 154 S.E. 2d 308, 312 (1967). Although the standard remains constant, the proper degree of care varies with the circumstances. *Id.*

1. Under N.C.G.S. § 42-42(a)(2), a landlord has a duty to "[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." N.C.G.S. § 42-42(a)(2) (1984). The Commission cited this statute after its conclusion that defendant was negligent. This statute, however, does not alter the common law standard of ordinary and reasonable care. *Brooks v. Francis*, 57 N.C. App. 556, 559, 291 S.E. 2d 889, 891 (1982).

With regard to the second element, this Court has defined proximate cause as

> a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Hairston v. Alexander Tank & Equipment Co., 310 N.C. at 233, 311 S.E. 2d at 565 (citations omitted). Foreseeability is thus a requisite of proximate cause. *Id.* To establish foreseeability, the plaintiff must prove that defendant, in the exercise of reasonable care, might have foreseen that its actions would cause some injury. *Id.* at 234, 311 S.E. 2d at 565. The defendant must exercise "reasonable prevision" in order to avoid liability. *Id.* The law does not require a defendant to anticipate events which are merely possible but only those which are reasonably foreseeable. *Id.*

Under the foregoing principles, as plaintiff's landlord, defendant had a duty to exercise due care in making repairs to the leased premises. The question thus becomes whether defendant, through its employees, acted as a reasonably prudent person would have under the circumstances. The pertinent circumstances, as found by the Commission based on competent evidence, were as follows:

The apartments in question were leased only to families with children. Plaintiff's children had repeatedly pushed out the screen in the middle panel of the door to his apartment. Defendant's employee replaced the screen in the middle panel with glass in an attempt to prevent further repetition of such acts.

The Commission made further "findings" as follows:

> 3. . . . It was foreseeable that many young children would be . . . in and out of the storm doors and around the middle panel of the storm door where they would look out and in and push against the door to open it if it did not fasten properly.
>
> . . . .

5. Defendant-landlord in the exercise of reasonable care had a duty to recognize that children have less discretion than adults and may be unmindful of dangers that adults would recognize.

. . . .

12. Defendant's employee created an unsafe condition by switching the panels in the storm door. He knew or in the exercise of ordinary care should have known that a glass panel in the middle of the door would be unsafe for the same small children that had been pushing the screen panel out. Defendant's employees negligently created an unsafe condition, and such negligence was the proximate cause of plaintiff's minor child's injury.

The Commission concluded that "defendant's employee . . . negligently failed to exercise due care in repairing the storm door . . . in switching the glass and screen panels . . . when he knew or in the exercise of reasonable care should have known that a glass panel in the middle of the door would be dangerous for the same small children that had been pushing out the previous screen panel."

We hold that the Commission could find and conclude that the replacement of the screen panel with glass by defendant's employee was not reasonably prudent conduct under the circumstances presented. The findings establish that defendant's employee had actual knowledge that plaintiff's children habitually opened the door in question by pushing forcefully on the middle panel. We cannot say *as a matter of law* that a reasonable person under these circumstances could not have foreseen that these children would continue to engage in their habitual behavior once the screen was replaced with glass, and that a glass panel where the children customarily applied force would create a potentially dangerous situation for them. A person exercising "reasonable prevision" might well have foreseen that a child of tender years would not alter a long-standing habit merely because a screen panel was replaced with glass, and that force applied by the child to glass could shatter the glass and cause serious injury to the child.

The application of particular facts to the reasonableness standard is almost always a question of fact, not of law. *Hulcher Bros. v. N.C. Dept. of Transportation*, 76 N.C. App. 342, 343, 332 S.E. 2d 744, 745 (1985). "Only when the facts are such that reasonable minds can reach but one conclusion does the question become one of law." *Id.* (citing *Patton v. Southern Railway Co.*, 82 F. 979 (4th Cir. 1897) and *Brown v. Durham*, 141 N.C. 249, 53 S.E. 513 (1906)). On the facts here, reasonable minds could differ. The question of whether defendant, through its employee, acted as a reasonably prudent person would act under the circumstances thus was properly for the factfinder, and the Court of Appeals erred in reversing the factfinder's resolution of the question in favor of the plaintiff.

The Court of Appeals based its holding denying compensation on *Cagle v. Robert Hall Clothes* and *Beaty v. Robert Hall Clothes*, 9 N.C. App. 243, 175 S.E. 2d 703 (1970), which it found "indistinguishable" from the present case. *Bolkhir v. N.C. State Univ.*, 85 N.C. App. at 523, 355 S.E. 2d at 787. In *Cagle*, a five year old child was injured when he fell through a glass door while attempting to leave defendant's store. The court there upheld a directed verdict for defendant on the ground that there was no evidence that defendant failed to exercise due care. *Cagle*, 9 N.C. App. at 245, 175 S.E. 2d at 704. The crucial distinction between the present case and *Cagle* is that in *Cagle* there was no evidence of prior incidents of children pushing on the door with such force as to cause breakage. The evidence here, by contrast, fully supported the findings regarding such prior incidents, and the factfinder could conclude from this evidence that the incident in question, and the resulting injury, were foreseeable.

[2] Plaintiff also contends that the Commission erred by awarding the medical expenses to him and his wife rather than to his injured son. Plaintiff brought this action as guardian ad litem for his son. It was in that capacity that he sought recovery of his son's medical expenses. He did not request that these expenses be paid to himself or to himself and his wife. Nevertheless, acting on her own motion, the Deputy Commissioner added the parents as "necessary and proper" parties and awarded them $4,741.38 for the son's medical expenses. The full Commission adopted her order without modification. Since the Court of Appeals held that defendant was not negligent, it did not address this issue.

When an unemancipated minor is injured by the negligence of another, two claims may arise. The minor has a claim for his or her losses, and the parent has a claim for the loss of the child's services during minority and the medical expenses reasonably necessary for treatment of the minor's injuries. *Flippin v. Jarrell*, 301 N.C. 108, 120, 270 S.E. 2d 482, 490 (1980); *Shipp v. Stage Lines*, 192 N.C. 475, 479, 135 S.E. 339, 341 (1926). Thus, prior to commencing this action, plaintiff had a separate cause of action for his son's medical expenses. However, a father waives this right by participating as guardian ad litem in a trial in which the minor is awarded medical expenses. *See Doss v. Sewell*, 257 N.C. 404, 410, 125 S.E. 2d 899, 903 (1962); *Pascal v. Transit Co. and Lambert v. Transit Co.*, 229 N.C. 435, 441-42, 50 S.E. 2d 534, 538-39 (1948). By this waiver, the father treats the minor as emancipated for the purpose of recovering the medical expenses, and the minor may recover all the damages flowing from the injury. *Shields v. McKay*, 241 N.C. 37, 84 S.E. 2d 286 (1954).

Defendant does not respond to this contention, and "[i]t is immaterial to [it] whether the infant or the parent asserts the claim." *Doss v. Sewell*, 257 N.C. at 410, 125 S.E. 2d at 903. Pursuant to the foregoing authorities, we hold that the parents have waived their claim for medical expenses in favor of their son. Accordingly, the Commission erred by awarding the medical expenses to the parents. On remand the Commission is instructed to modify its order to award the $4,741.38 in medical expenses to plaintiff's injured son.

For the foregoing reasons, the decision of the Court of Appeals is reversed. The cause is remanded to that court for further remand to the Industrial Commission for reinstatement of its decision and order, subject to the modification set forth above.

Reversed and remanded.

STATE OF NORTH CAROLINA v. DONNIE MICHAEL JORDAN

No. 384A87

(Filed 9 March 1988)

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

The State's evidence was sufficient to support defendant's conviction of a first degree sexual offense where the victim testified without contradiction that defendant held a knife against her throat and forced her to perform fellatio on him; the car described by the victim as belonging to her assailant was the car owned by defendant at the time of the offense; the victim's description of her assailant substantially matched that of defendant; and most of the victim's testimony was substantially corroborated by other witnesses. Evidence that the victim waited for some months before reporting defendant's identity to the authorities after she observed his automobile license number, that she was unable to recognize defendant during a later hitchhiking incident until after she was inside defendant's car, and that she gave conflicting statements of events occurring prior to the sexual assault goes only to the issues of credibility and weight to be given to the evidence and does not show that the State's evidence is inherently incredible.

2. **Rape and Allied Offenses § 6.1— first degree sexual offense—refusal to instruct on crime against nature**

The trial court in a first degree sexual offense case did not err in refusing to instruct the jury on crime against nature as a lesser included offense since (1) crime against nature is not a lesser included offense of a sexual offense in the first or second degree, and (2) there was no evidence from which the jury could have found that the victim consented to the sexual act so as to support an instruction on crime against nature.

APPEAL of right by defendant, pursuant to N.C.G.S. § 7A-27(a), from a judgment imposing a sentence of life imprisonment entered by *Griffin, J.*, at the 16 February 1987 Criminal Session of Superior Court, NEW HANOVER County, upon a jury verdict of guilty of first degree sexual offense. Heard in the Supreme Court 8 February 1988.

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

James W. Lea, III, for defendant-appellant.

FRYE, Justice.

Defendant contends on this appeal that the evidence was insufficient to support the verdict and that the trial court erred in

failing to instruct the jury that crime against nature is a lesser included offense of first degree sexual offense. We find no error.

Defendant was indicted on 15 September 1986 for first degree sexual offense of a female. He was tried at the 16 February 1987 Criminal Session of Superior Court, New Hanover County.

At trial, the victim testified that on 27 November 1982 her car broke down in front of a convenience store in Wilmington, North Carolina. Subsequently, she accepted a ride with defendant after he offered to drive her to Carolina Beach, North Carolina, where the victim worked. However, upon arriving in Carolina Beach, defendant refused the victim's requests to let her out of the car. The victim testified further that defendant then drove to a secluded area at Fort Fisher, North Carolina, stopped the car, got out, and proceeded to urinate. While defendant was outside the car, the victim attempted to escape but was unable to do so because the door on the passenger's side could be opened only from the outside. Upon returning to the car, defendant reached around the victim, grabbed a knife, held the knife to the victim's throat, and ordered her to disrobe. Defendant then forced the victim to perform fellatio on him. Shortly thereafter, defendant drove the victim back to Carolina Beach to an area a few blocks from her place of employment. Defendant got out of the car, went to the passenger's side, and opened the door. After the victim got out of the car, defendant backed the car up and drove away. Upon her arrival at work, the victim contacted the police and reported the incident.

Approximately three months later, the victim saw defendant when he picked up a friend of the victim's who was hitchhiking to Wilmington. After the victim got into defendant's car with her friend, she recognized defendant as being the man who had sexually assaulted her. The victim testified that she remained quiet while in defendant's car out of fear for her and her friend's safety. However, after departing from the car, as defendant was driving away, the victim mentally recorded defendant's license plate number. The victim then attempted to contact the police officer investigating the sexual offense incident, but was unable to do so.

The victim next saw defendant on 6 June 1986, when he entered her place of employment. Upon seeing the victim, defend-

ant left the establishment. The victim then contacted the police, described defendant to them, and at this point gave the police defendant's license plate number. Defendant was subsequently arrested on 28 June 1986 and charged with one count of first degree sexual offense.

Also testifying at trial was the police officer who originally investigated the incident. Officer Hines testified that the victim told him that on the night of the incident she had been hitchhiking when defendant stopped and offered her a ride. The officer testified further that the victim told him that, prior to the sexual assault, she and defendant stopped for a couple of drinks and stopped also to get some gas.

Further evidence at trial showed that on the date of the offense defendant owned a car, fitting the description given by the victim. Subsequent owners of the car stated, in an affidavit, that upon purchasing the car the door on the passenger's side could be opened only from the outside.

Aside from the discrepancy in relating the events preceding the sexual assault, the victim's initial report to the police substantially corresponded to her later pretrial statement and to her testimony at trial. During her testimony at trial, however, the victim denied telling Officer Hines that she had been hitchhiking on the night in question, and, in fact, stated that she never gave a statement to this officer. The jury found defendant guilty of first degree sexual offense pursuant to N.C.G.S. § 14-27.4(a)(2)a.

[1] Defendant contends first that the evidence was insufficient to support the verdict of first degree sexual offense. He argues that the particular facts of this case show that the evidence is inherently incredible, thus a reasonable jury would not have found that the offense occurred as claimed by the victim.

At the outset, we note that defendant did not make a motion to dismiss for insufficiency of the evidence pursuant to N.C.G.S. § 15A-1227 nor did he make a motion for nonsuit pursuant to N.C.G.S. § 15-173. Although N.C.G.S. § 15A-1446(d)(5) allows a defendant to appeal on insufficiency of evidence grounds, notwithstanding the fact that no objection, exception or motion was made at trial, this Court has held that this statute is negated by N.C.R. App. P. 10(b)(3), which states that a defendant "may not assign as

error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit at trial." *See State v. Stocks*, 319 N.C. 437, 355 S.E. 2d 492 (1987). However, as in *Stocks*, we have reviewed the evidence in our discretion, and we conclude that it sufficed to take the case to the jury and to support the jury verdict.

Evidence is sufficient to support a conviction if there is substantial evidence of every element of the crime. *State v. Bates*, 309 N.C. 528, 308 S.E. 2d 258 (1983). Substantial evidence "must be existing and real," and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Erwin*, 304 N.C. 93, 98, 282 S.E. 2d 439, 443 (1981). To defeat a motion to dismiss on insufficiency of the evidence, there must be substantial evidence to establish each essential element of the crime charged and that defendant was the perpetrator of the crime. *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985). For this purpose, all evidence favorable to the State is taken as true and conflicts and discrepancies are resolved in favor of the State. *See State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982).

The crux of defendant's argument concerns what defendant contends is the implausibility of the victim's testimony. Defendant contends the victim's testimony was unreliable because she waited an inordinate amount of time before reporting defendant's identity to the authorities after she observed his automobile license number; she was unable to recognize defendant during the hitchhiking incident until after she was inside defendant's car; and she gave conflicting statements of events occurring prior to the sexual assault.

What defendant argues as the basis for insufficient evidence in fact goes to the issues of credibility and weight to be given to the evidence. These are matters solely within the province of the jury. *State v. Orr*, 260 N.C. 177, 132 S.E. 2d 334 (1963). Only when the testimony is inherently incredible will this Court find the evidence insufficient to support a jury verdict. *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967) (insufficient evidence when sole identity made by eyewitness, standing 263 feet from defendant, who was a stranger to eyewitness). In the present case we do not find the victim's testimony inherently incredible.

We must determine, therefore, whether there is sufficient evidence to establish each essential element of the offense charged and defendant's identity as the perpetrator. *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181. Here, to support the conviction for first degree sexual offense, the State must prove that defendant engaged in a sexual act with the victim, by force and against the will of the victim, during which a dangerous weapon was employed or displayed. N.C.G.S. § 14-27.4(a)(2)a (1986).

In the present case, the victim testified, without contradiction, that defendant held a knife against her throat and forced her to perform fellatio on him. While defendant argues that the sole evidence was the victim's testimony and contends that this was insufficient in light of the fact that the victim showed no physical injury, the record reveals otherwise: The car described by the victim as belonging to her assailant was the same car owned by defendant at the time of the offense; the victim's description of her assailant substantially matched that of defendant; and most of the victim's testimony was substantially corroborated by other witnesses. Under these circumstances, we hold that there was sufficient evidence to support the jury finding that defendant was guilty of first degree sexual offense. *See State v. Griffin*, 319 N.C. 429, 355 S.E. 2d 474 (1987).

[2] Defendant next contends that the trial court erred in its refusal to instruct the jury that the offense of crime against nature is a lesser included offense of first degree sexual offense. We disagree. Crime against nature is not a lesser included offense of a sexual offense in the first or second degree. *See State v. Warren*, 309 N.C. 224, 306 S.E. 2d 446 (1983).

In *State v. Weaver*, 306 N.C. 629, 635, 295 S.E. 2d 375, 378 (1982), we held that the determination of when a lesser offense is encompassed in the greater offense is "made on a *definitional*, not a factual basis." Defendant asks this Court to abandon the definitional approach and, instead, look at the evidence in each case to determine whether a lesser offense is encompassed in the greater offense. Were this approach adopted, contends defendant, the evidence in the present case would support the charge of the lesser offense of crime against nature.

Even if we were to abandon the definitional approach, as urged by defendant, it would not help him in this case. A trial

court has no duty to instruct on a lesser offense when there is no evidence "from which the jury could reasonably find that the defendant committed the lesser offense." *State v. Bagley*, 321 N.C. 201, 210, 362 S.E. 2d 244, 249 (1987). Here, all the evidence tended to show that defendant committed the sexual act on the victim by force and against her will. Although defendant argues that the jury could have believed that the sexual act was committed but with the consent of the victim, the mere possibility that the jury might believe part but not all of a victim's testimony is insufficient to require an instruction on a lesser included offense. *State v. Kennedy*, 320 N.C. 20, 357 S.E. 2d 359 (1987). There was no evidence from which the jury could have found that the victim consented to the sexual act, therefore, the trial court did not err in refusing to submit a crime against nature charge to the jury.

In addition to the brief and oral argument submitted on defendant's behalf by his attorney, defendant filed a *pro se* supplemental brief in which he alleges ineffective assistance of counsel at trial and on appeal. We do not address the issues raised in this supplemental brief, since defendant's ineffective assistance of counsel claims are not developed on the record and are more properly addressed by a Motion for Appropriate Relief.

We find no error in defendant's trial.

No error.

STATE OF NORTH CAROLINA v. JOHN FRANCIS HOGAN, III

No. 165A87

(Filed 9 March 1988)

1. Criminal Law § 128.2— evidence of prior charge against defendant—mistrial not required

The trial court in a felony murder case did not err in denying defendant's motion for a mistrial when a detective testified that he had gotten information about an unspecified previous charge against defendant in Maryland, although such testimony was improper under N.C.G.S. § 8C-1, Rule 404(b), where the trial court sustained defendant's objection and instructed the jury to disregard the incompetent evidence, and where the evidence could not have resulted in

substantial and irreparable prejudice to defendant's case in light of his confession and the corroborating evidence that supported it. N.C.G.S. § 15A-1061.

2. Criminal Law § 102.6— prosecutor's jury argument—no appeal to base decision on community sentiment

The prosecutor's jury argument in this first degree murder case did not improperly appeal to the jury to decide the case based on community sentiment but appears to urge that cases should be decided on the evidence and the rule of law rather than on the sympathies of juries. Therefore, the trial court did not abuse its discretion in allowing such argument.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) (1986) from a judgment of life imprisonment entered by *Tillery, J.*, at the 3 November 1986 Criminal Session of Superior Court, NEW HANOVER County. Heard in the Supreme Court 8 February 1988.

Lacy H. Thornburg, Attorney General, by Edwin M. Speas, Jr., Special Deputy Attorney General, and Thomas J. Ziko, Associate Attorney General, for the State.

Robin E. Hudson for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of first degree murder and armed robbery. Because the armed robbery was the predicate felony for the first degree murder conviction on the basis of felony murder, the trial court arrested judgment on the armed robbery conviction. Defendant appeals from a judgment imposing a sentence of life imprisonment on the murder conviction. We find no error.

Victor Hough, the victim, was the night manager at a gas station in Wilmington. Defendant worked the day shift at the station as a mechanic. On the morning of 16 November 1985 an employee of the station found Hough's dead body across a chair in the station's back office. There were seven gunshot wounds in Hough's head, two of which were probably made at point-blank range. Seven .22 caliber casings were beside the body. Approximately $1,500-2,000 was missing from the station.

Defendant continued to work at the station until it closed on 19 February 1986. Sometime before 12 May 1986, he was arrested in Florida. While in custody, defendant confessed that he had killed Hough. He was returned to Wilmington, and in the next few days he again admitted to the killing. He stated the following:

He was addicted to cocaine and had been stealing from the station to support his habit. On the day of the crime, he had taken some drugs in his home and was "high." His wife, who also worked at the station, was upset when she discovered that he had used all the drugs in their home. She told defendant that there was about $2,000 at the station, and she suggested that they rob the station to get money to buy cocaine.

Defendant's wife drove him to the station. He found Hough in the back office and demanded money from him. After a short conversation Hough grabbed for the .22 caliber rifle defendant was carrying, and the rifle went off. Defendant claimed that the rifle was an automatic "and it just keeps shooting" when you pull the trigger down. Defendant stated that he then grabbed the money and returned to the car.

Defendant and his wife subsequently drove to a fishing hole where they threw into the water the rifle, the clothes defendant had worn, and $300 in bills with blood on them. When police officers searched the fishing hole, they found two boots and a .22 caliber rifle. An S.B.I. agent, who qualified as an expert in firearms and tool mark identification, testified that the seven cartridge casings found at the crime scene had been fired from the rifle that was recovered from the water. The bullets removed from the victim's body were so deformed that the expert was unable to determine whether they were fired from this rifle. He testified that although the next round was chambered automatically every time the trigger was pulled, the trigger had to be squeezed anew each time in order to fire the newly loaded round.

The jury considered possible verdicts of first degree murder "[o]n the basis of malice, premeditation and deliberation," first degree murder "[u]nder the first degree felony murder rule," and second degree murder. It returned a verdict of guilty of first degree murder under the felony murder rule. Following a capital sentencing hearing, the jury found as an aggravating circumstance that the murder was committed for pecuniary gain. N.C.G.S. § 15A-2000(e)(6) (1983). It found as mitigating circumstances that (1) the murder was committed while defendant was under the influence of mental or emotional disturbance, and (2) the capacity of 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)(2), (6) (1983). It then found that the aggravating circumstance was not sufficiently substantial, when considered with the mitigating circumstances, to call for the imposition of the death penalty. It recommended a sentence of life imprisonment, and judgment was entered accordingly.

[1] Tony Richardson, a detective with the Wilmington Police Department, investigated the Hough murder. During the investigation he flew to Pensacola, Florida to meet with defendant. During his testimony for the State, Richardson stated, in response to a question on direct examination as to what he had said to defendant on that occasion:

> Well[,] basically I told him I had been doing a lot of leg work on the case. I had been up to his former residence . . . and gather[ed] some .22 cases that I was going to send to the lab to be compared with the ones we found at the crime scene. *I told him that I had gotten some information from Maryland about where he had previously been charged in Maryland.*

(Emphasis supplied.) Defense counsel immediately objected. The trial court sustained the objection "as to any previous charge" and instructed the jury not to consider it. Defense counsel then moved for a mistrial, which was denied. He renewed the motion at the end of the State's evidence, and it was again denied. Defendant assigns error to the denial of this motion.

A trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings . . . resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (1983).

> It is well settled that the decision of whether to grant a mistrial rests in the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of an abuse of discretion. . . . [A] trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.

State v. Barts, 316 N.C. 666, 682, 343 S.E. 2d 828, 839 (1986) (citations omitted). "Where a trial court sustains an objection to in-

competent evidence and instructs the jury to disregard it, the refusal to grant a mistrial based on the introduction of the evidence will ordinarily not constitute an abuse of discretion." *Id.* at 684, 343 S.E. 2d at 840.

Here, the trial court sustained defendant's objection and instructed the jury to disregard the incompetent evidence. There was no indication as to the nature of the charge against defendant in Maryland or as to whether he had been convicted of it. Defendant's confession, together with the corroborating evidence produced by the officers' investigation of the fishing hole into which he stated that he had thrown the rifle and other incriminating evidence, made out a substantial case for his guilt. Under these circumstances, Detective Richardson's statement about an unspecific previous charge against defendant in Maryland, while improper under N.C.G.S. § 8C-1, Rule 404(b), could not have resulted in "substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (1983). We thus find no abuse of discretion in the denial of defendant's motion for mistrial.

[2] Defendant further contends that the trial court erred in overruling his objection to the following portion of the District Attorney's closing argument:

> This is serious business. This is cold blooded, premeditated, deliberate murder and even though you as the jury have the power to go out of this courtroom and to deliberate and to come back in here with a verdict of something less than that [*i.e.*, first degree murder], you ought not to do it. You ought not to do it based on this evidence, because in the future there are going to be other people tried in this county for first degree murder and if you let sympathy or passion or whatever stand in the place of evidence, in place of the truth, then we won't know how to administer the rule of law, the law in that red book. It won't have any meaning whatsoever. The faith [sic] of future people charged with first degree murder will be based on what jurors they had and how sympath[et]ic they are; whether or not they like the looks of the defendant or not; whether or not the lawyers made fancy arguments. That is not why I am here. I told you when I picked you as jurors, I am not here—it is not my duty to get up here and convince you by smart argument. That is not my job and if that was my job I wouldn't have this job.

He argues that the prosecutor was improperly appealing to the jury to decide the case based on community sentiment rather than on the evidence presented. *See State v. Scott*, 314 N.C. 309, 333 S.E. 2d 296 (1985) (argument that "there's a lot of public sentiment . . . against driving and drinking, causing accidents on the highway" improper because it went outside the record and appealed to the jury to convict the defendant because impaired drivers had caused other accidents, and because it could only be construed as an appeal to convict based on community demands).

Counsel are allowed wide latitude in arguments to the jury. *State v. Miller*, 315 N.C. 773, 780, 340 S.E. 2d 290, 294 (1986). The determination of whether this privilege has been abused rests within the sound discretion of the trial court, and absent such gross impropriety in the argument as would be likely to influence the jury's verdict, this Court will not disturb the trial court's discretionary ruling. *Id.*

The District Attorney here specifically advocated a decision based on the evidence; he stated that "*based on this evidence,*" *i.e.*, the evidence presented in the case, the jury should not return a verdict of less than guilty of first degree murder. (Emphasis supplied.) He specifically asked the jury not to allow "sympathy or passion or whatever [to] *stand in the place of evidence.*" (Emphasis supplied.) In context, the argument appears to urge that cases should be decided on the evidence and the rule of law rather than on the sympathies of jurors. We thus find no gross impropriety in the argument that would warrant a holding that the trial court abused its discretion in allowing it.

Further, in light of defendant's confession and the corroborating evidence that supported it, we consider it highly unlikely that the argument influenced the jury's verdict. This assignment of error is therefore overruled.

We find that defendant had a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. STEVEN DALTON WHEELER

No. 281PA87

(Filed 9 March 1988)

Homicide § 21.6; Weapons and Firearms § 3 – felony murder – discharging a firearm into occupied vehicle – evidence sufficient

In a prosecution for first degree murder under the felony murder rule based on discharging a firearm into an occupied vehicle, the trial court did not err by denying defendant's motion to dismiss at the close of all the evidence where there was evidence that defendant intentionally fired into the vehicle in that a rational trier of fact could conclude from evidence that defendant intentionally fired at the vehicle that he intended to fire into the vehicle; defendant's statement that he did not intend to shoot into the vehicle was contradicted by the evidence that he fired the pistol at the vehicle and his statement does not entitle him to have the case dismissed; the intentional firing into a vehicle which the defendant knows to be occupied supports a finding that the act was done in reckless disregard of the rights and safety of others; and the fact that only one of the thirteen or fourteen bullets defendant fired entered the vehicle and defendant's statement that he did not intend to fire into the vehicle went to the strength of the evidence. It can also be argued that if thirteen or fourteen shots are fired in the direction of a vehicle that a reasonable man could conclude that one of them is likely to enter the vehicle.

ON writ of certiorari to review an order entered by *Hight, J.*, at the 19 December 1986 session of Superior Court, VANCE County, denying defendant's motion for appropriate relief from a judgment imposing a life sentence at the 28 October 1985 Criminal Session of Superior Court, FRANKLIN County. Heard in the Supreme Court 9 February 1988.

Defendant was tried for first degree murder. The evidence tended to show that defendant was the manager of the Blues Bar. The victim, John Steven Dement, and his friend, Brent Julien, had been barred from the Blues Bar because they had engaged in a fight in the bar. On the day in question, Mr. Dement and Mr. Julien were at the bar. Defendant asked them to leave.

Mr. Dement and Mr. Julien left the bar and the defendant followed them. Mr. Dement, Mr. Julien and Deborah Sumner entered a pickup truck. The truck was moved toward the highway where it was stopped. Someone inside the truck fired two shots toward the group of people standing outside the bar. Defendant then fired thirteen or fourteen shots from a nine millimeter pistol

in the direction of the truck. Defendant testified that he did not intend to hit the truck. A bullet hit Mr. Dement in the back of the head and killed him. The truck pulled away. Mr. Julien and Ms. Sumner stopped Officer John Martin of the Wake Forest Police Department and told him what happened. Officer Martin contacted the Wake County Sheriff's Department. Deputy Ken Duckworth and Captain F. L. Benson went to the Blues Bar, where defendant told them he had fired either "back over" the truck or "in their direction" but knew he did not hit it because he was a good shot.

The jury found defendant guilty of first degree murder. The court sentenced him to life imprisonment. Six weeks later, the superior court denied defendant's motion for appropriate relief. On 22 July 1987 this Court allowed defendant's petition for writ of certiorari.

Lacy H. Thornburg, Attorney General, by Doris J. Holton, Assistant Attorney General, for the State.

Davis, Sturges & Tomlinson, by Charles M. Davis and Arthur Vann, for defendant appellant.

WEBB, Justice.

In his first assignment of error, defendant contends the trial court erred in denying his motion to dismiss at the close of all the evidence. Defendant was convicted of first degree murder under the felony murder rule, based on the felony of discharging a firearm into an occupied vehicle. Defendant argues that there was insufficient evidence to convict him of first degree murder because there was insufficient evidence to convict him of the underlying felony of discharging a firearm into an occupied vehicle. N.C.G.S. § 14-34.1 provides, in pertinent part:

> Any person who willfully or wantonly discharges or attempts to discharge:
>
> . . . .
>
> (2) A firearm into any . . . vehicle . . . while it is occupied is guilty of a Class H felony.

The felony murder rule, based on the underlying felony of firing into an occupied building or vehicle, has been interpreted in *State*

v. Wall, 304 N.C. 609, 286 S.E. 2d 68 (1982); *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976); and *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973). These cases hold that a person has committed the felony of firing into an occupied vehicle under N.C.G.S. § 14-34.1, which will support a conviction of felony murder under N.C.G.S. § 14-17, "if he intentionally, without legal justification or excuse, discharges a firearm into *an occupied* [vehicle] with knowledge that the [vehicle] is then occupied by one or more persons or when he has reasonable grounds to believe that the [vehicle] might be occupied by one or more persons." *Williams*, 284 N.C. at 73, 199 S.E. 2d at 412.

The defendant contends the case should have been dismissed at the close of all the evidence because a rational trier of fact could not have found beyond a reasonable doubt that the defendant intentionally fired into the vehicle. *See Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed. 2d 560 (1979); *State v. Thompson*, 306 N.C. 526, 294 S.E. 2d 314 (1982); and *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981). This case is similar to *Wall*. The evidence in that case was that the defendant fired three shots at a vehicle which was leaving the premises of a convenience store. Two of the shots entered the vehicle and one of them struck the driver in the head, causing his death. In upholding the charge of the superior court as to the proof of intent this Court said, "It is an inherently incredible proposition that defendant could have intentionally fired a shot 'at' the fleeing Volkswagen without intending that the bullet go 'into' the vehicle." *Wall*, 304 N.C. at 617, 286 S.E. 2d at 73. In this case, we hold any rational trier of fact could find the defendant intended to fire into the vehicle from the evidence that the defendant pointed the pistol toward the vehicle and fired the pistol so that a bullet went into the vehicle.

The defendant argues that by allowing a jury to find that the defendant intentionally fired into a vehicle from evidence he fired at the vehicle, we have expanded the words of the statute and reduced the burden of what the State must prove. He contends this is so because we have allowed him to be convicted by evidence that he intentionally fired at the vehicle rather than evidence he intentionally fired into the vehicle. We do not believe we have changed the statute. The question is what a rational trier of fact may reasonably find from the evidence. We hold that a rational trier of fact could conclude from evidence the defendant

intentionally fired at the vehicle that he intended to fire into the vehicle. The defendant also argues that we have violated the rule of *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508 (1975), by creating a presumption that the defendant intentionally fired into the vehicle if the jury should find he fired at the vehicle. The defendant contends this unconstitutionally relieves the State of proving all elements of the offense. The answer to this argument is that no presumption has been created and the superior court did not so charge the jury. The jury was allowed to make a reasonable inference based on competent evidence.

The defendant also contends that the only evidence of intent was the statement of the defendant that he did not intend to fire into the vehicle. He argues, relying on *State v. Johnson*, 261 N.C. 727, 136 S.E. 2d 84 (1964); and *State v. Carter*, 254 N.C. 475, 119 S.E. 2d 461 (1961), that the State introduced this exculpatory statement and is bound by it. He says the State's evidence on this point is the same as his evidence and the case should have been dismissed. In both *Johnson* and *Carter* the evidence was that the defendant had killed a person. The only explanation as to how the death occurred in each case was a statement by the defendant which showed she had killed in self-defense. In each case, this Court held a motion for nonsuit should have been allowed. In *Carter*, Chief Justice Winbourne, writing for the Court, said, "When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements." *Carter*, 254 N.C. at 479, 119 S.E. 2d at 464. In this case, the statement of the defendant that he did not intend to shoot into the vehicle was contradicted by the evidence that he fired the pistol at the vehicle. The defendant's exculpatory statement does not entitle him to have the case dismissed. *State v. Wilson*, 264 N.C. 373, 141 S.E. 2d 801 (1965).

The defendant contends, based on *State v. Brackett*, 306 N.C. 138, 291 S.E. 2d 660 (1982), that the State did not prove he intentionally fired into the vehicle. *Brackett* dealt with the willful and wanton burning of a building. This Court held that to convict a person of the willful and wanton burning of a building it is necessary to prove the intentional burning of the building and that it was done in reckless disregard of the rights and safety of others. We held in that case that the evidence supported a finding

that the defendant intentionally set fire to a building, but it did not support a finding that she did it in reckless disregard of the rights and safety of others. In this case, we hold that the intentional firing into a vehicle, which the defendant knows to be occupied, supports a finding that the act was done in reckless disregard of the rights and safety of others.

The defendant argues further that the maxim that a person intends the consequences of his acts does not apply in this case and that if it does it is more helpful to the defendant than to the State. He says this is so because he said he did not intend to fire into the vehicle and the fact that only one of the thirteen or fourteen bullets he fired entered the vehicle shows it was not likely one would do so. This is a matter of the strength of the evidence which was to be considered by the jury. It can also be argued that if thirteen or fourteen shots are fired in the direction of the vehicle that a reasonable man could conclude one of them is likely to enter the vehicle. This is evidence of an intent to fire into the vehicle.

The defendant's first assignment of error is overruled.

The defendant next contends the superior court erred in denying his motion for appropriate relief because the evidence was not sufficient to submit the charge of first degree murder to the jury and the jury's verdict was contrary to the weight of the evidence. Based on our holding as to the first assignment of error, we overrule this assignment of error.

No error.

NEIL WILSON McKINNEY, EXECUTOR OF THE ESTATE OF GORDON HENRY BAKER v. NITA MOSTELLER, CHARLES MOSTELLER, HARRY INGOLD, EDWARD BAKER INGOLD, NELLIE KATE INGOLD HARDIN, JOE R. HILTON, MISS RUBY HILTON, RACHEL WILLIS TROXLER, JOHN DAVID WILLIS, EUGENE BAKER WILLIS, LORETZ L. RAMSEUR, HELEN RAMSEUR MARLEY, TAMMIE LEIGH McKINNEY, CASSIDY DALE HAMPTON, A MINOR; CHAD ELLIOTT HAMPTON, A MINOR; ANDREW NEIL McKINNEY, A MINOR; JAMES ALDRIN McKINNEY, A MINOR

No. 303PA87

(Filed 9 March 1988)

Wills §§ 32.1, 52— residuary estate—survival of wife as condition precedent—no gift by implication

Where testator's will provided for his wife for her life, the residuary clause provided that, if testator's wife survived him, the residue of the estate would provide a trust for the lifetime of his wife with the remainder to pass to named beneficiaries not related to him, the will failed to provide for the distribution of testator's residuary estate in the event his wife predeceased him, and the wife in fact did predecease testator, the residuary clause was ineffective because the condition precedent was not met, and the residue of testator's estate did not pass under the will to the residuary beneficiaries by implication but passed to the heirs at law in accordance with the laws of intestacy.

ON grant of a petition by the collateral heirs of Gordon Henry Baker, pursuant to N.C.G.S. § 7A-31, for discretionary review of a decision of the Court of Appeals, 85 N.C. App. 429, 355 S.E. 2d 164 (1987), reversing declaratory judgment entered by *Lewis, J.*, at the 14 April 1986 Civil Session of Superior Court, CATAWBA County. Heard in the Supreme Court 7 December 1987.

Essex, Richards & Morris, P.A., by Stephen H. Morris, for Helen Ramseur Marley, defendant-appellant.

Joe P. Whitener for Nita Mosteller, Charles Mosteller, Harry Ingold, Edward Baker Ingold, Nellie Kate Ingold Hardin, Joe R. Hilton and Ruby Hilton, defendant-appellants.

Charles E. Brooks for Eugene Baker Willis, defendant-appellant.

Sigmon, Clark & Mackie, P.A., by E. Fielding Clark, II, for Tammie Leigh McKinney, Cassidy Dale Hampton, a Minor; Chad Elliott Hampton, a Minor; Andrew Neil McKinney, a Minor; and James Aldrin McKinney, a Minor, defendant-appellees.

FRYE, Justice.

Plaintiff, as executor of the estate, instituted this declaratory judgment action seeking an interpretation and construction of the will of Gordon Henry Baker. The trial court found that Item Five of the testator's will, which purported to distribute the residue of the estate, was ineffective because its condition precedent was not satisfied. The Court of Appeals reversed the trial court, holding that the residue of the testator's estate passed under the will by implication. We allowed the collateral heirs' petition for discretionary review and now reverse the decision of the Court of Appeals.

Gordon Henry Baker died 16 November 1984, leaving a will dated 16 September 1983. He was predeceased by his spouse and children and left no lineal descendants. Between 1970 and the date of his last will, the testator executed four wills and one codicil. In all of these instruments, he followed a testamentary scheme of providing for his wife for her life, his son for his life, with the final testamentary disposition of his estate to institutions or individuals not related to him.

The probated will of the testator reads in pertinent part:

ITEM FOUR

> If my wife, Ione Harris Baker, does not survive me, then, and in that event, I will, devise and bequeath the 32.14 acre tract of land hereinafter described and also the approximately ten (10) acres of land hereinafter described, unto Neil Wilson McKinney and his wife, Loretta Boone McKinney, absolutely and in fee simple . . . .

ITEM FIVE

> *If my said wife, Ione Harris Baker, survives me,* then and in that event, I direct that . . . my Executor shall deliver and convey all the rest and remainder of my aforesaid estate . . . to Neil Wilson McKinney, in Trust, for the use and purposes hereinafter set forth, and I direct that such remainder of my residuary estate hereinafter referred to as my Trust Estate so passing to my Trustee, shall be administered and disposed of upon the following terms and provisions . . . . (emphasis added).

Testator then provided for a trust for the lifetime of his wife with the remainder to go one-half to the McKinneys and one-half to the McKinney and Hampton children, appellees in this action.

The only question presented on this appeal is whether the residue of testator's estate as described in Item Five passes under his will or by intestate succession.

An examination of the testator's will shows that he failed to provide for the distribution of his residuary estate in the event his wife predeceased him. This in fact occurred, as Mrs. Baker died several months after the will's execution, during the lifetime of her husband. Item Five of his will, which purports to distribute the residue of testator's estate, has an expressed condition precedent. It is only effective upon a contingency that testator's wife survive him. Mr. Baker did not change his will after his wife's death so as to provide for this contingency as it related to the residuary estate.

Mr. Baker's will provided, *inter alia*, that if his wife did not survive him, Mr. and Mrs. McKinney would receive two tracts of land "absolutely and in fee simple." The residuary clause provided that if his wife survived him, the "rest and remainder" of his estate, left after providing for Mrs. Baker, would pass "one-half to the McKinneys and one-half to the Hampton and McKinney children in five equal portions." The residuary legatees argue that Mr. Baker intended, through this residuary clause, to dispose of all of his remaining property, so that none would pass by intestacy to his heirs at law; that the disposition of the residue was without regard to whether Mrs. Baker died before or after the testator. We cannot discern this from the plain language used in testator's will, which distributes the residue only if "my said wife . . . survives me."

It is true that in searching a will to determine the testator's intent, courts are to be guided by the presumption that "one who makes a will is of disposing mind and memory and does not intend to die intestate as to any part of his property." *Wing v. Trust Co.*, 301 N.C. 456, 463, 272 S.E. 2d 90, 95 (1980). Moreover, this Court has held that the presumption against intestacy is strengthened by the presence of a residuary clause in a will. *Gordon v. Ehringhaus*, 190 N.C. 147, 129 S.E. 187 (1925). However, a residuary clause in a will should be construed so as to prevent in-

testacy as to part of the testator's estate only when there is no apparent intent to the contrary, plainly and unequivocally expressed in the will. *See Betts v. Parrish*, 312 N.C. 47, 320 S.E. 2d 662 (1984) (citing *Faison v. Middleton*, 171 N.C. 170, 88 S.E. 141 (1916)). The condition precedent in Item Five demonstrates a contrary intention and militates against such a presumption when the condition precedent has not been met.

The named beneficiaries argue further that the testator's intent can be ascertained from the will and that it should be given effect by implying a gift. The Court of Appeals, relying on this Court's decision in *Wing v. Trust Co.*, 301 N.C. 456, 272 S.E. 2d 90, agreed. However, in *Betts v. Parrish*, 312 N.C. 47, 320 S.E. 2d 662, we declined to imply a gift under circumstances similar to the instant case. In *Betts*, the residuary clause of the testator's will was prefaced with the sentence "[i]f my mother and my wife should both predecease me, then I will, devise and bequeath all of my property . . . as follows . . . ." There, we held that the residuary legatee should take all of the testator's property only if the testator's mother and wife *both* predeceased the testator. This in fact did not happen. Only the wife predeceased the testator. We concluded that the residuary legatees did not take any interest under this provision of the will since the condition precedent, the prior death of the testator's mother and wife, was not satisfied.

In *Betts* and in the case *sub judice*, a lapsed devise occurred when the beneficiary died prior to the death of the testator. Because a condition precedent in the residuary clause was not satisfied, we held that the residue in *Betts* must pass by intestate succession. *Wing*, on the other hand, in which this Court approved a gift by implication, involved the question of the ultimate distribution of the corpus of a testamentary trust after the death of the income beneficiaries, unfettered by any question of a lapsed devise. That situation merely required that the Court allow for the distribution of assets unaccounted for in the estate, not that an expressed condition precedent be ignored. Thus, for the same reasons that *Wing* was inapplicable in *Betts*, it is inapplicable under the facts *sub judice*. *See Betts v. Parrish*, 312 N.C. 47, 320 S.E. 2d 662.

We reaffirm our holding that a gift by implication is not favored in the law and cannot rest upon mere conjecture. The in-

ference of such an implied gift must rest upon cogent reasoning and "cannot be indulged merely to avoid intestacy." *Wing v. Trust Co.*, 301 N.C. 456, 272 S.E. 2d 90 (quoting *Burney v. Holloway*, 225 N.C. 633, 637, 36 S.E. 2d 5, 8 (1945)).

The residuary beneficiaries argue strongly that it is clear that they were to be the secondary object of testator's bounty. Even assuming that extrinsic evidence supports that contention, we are commanded to gather the intent of the testator from the four corners of his will, and such intent should be given effect unless contrary to some rule of law or at variance with public policy. *McCain v. Womble*, 265 N.C. 640, 144 S.E. 2d 857 (1965). The effect that we give to testator's will is neither offensive to public policy nor contrary to any rule of law. As gleaned from the will itself, the intent of the testator is manifest and unequivocal, that is, the residue is to pass to the named beneficiaries under the residuary clause of the will only if testator's wife survives him. She did not. Therefore, the residue passes to the heirs at law in accordance with the laws of intestacy as enacted by the legislature. *See* N.C.G.S. §§ 29-8 and 29-15 (1984).

The presumption against partial intestacy is merely a rule of construction and cannot have the effect of transferring property in the face of contrary provisions in the will. The presumption must yield when outweighed by manifest and unequivocal intent. *Little v. Trust Co.*, 252 N.C. 229, 113 S.E. 2d 689 (1960).

For the foregoing reasons, the Court of Appeals erred in reversing the trial court's declaratory judgment. The decision of the Court of Appeals is reversed and the cause remanded to the Court of Appeals for further remand to the trial court to reinstate its judgment.

Reversed and remanded.

WILKES COUNTY VOCATIONAL WORKSHOP, INC. v. UNITED SLEEP PRODUCTS, INC., AND JOHN HILL

No. 576A87

(Filed 9 March 1988)

Accounts § 1— open account—contract with individual defendant—summary judgment improper

The Court of Appeals erred in affirming the entry of summary judgment for the individual defendant in an action on an open account where a genuine issue of material fact was presented as to whether plaintiff manufactured and delivered its product pursuant to a contract with the individual defendant or whether plaintiff contracted solely with the corporate defendant.

APPEAL of right by plaintiff pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, reported at 87 N.C. App. 427, 361 S.E. 2d 327 (1987), which affirmed a summary judgment for defendant John Hill entered by *Gregory, J.*, on 16 October 1986 in District Court, WILKES County. Heard in the Supreme Court 11 February 1988.

Hall and Brooks, by John E. Hall, for plaintiff-appellant.

Ferree, Cunningham & Gray, P.A., by George G. Cunningham and William C. Gray, Jr., for defendant-appellee.

WHICHARD, Justice.

The sole issue is whether the Court of Appeals erred in affirming the entry of summary judgment for the individual defendant. We hold that it did, and accordingly we reverse.

Plaintiff, a charitable corporation which employs mentally and physically handicapped persons, seeks to recover from defendants the sum of $8,096.25 plus interest allegedly due on an open account. The corporate defendant did not answer or otherwise resist judgment. The individual defendant answered, denying any indebtedness to plaintiff. He subsequently moved for summary judgment and filed a supporting affidavit averring that: the corporate defendant is a duly organized corporation; the subject matter of this action involves transactions between plaintiff and the corporate defendant; the individual defendant was an employee of the corporate defendant during the times in question but did not place any of the orders to plaintiff which are the sub-

ject matter of this action; another employee placed these orders and received the stock purchased from plaintiff; and the corporate defendant filed corporate tax returns following its creation and during the time these transactions were conducted.

Plaintiff countered by filing its own motion for summary judgment. It supported the motion with an affidavit by Tony Jolly, the officer and manager in charge of its non-profit business, which averred:

> We are engaged in the business of providing jobs for the mentally and physically handicapped persons of Wilkes and adjoining counties. It is my responsibility to provide these jobs for these mentally and physically handicapped persons and by doing so I contact various persons and businesses to get contract work for these persons to engage in. I contacted John Hill, who advised me that he had a business known as United Sleep Products, Inc. and that he needed work to be done for his business. Mr. Hill and I entered into an oral contract under the terms of which [plaintiff] was to manufacture box springs frames for Mr. Hill and also to do so on the order from Mr. Hill. Mr. Hill gave us orders at the Workshop and we filled those orders and billed him accordingly. The amount of the indebtedness of Mr. John Hill at this time is $9,096.25[1] together with interest thereon at the rate of 8% per annum from September 13, 1985, the last day any payment was made.
>
> [Plaintiff], through the undersigned, did all of its business with John Hill and we look to him to pay for the services rendered to him.

The trial court concluded from the pleadings and affidavits that there was no genuine issue as to any material fact with regard to plaintiff's claim against the corporate defendant. Accordingly, it entered summary judgment against the corporate defendant for the amount claimed. The corporate defendant did not appeal.

The trial court also concluded that there was no genuine issue as to any material fact with regard to plaintiff's claim

1. The discrepancy between the sum sought in the complaint and the sum stated in this affidavit is not material to the resolution of this appeal.

against the individual defendant and that summary judgment should be awarded in favor of the individual defendant. Accordingly, it entered summary judgment that plaintiff "have and recover nothing" of the individual defendant, and it dismissed the complaint as to him.

The Court of Appeals, with one judge dissenting, affirmed the summary judgment in favor of the individual defendant. Plaintiff appeals as a matter of right. N.C.G.S. § 7A-30(2) (1986).

"In ruling on a motion for summary judgment, the court does not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact." *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E. 2d 666, 668 (1980), *citing Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). "[S]ummary judgment, by definition, is always based on two underlying questions of law: (1) whether there is a genuine issue of material fact and (2) whether the moving party is entitled to judgment . . . ." *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E. 2d 479, 481 (1987). "When ruling on a motion for summary judgment, 'the court must look at the record in the light most favorable to the party opposing the motion.' " *W. S. Clark & Sons, Inc. v. Union National Bank*, 84 N.C. App. 686, 688, 353 S.E. 2d 439, 440, *disc. rev. denied*, 320 N.C. 177, 358 S.E. 2d 70 (1987) (quoting *Peterson v. Winn-Dixie*, 14 N.C. App. 29, 31, 187 S.E. 2d 487, 488 (1972)).

Applying these well-established principles to the evidence forecast here, we conclude that the factfinder could find that plaintiff has a claim against the individual defendant for the sum alleged. The affidavit by plaintiff's officer and manager contains iterative references which permit a finding that plaintiff contracted with the individual defendant and fulfilled its portion of the bargain. The affidavit states:

> I contacted John Hill who advised me that *he* had a business known as United Sleep Products, Inc. and that *he* needed work to be done for *his* business. *Mr. Hill* and I entered into an oral contract under the terms of which [plaintiff] was to manufacture box springs frames *for Mr. Hill* and also to do so on the order *from Mr. Hill. Mr. Hill gave us orders* . . . and we filled those orders and billed *him* accordingly. The amount of *the indebtedness of Mr. John Hill* . . . is . . . $9,096.25 . . . .

> [Plaintiff] . . . did all of its business *with John Hill* and we look *to him* to pay for the services rendered *to him.*

(Emphasis supplied.) On this evidence we are unable to say as a matter of law that plaintiff contracted solely with the corporate defendant. There is, instead, a genuine issue of material fact as to whether plaintiff manufactured and delivered its product pursuant to a contractual arrangement with the individual defendant. Summary judgment in favor of the individual defendant thus was improper. N.C.G.S. § 1A-1, Rule 56 (1983); *Housing, Inc. v. Weaver*, 37 N.C. App. 284, 246 S.E. 2d 219 (1978), *aff'd per curiam*, 296 N.C. 581, 251 S.E. 2d 457 (1979).

Accordingly, the decision of the Court of Appeals is reversed. The case is remanded to that court with instructions to remand to the trial court for further proceedings on plaintiff's claim against the individual defendant.

Reversed and remanded.

STATE OF NORTH CAROLINA v. DANIEL CORNELIUS MURPHY

No. 325A87

(Filed 9 March 1988)

1. Jury § 6— prospective jurors—refusal to sequester—comments about death penalty

The trial court did not abuse its discretion by refusing to sequester prospective jurors in a first degree murder case because of comments by two prospective jurors concerning the Biblical basis for the death penalty and a comment by a third prospective juror that a life sentence "does not mean that they will be in there for life and they are capable of committing this crime again" where defense counsel's question elicited the remark by the third prospective juror; all three of these prospective jurors were excused and never sat on the case; and defendant did not receive the death penalty but received a life sentence. N.C.G.S. § 15A-1214(j).

2. Homicide § 20.1— photographs and videotape of victim's body—denial of motion to limit

The trial court did not err in denying defendant's motion to limit the State's photographic evidence of a homicide victim's body where this evidence included four photographs depicting all or part of the victim's body and a videotape of the crime scene which included the body; the photographs and

videotape were used to illustrate testimony as to the location and condition of the victim's body; and each photograph showed something different, none was especially inflammatory, and the total amount of photographic evidence was not excessive.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a life sentence imposed by *Griffin, J.*, at the 16 February 1987 Criminal Session of Superior Court, NEW HANOVER County. This Court allowed defendant's motion to bypass the Court of Appeals as to sentences of less than life. Heard in the Supreme Court 8 February 1988.

Defendant was tried for first degree murder, felonious larceny of an automobile, breaking or entering, and larceny of a blank check and car keys. Evidence at trial tended to show that defendant had done yard work and other odd jobs for the 69-year-old victim, Mrs. Davis. On 7 September 1986 he called her at night and asked her to come to his house so he could pay her some money. She refused. The next day someone called and told her to claim a package at the police station. She called the police and told them she believed defendant had made both of these calls.

Over a five hour period on the evening of 10 September, a friend of Mrs. Davis, and later Mrs. Davis' daughter, both called Mrs. Davis and received no answer. The friend went to Mrs. Davis' house, saw her car missing, and entered the unlocked front door. She found Mrs. Davis' body lying face down in a pool of blood. A windowpane in the back door had been broken, with the broken glass found inside the house. A bloody handprint was on the bedroom door. A box of checks beginning with #1480 was found on a bureau in the bedroom.

A pathologist found four wounds on her body, including a blow to the head which fractured her skull and tore her brain.

The next morning Mrs. Davis' car was found on a nearby dirt road. Shoe impressions had been made in the dirt. There was a crumpled check stub numbered 1478 in the front seat. Defendant cashed Mrs. Davis' check #1478 at 3:50 that day. It was made out for $475, not in Mrs. Davis' writing.

Police Captain William F. Henry found defendant at his grandfather's house. Defendant voluntarily went with him to the

police station. Defendant was read his rights, waived them, and allowed the police to take his fingerprints and search his wallet. They found Mrs. Davis' check #1479. It was blank. They arrested him. He confessed to the killing, and allowed his confession to be videotaped. His fingerprints matched those in Mrs. Davis' house and car. His shoes matched the prints near the car.

Defendant was found guilty as charged. He received a separate sentencing hearing for the murder. When the jury could not agree on a recommendation, defendant was sentenced to life imprisonment. He received consecutive sentences of ten years for each of the other crimes.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.

Arnold Smith for defendant appellant.

WEBB, Justice.

[1] In his first assignment of error, defendant contends the trial court erred in denying his motion to sequester the prospective jurors during the selection of the jury. Defendant argues that the denial of this motion prejudiced him because of certain remarks by prospective jurors, to wit, by prospective juror number four who said, "but I believe [the death penalty] has some basis both in historical fact and in the Bible references"; by prospective juror number ten who said, "I agree exactly with what he said, again, the Biblical reference"; and by prospective juror number seven who said, "If someone has been convicted of First Degree Murder and found guilty, a life imprisonment sentence does not mean that they will be in there for life and they are capable of committing this crime again."

N.C.G.S. § 15A-1214(j) provides: "In capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after selection." This statute gives neither party an absolute right to such a procedure. "The decision of whether to grant sequestration and individual *voir dire* of prospective jurors rests in the sound discretion of the trial court, and its ruling will not be disturbed absent a showing of an abuse of discretion." *State v. Barts*, 316

N.C. 666, 678-9, 343 S.E. 2d 828, 837 (1986). Defendant has not shown, nor can we find, any abuse of discretion by the trial court in the present case. It was defense counsel's question that elicited the remark by prospective juror number seven about life imprisonment. This prospective juror and prospective jurors four and ten were excused and never sat on the case. Furthermore, since defendant did receive a life sentence, these remarks could not have been prejudicial to him. Defendant's assignment of error has no merit.

[2] Defendant next contends the trial court erred in denying his motion to limit the State's photographic evidence of the victim's body. This evidence included four photographs depicting all or part of the victim's body, and a videotape of the crime scene which included the body. Defendant argues that "the magnitude of the photographic evidence" depicting the victim's body tended to "repulse the sensibilities and to arouse the sympathy and passion of the jury."

Properly authenticated photographs of a homicide victim may be introduced into evidence even if they are gory, gruesome, horrible or revolting, so long as they are used by a witness to illustrate his testimony and so long as an excessive number of photographs are not used solely to arouse the passions of the jury. *State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987); *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980). In the present case, the photographs and the videotape were used to illustrate testimony as to the location and condition of the victim's body. Each photograph showed something different, none was especially inflammatory, and the total amount of photographic evidence was not excessive. Furthermore, in light of the overwhelming evidence of defendant's guilt, and in light of his receiving a sentence of life imprisonment, the minimum sentence for first degree murder, we cannot find that the admission of this photographic evidence prejudiced defendant. This assignment of error is overruled.

No error.

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

ARMSTRONG v. TOWN OF BEAUFORT

No. 38P88.

Case below: 88 N.C. App. 311.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988.

BARNHILL SANITATION SERVICE v. GASTON COUNTY

No. 655P87.

Case below: 87 N.C. App. 532.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988.

BLACK HORSE RUN PPTY. OWNERS ASSOC. v. KALEEL

No. 58P88.

Case below: 88 N.C. App. 83.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 9 March 1988.

CARDWELL v. FORSYTH COUNTY
ZONING BD. OF ADJUSTMENT

No. 77P88.

Case below: 88 N.C. App. 244.

Petition by defendants (Stone, Ayers and Martin Marietta) for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988. Petition by defendants (County Appellants) for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988.

COLEY v. GARRIS

No. 634P87.

Case below: 87 N.C. App. 493.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988.

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

G & S BUSINESS SERVICES v. FAST FARE

No. 656P87.

Case below: 87 N.C. App. 678.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988.

GREAT AMERICAN INS. CO. v. BAILEY

No. 53P88.

Case below: 88 N.C. App. 311.

Petition by defendants for writ of certiorari to the North Carolina Court of Appeals denied 9 March 1988.

HALL v. CITY OF DURHAM

No. 16PA88.

Case below: 88 N.C. App. 53.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and plaintiffs' cross petition allowed 9 March 1988.

INS. CO. OF NORTH AMERICA v.
AETNA LIFE & CASUALTY CO.

No. 46P88.

Case below: 88 N.C. App. 236.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988.

McLAURIN v. WINSTON-SALEM
SOUTHBOUND RAILWAY CO.

No. 605PA87.

Case below: 87 N.C. App. 413.

Petition by defendant (Southbound) for discretionary review pursuant to G.S. 7A-31 allowed 9 March 1988.

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

NIPLE v. SEAWELL REALTY & INSURANCE CO.

No. 17P88.

Case below: 88 N.C. App. 136.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988.

OLIVER v. OLIVER

No. 625P87.

Case below: 87 N.C. App. 509.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988.

OLYMPIC PRODUCTS CO. v. ROOF SYSTEMS, INC.

No. 69P88.

Case below: 88 N.C. App. 315.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988. Petition by defendants (Roof and Carlisle Corp.) for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988.

PICKARD v. PICKARD

No. 632P87.

Case below: 87 N.C. App. 509.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988.

ROPER v. EDWARDS

No. 3PA88.

Case below: 88 N.C. App. 149.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 9 March 1988.

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

SEAFARE CORP. v. TRENOR CORP.

No. 79P88.

Case below: 88 N.C. App. 404.

Petition by defendants for writ of supersedeas and temporary stay denied 20 February 1988.

SIMPSON v. N.C. LOCAL GOV'T EMPLOYEES' RETIREMENT SYSTEM

No. 2A88.

Case below: 88 N.C. App. 218.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988. Appeal by defendants pursuant to G.S. 7A-30 allowed 9 March 1988. Petition by defendants for writ of supersedeas allowed 9 March 1988.

STATE v. BARNES

No. 630P87.

Case below: 87 N.C. App. 510.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988.

STATE v. BUNDY

No. 616P87.

Case below: 87 N.C. App. 510.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988.

STATE v. JOHNSON

No. 66P88.

Case below: 87 N.C. App. 511.

Petition by defendant for writ of certiorari of the North Carolina Court of Appeals denied 9 March 1988.

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

STATE v. LEONARD

No. 620P87.

Case below: 87 N.C. App. 488.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988. Motion by the State to dismiss appeal for lack of substantial constitutional question allowed 9 March 1988.

STATE v. LITTLEJOHN

No. 45P88.

Case below: 88 N.C. App. 313.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988.

STATE v. WOODS

No. 62P88.

Case below: 85 N.C. App. 350.

Petition by defendants for writ of certiorari to the North Carolina Court of Appeals dismissed 9 March 1988.

TWO WAY RADIO SERVICE v. TWO WAY RADIO OF CAROLINA

No. 29PA88.

Case below: 88 N.C. App. 314.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 9 March 1988.

WATSON v. N.C. REAL ESTATE COMM.

No. 75P88.

Case below: 87 N.C. App. 637.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 22 February 1988. Motion by plaintiff for temporary stay denied 22 February 1988.

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

ZINN v. WALKER

No. 611P87.

Case below: 87 N.C. App. 325.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 March 1988.

PETITIONS TO REHEAR

ABERNATHY v. CONSOLIDATED FREIGHTWAYS CORP.

No. 369PA87.

Case below: 321 N.C. 236.

Petition by plaintiff denied 9 March 1988.

ASSAAD v. THOMAS

No. 615P87.

Case below: 321 N.C. 471.

Petition by plaintiff dismissed 9 March 1988.

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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ACCOUNTS

§ 1. Open Accounts

Summary judgment was improperly entered for the individual defendant in an action on an open account where a genuine issue of material fact was presented as to whether plaintiff manufactured and delivered its product pursuant to a contract with the individual defendant or whether plaintiff contracted solely with the corporate defendant. *Wilkes County Vocational Workshop v. United Sleep*, 735.

APPEAL AND ERROR

§ 64. Affirmance

Where one member of the Supreme Court did not participate and the remaining six justices are equally divided, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *Hochheiser v. N.C. Dept. of Transportation*, 117; *Campbell v. Pitt County Memorial Hospital*, 260.

ARREST AND BAIL

§ 11.2. Liabilities on Bail Bonds; Breach of Appearance Bond by Defendant

The trial judge should have allowed intervenor defendants' motions to set aside a judgment and dismiss an action where plaintiffs were sureties on an appearance bond who had made no payment on the bond. *Harshaw v. Mustafa*, 288.

ASSAULT AND BATTERY

§ 14.4. Sufficiency of Evidence of Assault with Deadly Weapon with Intent to Kill or Inflicting Serious Injury where Weapon Is a Firearm

The evidence of assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death was sufficient. *S. v. James*, 676.

AUTOMOBILES AND OTHER VEHICLES

§ 94.7. Contributory Negligence of Passenger; Knowledge that Driver Is Intoxicated

It was not necessary to reach the question of whether the trial judge's instruction on contributory negligence was erroneous where the evidence of contributory negligence was so overwhelming as to compel the jury's conclusion. *Watkins v. Hellings*, 78.

BILLS OF DISCOVERY

§ 6. Compelling Discovery; Sanctions Available

The trial court properly denied defendant's pretrial discovery motion to compel the State to give him a list of the witnesses the State intended to call. *S. v. Holden*, 125.

The trial court did not abuse its discretion in refusing to allow a composite to be introduced into evidence as a sanction for the State's failure to disclose the composite pursuant to defendant's discovery motion rather than allowing defendant's motion for a mistrial when a reference was made to the composite. *S. v. Browning*, 535.

The trial court did not err in refusing to order disclosure under G.S. 15A-903(f)(2) of a police memorandum purportedly containing a prior inconsistent

of the offense and did not attribute oral statements to any of the three witnesses mentioned therein. *S. v. Vandiver*, 570.

The trial court did not err in a prosecution for murder, robbery, and assault by receiving into evidence photographs of a victim which had not been furnished to defendant upon his motion for discovery. *S. v. James*, 676.

The prosecutor in a first degree murder prosecution did not intentionally fail to inform defense counsel of material which could have been used to impeach the testimony of a State's witness. *S. v. Nichols*, 616.

§ 31. Affording the Accused the Basic Essentials for Defense

The trial court in a murder and attempted rape case did not err in denying defendant's motion that the State provide him with a ballistics expert and funds to hire a private investigator. *S. v. Holden*, 125.

Defendant did not make a sufficient showing that his mental condition was likely to be a significant factor during the sentencing phase of his first degree murder trial so as to require the trial court to allow defendant's motion for funds to hire a private psychiatrist or psychologist to assist him in presenting evidence concerning mitigating circumstances. *S. v. Lloyd*, 301.

The trial court erred by denying defendant's motion for a court appointed psychiatrist where the evidence was sufficient to show that defendant had a particularized need for the assistance of a psychiatrist in the preparation of his defense. *S. v. Moore*, 327.

The appointment of a psychiatrist to determine defendant's competency to stand trial did not in effect provide defendant with the assistance of a psychiatrist for the purpose of assisting in his defense. *Ibid.*

The trial court erred by denying defendant's motion for a fingerprint expert where defendant made the requisite threshold showing of specific necessity by showing that absent a fingerprint expert he would be unable to assess adequately the State's expert's conclusion that defendant's palm print was found at the scene of the crime. *Ibid.*

§ 34. Double Jeopardy

Defendant's convictions for first degree kidnapping and attempted first degree rape were remanded for arrest of judgment on one of the convictions. *S. v. Fisher*, 19.

The trial court did not err by denying defendant's motion to dismiss on a plea of former jeopardy where defendant had made the motion for a mistrial at his former trial. *S. v. Powell*, 364.

§ 48. Effective Assistance of Counsel

Defendant was not denied the effective assistance of counsel because defense counsel, during his opening statement to the jury, placed before the jury evidence of other pending charges against defendant when he incorrectly stated that defendant had no other pending charges against him for breaking and entering and was contradicted by the prosecutor. *S. v. Lewis*, 42.

§ 50. Speedy Trial Generally

The defendant in a prosecution for first degree sexual offense was not deprived of his constitutional right to a speedy trial by a 427 day delay between indictment and trial. *S. v. Kivett*, 404.

CONSTITUTIONAL LAW — Continued

§ 56. Trial by Jury Generally

The trial court in a murder prosecution did not deprive defendant of his Sixth Amendment right to an impartial jury by failing to allow an inquiry into the fitness of a juror who participated in the guilt phase of the case where a mistrial was declared during the penalty phase of the trial due to incapacity of the juror. *S. v. Nichols*, 616.

§ 60. Racial Discrimination in Jury Selection Process

Defendant failed to present an adequate record on appeal from which to determine whether jurors were improperly excused by peremptory challenges on the basis of race in a first degree murder and armed robbery prosecution. *S. v. Mitchell*, 650.

§ 63. Exclusion from Jury for Opposition to Capital Punishment

The trial court did not err in a prosecution for murder, kidnapping and discharging a firearm into an occupied motor vehicle by death qualifying the jury. *S. v. Strickland*, 31.

The court's exclusion for cause of certain jurors who expressed an unwillingness to impose the death penalty did not produce a jury biased in favor of conviction in violation of defendant's constitutional rights. *S. v. Green*, 594.

§ 80. Death Sentences

The N.C. death penalty statute is not unconstitutional on grounds that it is applied in a discriminatory manner, is vague and overbroad, and involves subjective discretion. *S. v. Green*, 594.

CRIMINAL LAW

§ 9.3. Determination of Guilt as Principal in Second Degree

The State's evidence was sufficient to support defendant's conviction for armed robbery of a highway patrolman's revolver under a theory of acting in concert although defendant's companion actually took the revolver from the patrolman. *S. v. Bray*, 663.

§ 23.3. Acceptance of Guilty Plea; Requirement that Plea Be Voluntary and Made with Understanding

The trial court adequately explained the two theories of first degree murder under which defendant was pleading guilty, defendant's responses indicated that he understood the nature of the plea and the possible consequences, and there was sufficient evidence to support a plea of guilty. *S. v. Barts*, 170.

§ 26.3. Plea of Former Jeopardy; Same Offense

The trial court did not err in a prosecution for first degree sexual offense by finding that no prior dismissal had been taken where the district attorney had told the Clerk he would file a written dismissal later in the week but had not done so. *S. v. Miller*, 445.

§ 26.5. Former Jeopardy; Same Acts Violating Different Statutes

Where defendant was convicted of first degree kidnapping, first degree rape and first degree sexual offense, and it appears that the jury must have relied on the sexual offense or the rape in order to find the sexual assault element of first degree kidnapping, the trial court could avoid a multiple punishment problem by arresting judgment on the first degree rape case. *S. v. Freeland*, 115.

CRIMINAL LAW — Continued

Defendant was not placed in double jeopardy by being convicted and sentenced for both first degree rape and taking indecent liberties with a minor based on the same incident. *S. v. Rhodes*, 102.

§ 33.4. Evidence Tending to Excite Sympathy

Assuming the court in a prosecution for the first degree murder of a highway patrolman erred in allowing the patrolman's parents and fiancee to identify themselves in the courtroom and in allowing the patrolman's mother to testify when she last saw her son alive, where her son was buried, and whether her son was engaged, the error was harmless in light of defendant's admission that he shot the patrolman. *S. v. Bray*, 663.

§ 34.4. Admissibility of Evidence of other Offenses

The trial court did not err in a prosecution for crime against nature, taking indecent liberties with a child, and first degree sexual offense by admitting into evidence a videotape and magazines found in defendant's home. *S. v. Rael*, 528.

§ 34.5. Admissibility of Evidence of other Offenses to Show Identity of Defendant

In a prosecution for the first degree murder of three persons in a tavern, evidence concerning an incident in which defendant pistol-whipped one patron and shot a second patron in another tavern two weeks earlier was admissible to prove defendant's identity as the perpetrator of the murders in question. *S. v. Green*, 594.

§ 34.7. Admissibility of Evidence of other Offenses to Show Knowledge or Intent

The trial court did not err in a prosecution for first degree sexual offense by admitting evidence of a separate offense committed by defendant against the same victim on the day after he committed the offense for which he stood trial. *S. v. Miller*, 445.

The trial court did not err in a prosecution of defendant for the first degree rape of his twelve-year-old stepdaughter by admitting testimony from defendant's wife concerning an incident with her eight-year-old female cousin. *S. v. Boyd*, 574.

Evidence that defendant and a companion assaulted a jailer with a pipe to escape from jail in Arkansas and that they broke into an Arkansas home and stole a rifle and a truck which they drove to North Carolina was admissible to show intent and motive for killing a highway patrolman in North Carolina. *S. v. Bray*, 663.

§ 34.8. Admissibility of Evidence of other Offenses to Show Modus Operandi

Testimony by a witness that defendant had attempted to commit a sexual offense against her some ten weeks after the sexual offense for which defendant was on trial was admissible to prove defendant's modus operandi, motive, intent, preparation and plan. *S. v. Bagley*, 201.

§ 43. Photographs

The trial court did not err in a prosecution for murder, robbery, and assault by admitting for illustrative purposes a photograph of the victims taken more than one year before the crimes were committed. *S. v. James*, 676.

§ 43.2. Photographs or Sketches; Authentication and Verification

The trial court in a prosecution for first degree murder, assault, and robbery did not err by admitting for illustrative purposes a sketch of the crime area prepared by someone other than the testifying witness. *S. v. James*, 676.

CRIMINAL LAW — Continued

§ 46.1. Flight of Defendant as Implied Admission; Sufficiency of Evidence

There was sufficient evidence in this first degree murder case to support the trial court's instruction on flight as evidence of guilt. *S. v. Green*, 594.

§ 50.2. Opinion of Nonexpert

An officer's testimony that after viewing a composite he formed an opinion that it was a very similar likeness of defendant and that he then sought out the two child victims and obtained from them a positive identification of defendant as the person who assaulted them did not constitute an improper expression of a lay opinion in violation of Rule of Evidence 701 or an impermissible opinion about the credibility of the victim who helped prepare the composite. *S. v. Browning*, 535.

§ 63. Evidence as to Sanity of Defendant

The trial court did not err in a prosecution for first degree murder by allowing two witnesses called by the State to give their opinions as to defendant's sanity at the time of the killing. *S. v. Davis*, 52.

The Supreme Court declined the defendant's invitation to change the presumption of sanity or the rule that requires a defendant to carry the burden of proving his insanity. *Ibid.*

The Supreme Court declined to replace the *M'Naghten* test for insanity with the American Law Institute standard. *Ibid.*

The trial court did not err in a prosecution for murder, kidnapping and discharging a firearm into an occupied vehicle by allowing the prosecutor to ask defendant's companion on the night of the shooting whether defendant was in his right mind and knew the difference between right and wrong or in allowing the witness's answers. *S. v. Strickland*, 31.

The trial court did not err in a prosecution for murder, kidnapping, and discharging a weapon into an occupied vehicle by not charging the jury on the defense of insanity. *Ibid.*

§ 63.1. Sanity of Defendant; Nature and Competency of Evidence

The trial court did not err in a prosecution for murder, kidnapping and discharging a firearm into an occupied vehicle by allowing the State to ask defendant's estranged wife whether defendant knew the difference between right and wrong on the date of the killing. *S. v. Strickland*, 31.

§ 64. Evidence as to Intoxication

The trial court did not err in a prosecution for murder, kidnapping and discharging a firearm into an occupied vehicle by allowing the State to ask defendant's companion whether defendant was intoxicated on the night of the murder. *S. v. Strickland*, 31.

§ 65. Evidence as to Emotional State

In a prosecution for murder, kidnapping, and discharging a firearm into an occupied vehicle, testimony by defendant's companion that he believed defendant's statement that defendant would get him next if he told anybody was not prejudicial in context. *S. v. Strickland*, 31.

§ 66.9. Photographic Identification of Defendant; Suggestiveness of Procedure

The trial court in a prosecution for murder, rape, and kidnapping did not err by concluding that the pretrial identification procedures through which a witness identified defendant were not so unnecessarily suggestive and conducive to ir-

reparable mistaken identification as to violate defendant's right to due process. *S. v. Fisher*, 19.

§ 66.14. Independent Origin of In-court Identification of Defendant as Curing Improper Pretrial Identification

The trial court in a prosecution for first degree rape, first degree sex offense, and crime against nature did not err by finding that the victim's in-court identification of defendant was of independent origin and untainted by illegal pretrial procedures. *S. v. Powell*, 364.

§ 73. Hearsay Testimony in General

Statements of an accomplice were properly excludable as hearsay under common law rules of evidence in a first degree murder prosecution. *S. v. Barts*, 170.

§ 73.1. Admission of Hearsay Statement

The trial court did not err in a prosecution for first degree burglary and armed robbery by granting the State's motion in limine prohibiting defendant from eliciting evidence of certain out-of-court exculpatory statements made by defendant until he himself testified. *S. v. Maness*, 454.

§ 73.2. Statements not within Hearsay Rule

An officer's testimony that he received information that the victim had been shot was not inadmissible hearsay. *S. v. Holden*, 125.

An SBI agent's testimony that a friend of defendant's wife told him that he observed defendant's wife come out of the house with something that appeared to be a gun was not inadmissible hearsay. *Ibid.*

The trial court did not err in a first degree murder prosecution by introducing the statement of an absent witness. *S. v. Nichols*, 616.

§ 73.4. Spontaneous Utterances

Statements made by a burglary and rape victim when an officer arrived at her apartment after her assailant had fled and asked her if she could tell him what happened were admissible under the excited utterance exception to the hearsay rule. *S. v. Murphy*, 72.

Even if statements made by defendant as he emerged from the crime scene that he had found the victim's body on the floor and turned it over were admissible as excited utterances, the exclusion of such evidence was not prejudicial error. *S. v. Lloyd*, 301.

§ 75.4. Confessions Obtained in Absence of Counsel

The trial court properly denied defendant's motion to suppress a statement he made to an SBI agent. *S. v. Holden*, 125.

Although defendant's confession was litigated at a hearing on his motion to suppress and was determined to be admissible, defendant retained the right to introduce evidence relevant to its weight or credibility. *S. v. Moore*, 327.

§ 75.10. Confession; Waiver of Constitutional Rights Generally

The trial court did not err in a prosecution for murder, robbery, and assault by denying defendant's motion to suppress his inculpatory statement. *S. v. James*, 676.

§ 80. Records

A federal firearms form which was filled out by defendant and a salesman at the time defendant bought the murder weapon was admissible under the business records exception to the hearsay rule. *S. v. Holden*, 125.

CRIMINAL LAW — Continued

§ 84. Evidence Obtained by Unlawful Means

The trial court in a prosecution for first degree burglary and armed robbery properly refused to exclude testimony regarding stolen property, despite suppressing testimony of the arresting officers as to the property, because none of the testimony at issue could be traced to that seizure. *S. v. Maness*, 454.

§ 85.1. Character Evidence; What Questions and Evidence Are Admissible

Under G.S. § 8C-1, Rule 404(a)(1), an accused must tailor evidence of good character to a particular trait relevant to an issue in the case. *S. v. Squire*, 541.

The trial court erred in a prosecution for first degree murder in which defendant claimed self-defense by precluding evidence of defendant's character traits other than peacefulness and truthfulness. *Ibid.*

§ 85.3. Character Evidence; State's Cross-examination of Defendant

The trial court in a first degree murder prosecution did not commit plain error by allowing the district attorney to cross-examine defendant about the various names by which she had been known in a way which implied that she had been married four times or to elicit testimony that defendant had spent the night with the deceased on their first date. *S. v. Childress*, 226.

§ 86.4. Impeachment of Defendant; Prior Arrests, Indictments, and Accusations of Crime

The trial court erred in a murder prosecution by denying defendant's motion in limine to exclude evidence that she had been involved in other killings. *S. v. Lamb*, 633.

§ 86.5. Impeachment of Defendant; Particular Questions and Evidence as to Specific Acts

Cross-examination of defendant regarding a sexual offense which occurred ten weeks after the offense for which defendant was on trial was not improper under Rule of Evidence 608(b). *S. v. Bagley*, 201.

§ 87. Direct Examination of Witnesses

Witnesses in a homicide case did not improperly testify to assumptions. *S. v. Holden*, 125.

§ 89.1. Credibility of Witnesses; Evidence of Character Bearing on Credibility

There was no error in a prosecution for first degree sex offense from the trial court's refusal to allow defendant to cross-examine the victim's mother about whether she concealed income in order to receive more government assistance where defendant failed to have the witness answer for the record. *S. v. Miller*, 445.

§ 89.8. Impeachment of Witnesses; Promise of Hope of Payment, Leniency or other Reward

The trial court did not err in a prosecution for first degree sex offense by not permitting defendant to cross-examine the victim's mother about her motivation for testifying. *S. v. Miller*, 445.

§ 89.10. Impeachment of Witnesses; Prior Criminal Conduct

The trial court in a prosecution for kidnapping, murder, and discharging a firearm into an occupied vehicle did not err by refusing to allow defendant to cross-examine a witness about assaults the witness had allegedly committed. *S. v. Strickland*, 31.

CRIMINAL LAW — Continued

§ 91.12. Speedy Trial; Periods Excluded from Time Computation; Pretrial Motions

Defendant's speedy trial rights were not violated by the passage of 224 days between indictment and trial. *S. v. Miller*, 445.

§ 91.14. Speedy Trial; Periods Excluded from Time Computation; Continuance Granted

There was no error in a prosecution for first degree sexual offense where 427 days elapsed from defendant's indictment until trial. *S. v. Kivett*, 404.

§ 91.16. Speedy Trial; Other Time Periods Excluded from Time Computation

The trial court erred in a prosecution for first degree sex offense by excluding from the speedy trial computation a twenty-one day period from the date of indictment until the date the next term of superior court commenced. *S. v. Kivett*, 404.

The trial court did not abuse its discretion in a murder prosecution by denying defendant's motion to dismiss for speedy trial violations where 342 days between dismissal of the first indictment and reindictment were excluded. *S. v. Lamb*, 633.

§ 92.1. Consolidation of Charges against Multiple Defendants; Consolidation Held Proper, Same Offense

The trial court did not err in granting the State's motion for joinder and in denying defendant's motion to sever his first degree murder trial from that of his female codefendant on the ground that the codefendant's testimony was so antagonistic to defendant's plea of not guilty as to prejudice his right to a fair trial. *S. v. Green*, 594.

§ 92.4. Consolidation of Multiple Charges against Same Defendant Held Proper

The trial court did not err by granting the State's motion to consolidate charges of first degree burglary and armed robbery for trial where the evidence showed a common scheme. *S. v. Maness*, 454.

§ 97.1. No Abuse of Discretion in Permitting Additional Evidence

The trial court did not abuse its discretion in permitting a State's witness to retake the stand after the jury had begun its deliberations and to give further testimony concerning the date of a photographic identification even if the court was not aware that the date given by the witness upon recall was inconsistent with the date given in his prior testimony. *S. v. Riggins*, 107.

§ 98.2. Sequestration of Witnesses

The trial court did not err in the denial of defendant's motion to sequester the State's witnesses. *S. v. Holden*, 125.

§ 99.3. Court's Expression of Opinion; Remarks in Connection with Admission of Evidence

The trial judge did not express an opinion when he permitted a recalled witness to present new testimony about the date of a photographic identification without informing the jury that the testimony was different from the witness's earlier sworn testimony. *S. v. Riggins*, 107.

§ 99.7. Conduct of the Court; Admonitions to Witnesses

The trial court and the district attorney in a second degree murder prosecution did not improperly stifle the free presentation of testimony by warning a witness that she could be subject to perjury and contempt of court. *S. v. Lamb*, 633.

CRIMINAL LAW — Continued

§ 101.4. Conduct Affecting or During Deliberation of Jury

The trial judge properly exercised his discretion in compliance with G.S. 15A-1233(a) when he denied a jury request to review a transcript of the testimony. *S. v. Lewis*, 42.

§ 102. Argument of Counsel

The trial court's refusal to permit both counsel for defendant to address the jury during defendant's final arguments in the guilt-innocence and sentencing phases of a capital case constituted prejudicial error per se in both phases. *S. v. Mitchell*, 650.

§ 102.6. Particular Comments in Jury Argument

The prosecutor's jury argument in a murder and attempted rape case that "his wife came over to see him in jail and don't you know what he told her is to get that gun and hide that gun" was a reasonable inference from the evidence. *S. v. Holden*, 125.

Statements by the prosecutor in his jury argument to the effect that there are guilty people walking the streets of this country every day because the government cannot collect enough evidence to try them for crimes were not improper when considered in context. *Ibid.*

The prosecutor's jury arguments in a murder and rape case that "if he gets out there he's going to do it again" and "How many more women are we going to see this man rape before we say enough is enough?" were not so grossly improper as to require the trial judge to correct the arguments ex mero motu. *Ibid.*

The prosecutor's jury arguments that "The victim didn't have an opportunity to have [defendant's attorneys] represent her" on the date of the crimes and that "she cries out from the grave for justice" were not improper. *Ibid.*

The prosecutor's jury argument that "I wish I had a quarter for every defendant that . . . says after he got in jail he found the Lord and now he's got religion" was not so grossly improper as to require correction ex mero motu. *Ibid.*

The prosecutor's jury argument in this first degree murder case did not improperly appeal to the jury to decide the case based on community sentiment but appears to urge that cases should be decided on the evidence and the rule of law. *S. v. Hogan*, 719.

§ 102.12. Jury Argument; Comment on Sentence or Punishment

The prosecutor's jury argument that "he should not be out there on the street and given the opportunity to commit this crime again" and that "the only way you can be sure . . . is if you give him the death penalty" was not improper. *S. v. Holden*, 125.

The trial court properly refused to permit defense counsel in his jury argument to describe the execution procedure defendant would encounter if he were sentenced to death. *Ibid.*

The trial court in a capital case properly sustained the State's objection to defense counsel's jury argument asking each juror individually to spare defendant's life. *Ibid.*

The trial court did not err in prohibiting defendant from arguing to the jury in a capital case that a life sentence would be imposed if the jury could not agree upon a sentence. *S. v. Lloyd*, 301.

CRIMINAL LAW -- Continued

§ 106.2. Sufficiency of Evidence where there Is Circumstantial Evidence

The evidence in a first degree murder prosecution was sufficient even though it required an inference on an inference. *S. v. Childress*, 226.

§ 111.1. Particular Miscellaneous Instructions

The trial court misstated the law in its instruction to defendant concerning his decision as to whether to testify when the court stated that the prosecution "could, on good faith, ask you about prior misconduct, whether it resulted in convictions in court if they had some good faith reason to ask those questions, and you would be under oath to answer the questions truthfully," but such error was harmless beyond a reasonable doubt. *S. v. Autry*, 392.

§ 113. Instructions; Statement of Evidence and Application of Law Thereto

The trial judge did not err in a prosecution for first degree burglary and armed robbery by not instructing the jury on a lack of evidence of defendant's prior criminal activity or convictions. *S. v. Maness*, 454.

§ 113.5. Charge on Defense of Alibi

The trial court in a rape and sexual offense case did not deprive defendant of his alibi defense by instructing the jury to return verdicts of guilty if it found that defendant committed the crimes charged "on the date alleged" and by refusing to include the specific date in its mandate to the jury. *S. v. Stover*, 580.

§ 113.6. Charge where there Are Several Defendants

The trial court erred in the joint trial of two defendants for first degree murder and first degree rape by giving instructions readily susceptible to being interpreted as instructions to convict each defendant if the jury found that the other had committed the crimes charged. *S. v. McCollum*, 557.

§ 114.2. Instructions; No Expression of Opinion in Statement of Evidence or Contentions

The trial court in a first degree murder prosecution did not commit plain error or express an opinion in its instructions by reciting the evidence and the State's contentions. *S. v. Childress*, 226.

§ 115. Instructions on Lesser Degrees of Crime

The trial court did not err in a prosecution for burglary and armed robbery by not submitting to the jury lesser included offenses. *S. v. Maness*, 454.

§ 117. Charge on Credibility of Witnesses

There was no prejudice in a murder prosecution where the trial court agreed to give defendant's requested instruction that the jury could consider witnesses' pretrial conflicting statements in determining truthfulness and actually instructed the jury to consider consistent statements in determining truthfulness. *S. v. Lamb*, 633.

§ 117.4. Charge on Credibility of State's Witnesses

There was no prejudicial error in a prosecution arising from a burglary, rape, and kidnapping where the court did not instruct the jury prior to the testimony of three State's witnesses that the witnesses were testifying under grants of immunity. *S. v. McLaughlin*, 267.

CRIMINAL LAW — Continued

§ 122.2. Additional Instructions Upon Jury's Failure to Reach Verdict

The trial court's inquiry into the numerical division of the jury after the jury reported that it was deadlocked was not coercive in the totality of the circumstances, and the court's additional instructions were proper. *S. v. Bussey*, 92.

When informed of the numerical division of the jury, the court's response, "You're making progress," was not error when considered in the context of the court's previous lengthy additional instructions. *Ibid.*

The trial court did not err in a murder prosecution by inquiring into the numerical division of the jury or in its instructions to the jury about deliberating toward a verdict. *S. v. Forrest*, 186.

§ 128.1. Mistrial

The trial court did not abuse its discretion in the prosecution of defendant for the first degree rape of his stepdaughter by denying his motion for a mistrial after defendant's wife testified that her husband had been brought to court before for rape. *S. v. Boyd*, 574.

§ 128.2. Particular Grounds for Mistrial

The trial court did not err in denying defendant's motion for a mistrial made on the ground of possible juror intimidation after he learned that a spectator who had been subpoenaed by defendant but did not testify had been excluded from the courtroom by the trial judge because he was glaring at the jury foreperson. *S. v. Stover*, 580.

The trial court in a felony murder case did not err in denying defendant's motion for a mistrial when a detective testified that he had gotten information about an unspecified previous charge against defendant in Maryland although such testimony was improper under Rule of Evidence 404(b). *S. v. Hogan*, 719.

§ 134.4. Youthful Offenders

The committed youthful offender statute does not apply to a conviction or plea of guilty to a first degree sexual offense for which the punishment is mandatory life imprisonment. *S. v. Browning*, 535.

§ 135.3. Exclusion of Veniremen Opposed to Death Penalty

Death qualification of the jury did not violate the U. S. or N. C. Constitutions. *S. v. Holden*, 125.

The trial court properly denied defendant's motion in a first degree murder case for two separate jury trials to decide the issues of guilt or innocence and punishment. *Ibid.*

The trial court did not err in excusing a juror for cause and substituting an alternate juror after the completion of the guilt phase of a first degree murder case and prior to the sentencing phase where the court learned after the guilt phase was completed that the juror had changed her mind and could not vote for the death penalty under any circumstances. *Ibid.*

The trial court in a capital case properly excluded for cause two prospective jurors who indicated that they could not follow the law or instructions of the trial court if to do so would result in a death sentence. *S. v. Lloyd*, 301.

§ 135.4. Capital Cases; Separate Sentencing Proceeding

The statute authorizing the death penalty is not unconstitutional because the jury has discretion whether to impose it. *S. v. Holden*, 125.

CRIMINAL LAW — Continued

Defendant was not prejudiced by the prosecutor's jury argument in a murder and attempted rape case that evidence that defendant gave CPR to a victim while working with a rescue squad was really an aggravating rather than a mitigating factor because defendant used his position as a member of the rescue squad to commit a rape. *Ibid.*

The N.C. death penalty statute is not unconstitutional on grounds that it is applied in a discriminatory manner, is vague and overbroad, and involves subjective discretion. *S. v. Green*, 594.

§ 135.6. Capital Cases; Separate Sentencing Proceeding; Competency of Evidence

Evidence of defendant's prior conviction was properly admitted during the sentencing phase of a first degree murder case to prove the aggravating circumstance that defendant had previously been convicted of a felony involving the use or threat of violence to the person. *S. v. Holden*, 125.

Testimony by five witnesses concerning prior criminal activity by defendant (two rapes and three assaults) was properly admitted to rebut evidence offered by defendant to prove the mitigating factor that he had no significant history of prior criminal activity. *Ibid.*

Defendant was not prejudiced by the trial court's exclusion of a psychological evaluation concerning defendant's competency to stand trial during the penalty phase of a first degree murder case. *S. v. Lloyd*, 301.

§ 135.7. Capital Cases; Separate Sentencing Proceeding; Instructions

The trial court in a capital case properly refused to instruct the jury that the court would impose a life sentence if the jury could not unanimously agree on a recommendation of punishment within a reasonable time. *S. v. Holden*, 125.

The trial court properly refused to give defendant's requested instruction that "if you find that the aggravating circumstance is sufficiently substantial to call for the death penalty in light of the mitigating circumstances, you must unanimously and beyond a reasonable doubt find that death is the appropriate punishment in this case for this defendant." *Ibid.*

The trial court properly refused to give defendant's requested instruction that the appropriate sentence for the "typical" or "normal" cases of premeditated and deliberated murder is life imprisonment. *Ibid.*

§ 135.8. Capital Cases; Separate Sentencing Proceeding; Aggravating Circumstances

A plea of no contest followed by a final judgment imposing a sentence is a conviction within the meaning of the previous conviction of a felony involving the use or threat of violence to the person aggravating circumstance. *S. v. Holden*, 125.

Statements made by defendant were sufficient evidence for the trial court to submit the aggravating circumstance as to whether a murder was committed for the purpose of avoiding or preventing a lawful arrest. *Ibid.*

In a prosecution for three first degree murders committed in a tavern, the State presented sufficient evidence that one victim was killed to eliminate him as a witness to support the court's submission of the aggravating factor that such murder was committed for the purpose of avoiding or preventing a lawful arrest. *S. v. Green*, 594.

The trial court's findings of witness elimination and violent course of conduct aggravating factors for a first degree murder were not based on the same evidence. *Ibid.*

CRIMINAL LAW — Continued

The State was not limited to the introduction of the court record of defendant's prior armed robbery conviction in establishing the aggravating circumstance that defendant had previously been convicted of a felony involving the use or threat of violence to the person, and the State was properly permitted to present the testimony of a former police officer who had investigated the armed robbery. *Ibid.*

There was sufficient evidence to support the trial court's submission of the especially heinous, atrocious or cruel aggravating circumstance in a first degree murder case. *Ibid.*

§ 135.9. Capital Cases; Separate Sentencing Proceeding; Mitigating Circumstances

The trial court did not err in refusing to give peremptory instructions on the fifteen mitigating factors placed before the jury in a first degree murder case. *S. v. Holden*, 125.

The trial court properly refused to instruct that the burden was on the State to prove beyond a reasonable doubt that a mitigating circumstance does not exist. *Ibid.*

The trial court properly refused to instruct the jury that "no single juror is precluded from considering anything in mitigation in the ultimate balancing process, even if that mitigating factor was not considered or agreed upon by all 12 of you unanimously." *Ibid.*

The trial court properly refused to give defendant's requested instruction that "Evidence that the defendant's mental or emotional development was significantly below that of persons of his chronological age is a mitigating circumstance entitled to great weight." *Ibid.*

The trial court in a first degree murder case did not err in submitting the statutory mitigating circumstance of "no significant history of prior criminal activity" where defendant had been convicted of two felonies almost twenty years before and had been convicted only of seven alcohol-related misdemeanors in the last ten years. *S. v. Lloyd*, 301.

The trial court in a first degree murder case did not err in refusing to submit the nonstatutory mitigating circumstances that defendant had no prior record of capital offenses and that defendant had not been convicted of a felony in the past ten years where the court submitted the "no significant history of prior criminal activity" mitigating circumstance and permitted the jury to consider any other circumstances arising from the evidence which the jury deemed to have mitigating value. *Ibid.*

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 or requiring jurors to reach unanimous decisions regarding the presence of mitigating circumstances. *Ibid.*

The "especially heinous, atrocious, or cruel" aggravating circumstance is neither unconstitutionally vague nor overbroad. *Ibid.*

§ 135.10. Capital Cases; Separate Sentencing Proceeding; Review

A sentence of death imposed on a defendant who killed his victim after sexually assaulting her was not excessive or disproportionate. *S. v. Holden*, 125.

A sentence of death imposed upon a defendant convicted of first degree murder on the basis of premeditation and deliberation and of robbery was not excessive or disproportionate to the penalty imposed in similar cases. *S. v. Lloyd*, 301.

CRIMINAL LAW — Continued

Sentences of death imposed on defendant for three first degree murders committed with premeditation and deliberation were not disproportionate to the punishment imposed in similar cases. *S. v. Green*, 594.

§ 138.14. Fair Sentencing Act; Consideration of Aggravating and Mitigating Factors in General

The trial court did not abuse its discretion in concluding that the aggravating factor of prior crimes outweighed the mitigating circumstances that defendant voluntarily surrendered to the jurisdiction of the court and that the relationship between the victim and defendant was otherwise extenuating and in imposing a sentence of life imprisonment for second degree murder. *S. v. Canty*, 520.

§ 138.21. Fair Sentencing Act; Aggravating Factor of Especially Heinous, Atrocious, or Cruel Offense

The evidence showed excessive brutality and psychological suffering not normally present in second degree murders so as to support the trial court's finding that a murder was especially heinous, atrocious, or cruel. *S. v. Mancuso*, 464; *S. v. Marley*, 415.

A pretrial order rejecting the especially heinous, atrocious or cruel aggravating factor as a basis for imposing the death penalty for a murder was not binding upon the trial judge in a sentencing hearing after defendant was convicted of second degree murder. *S. v. Mancuso*, 464.

§ 138.24. Fair Sentencing Act; Aggravating Circumstance of Physical Infirmity of Victim

The trial court properly found as an aggravating factor for second degree murder that "the victim was physically infirm because he had an alcohol concentration of .29%." *S. v. Drayton*, 512.

§ 138.27. Fair Sentencing Act; Aggravating Factor of Taking Advantage of Position of Trust or Confidence

The trial court did not err in sentencing defendant on a plea of guilty to second degree murder by finding as an aggravating factor that defendant took advantage of a position of trust or confidence where the victim was only three months old. *S. v. Holden*, 689.

§ 138.29. Fair Sentencing Act; Other Aggravating Factors

The State's evidence during the sentencing hearing was sufficient to support the trial court's finding of premeditation and deliberation as an aggravating factor for a second degree murder to which defendant pled guilty. *S. v. Brewer*, 284.

Where a defendant is tried for first degree murder upon the theory of premeditation and deliberation and is found by the jury to be guilty of second degree murder, the trial court is precluded from finding as an aggravating factor for second degree murder that defendant acted with premeditation and deliberation. *S. v. Marley*, 415.

Perjury may no longer constitute a nonstatutory aggravating factor in North Carolina. *S. v. Vandiver*, 570.

§ 138.32. Fair Sentencing Act; Mitigating Factor of Duress

Evidence in a murder case that the victim had stabbed defendant forty-eight hours before defendant shot the victim did not require the trial court to find the statutory mitigating circumstance that defendant acted under duress. *S. v. Canty*, 520.

CRIMINAL LAW — Continued

The trial court did not err in a prosecution for second degree murder of an infant by her mother by failing to find the statutory mitigating factor that defendant committed the offense under duress, coercion, threat or compulsion. *S. v. Holden*, 689.

§ 138.34. Fair Sentencing Act; Mitigating Factor of Mental or Physical Condition

The trial judge did not abuse his discretion when sentencing defendant for burglary and robbery by failing to find that defendant's alcoholism or drug abuse lessened his culpability for the offenses. *S. v. Barts*, 170.

The trial court was not required to find as a mitigating circumstance for second degree murder that defendant's limited mental capacity significantly reduced his culpability for the offense where the evidence was uncontradicted that defendant had a limited mental capacity but was in conflict as to whether this limited capacity significantly reduced defendant's culpability. *S. v. Smith*, 290.

The trial court did not err in sentencing defendant for the second degree murder of her own child by failing to find in mitigation that defendant suffered from a physical condition significantly reducing her culpability. *S. v. Holden*, 689.

§ 138.35. Fair Sentencing Act; Mitigating Factor of Immaturity or Limited Mental Capacity

The trial judge did not abuse his discretion when sentencing defendant for second degree murder by failing to find the statutory mitigating factor that defendant's immaturity or limited mental capacity significantly reduced her culpability. *S. v. Holden*, 689.

§ 138.38. Fair Sentencing Act; Mitigating Factor of Strong Provocation

Evidence that the victim had stabbed defendant forty-eight hours earlier, that the victim had threatened defendant's life and refused to talk with him about the stabbing incident eight hours earlier, and that defendant believed the victim was armed at the time defendant shot him did not require the trial court to find the mitigating circumstance that defendant acted under strong provocation. *S. v. Canty*, 520.

§ 138.40. Fair Sentencing Act; Mitigating Factor of Acknowledgment of Wrongdoing

The trial court did not abuse its discretion when sentencing defendant for burglary and armed robbery by failing to find the mitigating factor that the defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process. *S. v. Barts*, 170.

When a defendant moves to suppress a confession, he may not use evidence of the confession to prove the voluntary acknowledgment of wrongdoing mitigating circumstance. *S. v. Smith*, 290.

§ 138.41. Fair Sentencing Act; Mitigating Factor of Good Character or Reputation

The trial court did not err in a prosecution for first degree burglary and armed robbery by failing to find as a mitigating factor that defendant had been a person of good character or had a good reputation in the community in which he lived. *S. v. Maness*, 454.

§ 138.42. Fair Sentencing Act; Other Mitigating Factors

The trial court in a second degree murder case did not err in failing to find as a nonstatutory mitigating circumstance that the victim stabbed defendant forty-

eight hours prior to the shooting of the victim where the court found the statutory mitigating circumstance that the relationship between the victim and defendant was otherwise extenuating. *S. v. Canty*, 520.

The trial court did not err when sentencing defendant for the second degree murder of her infant by not finding as a nonstatutory mitigating factor that defendant suffered from a psychological condition reducing her culpability. *S. v. Holden*, 689.

§ 140.3. Consecutive Sentences

The trial court did not abuse its discretion in a prosecution for armed robbery and first degree burglary by imposing consecutive sentences. *S. v. Maness*, 454.

§ 150.1. Defendant's Waiver of Right to Appeal

A defendant who was convicted of both larceny and common law robbery waived his right to raise double jeopardy on appeal. *S. v. McLaughlin*, 267.

§ 181.2. Postconviction Hearing; Burden of Proof; Evidence

The trial court in a prosecution for rape, first degree sex offense, and crime against nature did not err by denying defendant's motion for appropriate relief based on newly-discovered evidence where defendant knew of the new evidence during the trial. *S. v. Powell*, 364.

DAMAGES

§ 10. Credit on Damages; Collateral Source Rule

The collateral source rule prohibits the defendants in a medical malpractice case from offering evidence of mitigation of damages by past Medicaid payments, future public benefits, and gratuitous services and payments by the minor plaintiff's grandmother. *Cates v. Wilson*, 1.

In a medical malpractice action by a mother and a child born with cerebral palsy and mental retardation, the trial court's erroneous admission of collateral source evidence of past and future Medicaid benefits, AFDC payments and child support constituted prejudicial error entitling plaintiffs to a new trial on issues of liability and damages. *Ibid.*

§ 16.1. Sufficiency of Evidence; Extent of Injuries

The trial court did not abuse its discretion in setting aside the verdict of $4,580,000 for the minor plaintiff and ordering a new trial on the issue of damages in an action against a hospital to recover damages resulting from a brain injury suffered by the minor plaintiff during a footling breech birth. *Campbell v. Pitt County Memorial Hosp.*, 260.

DIVORCE AND ALIMONY

§ 30. Equitable Distribution

The trial court erred by granting defendant's motion asking to be relieved from the effect of a divorce judgment to the extent that it barred her from asserting a claim for equitable distribution. *Howell v. Howell*, 87.

EMINENT DOMAIN

§ 3. Necessity of Public Purpose under Power of Eminent Domain

The trial court erred in a private condemnation action by granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment on the grounds that plaintiff telephone company's desired use of the land in question was not for the use and benefit of the public because the condemnation was for the purpose of providing telephone service to a single customer. *Carolina Telephone and Telegraph Co. v. McLeod*, 426.

EVIDENCE

§ 14. Communications between Physician and Patient

Plaintiffs waived their physician-patient privileges as to non-party treating physicians whom defendants called as expert witnesses, and this waiver extended not only to information obtained by the treating physicians but also to opinions held by the treating physicians formed as a result of information gained during their treatment of plaintiffs. *Cates v. Wilson*, 1.

FALSE IMPRISONMENT

§ 2.1. Sufficiency of Evidence

A directed verdict for defendant on plaintiff's claim for false imprisonment was improper where the evidence supported the contention that plaintiff was intimidated into staying in a department store for nearly an hour by the repeated threats of the manager to arrest him. *West v. King's Dept. Store, Inc.*, 698.

The trial court properly granted a directed verdict on the female plaintiff's claim for false imprisonment where she was not accompanying her husband when he was confronted by the manager of a department store. *Ibid.*

GUARANTY

§ 2. Actions to Enforce Guaranty

The trial court correctly entered summary judgment for plaintiffs on a letter which plaintiffs claimed was a personal guaranty. *Craftique, Inc. v. Stevens and Co., Inc.*, 564.

HOMICIDE

§ 11. Defense of Accident

The trial court in a first degree murder prosecution did not err by submitting the case to the jury despite defendant's evidence of accident. *S. v. Childress*, 226.

§ 12. Indictment

It is not necessary to list the aggravating factors on the bill of indictment in order to seek the death penalty. *S. v. Dixon*, 111.

The trial court properly denied defendant's motion to require the State to file a bill of particulars reciting the aggravating factors it intended to rely on at the punishment phase. *S. v. Holden*, 125.

A murder indictment which omitted the county of defendant's residence and which omitted the averment "with force and arms" was not fatally defective. *S. v. James*, 676.

HOMICIDE — Continued

§ 12.1. Indictment; Premeditation and Deliberation; Perpetration of Felony

The State could not be required to elect whether it intended to base its first degree murder case on premeditation and deliberation or the felony murder rule. *S. v. Holden*, 125.

§ 15. Relevancy and Competency of Evidence

There was no prejudicial error in a prosecution for first degree murder where the court allowed a witness to testify that a nephew of the deceased had accused defendant of killing the victim. *S. v. Childress*, 226.

§ 18.1. Particular Circumstances Showing Premeditation and Deliberation

There was sufficient evidence of premeditation and deliberation to submit a first degree murder charge to the jury. *S. v. Forrest*, 186.

§ 20. Real and Demonstrative Evidence Generally

The trial court did not err in a first degree murder prosecution by admitting into evidence certain items found at the crime scene. *S. v. Childress*, 226.

§ 20.1. Photographs

The State was properly allowed to introduce seven photographs showing a murder victim's body and the crime scene. *S. v. Holden*, 125.

The trial court did not err in denying defendant's motion to limit the State's photographic evidence of a homicide victim's body where this evidence included four photographs depicting all or part of the victim's body and a videotape of the crime scene which included the body. *S. v. Murphy*, 738.

§ 21.5. Sufficiency of Evidence of First Degree Murder

The evidence in a first degree murder prosecution was sufficient even though it required an inference on an inference. *S. v. Childress*, 226.

There was sufficient evidence of premeditation and deliberation to support defendant's conviction of first degree murder of a highway patrolman. *S. v. Bray*, 663.

The trial court did not err by denying defendant's motion to dismiss the charge of first degree murder. *S. v. James*, 676.

The trial court did not err in a first degree murder prosecution by denying defendant's motions to dismiss all charges on the grounds of insufficient evidence. *S. v. Nichols*, 616.

§ 21.6. Sufficiency of Evidence of First Degree Murder; Homicide in Perpetration of Felony

The evidence was sufficient to support a jury verdict finding defendant guilty of first degree murder. *S. v. Holden*, 125.

There was sufficient evidence of armed robbery to submit felony murder to the jury even if defendant's intent to take the victims' wallets was formed after he shot the victims. *S. v. Green*, 594.

The trial court did not err by denying defendant's motion to dismiss at the close of all the evidence in a prosecution for first degree murder under the felony murder rule based on discharging a firearm into an occupied vehicle. *S. v. Wheeler*, 725.

§ 23.1. Instructions on Elements of Offense

The trial judge did not err in its instructions on malice in a first degree murder prosecution. *S. v. Forrest*, 186.

HOMICIDE — Continued

§ 24. Instructions on Burden of Proof

There was no plain error in a prosecution for first degree murder where the trial court's instructions clearly charged the jury that the State bore the burden of proof of each of the elements in question and that the jury could consider circumstantial evidence. *S. v. Davis*, 52.

§ 24.1. Instructions on Presumptions Arising from Use of Deadly Weapon

The trial court did not err in a murder prosecution where defendant shot and killed his terminally ill father by instructing the jury that it could infer malice from the use of a deadly weapon. *S. v. Forrest*, 186.

The trial court's instructions on the inferences of malice and unlawfulness arising from proof of the intentional use of a deadly weapon proximately causing death and on defendant's burden to prove insanity to the satisfaction of the jury did not together create a constitutionally impermissible mandatory rebuttable presumption on the element of unlawfulness. *S. v. Marley*, 415.

§ 25.2. Instructions on Premeditation and Deliberation

There was no plain error in the trial court's instruction on premeditation and deliberation in a first degree murder prosecution. *S. v. Dixon*, 111.

A defendant who was convicted and sentenced for first degree murder on the theory of premeditation and deliberation and who received a consecutive sentence for armed robbery was not prejudiced by the trial court's failure to submit first degree murder on the theory of felony murder with robbery as the underlying felony. *S. v. Lewis*, 42.

§ 27.1. Instructions on Voluntary Manslaughter

The trial court's instruction on malice in a murder prosecution was not incomplete in that it failed to define just cause, excuse, or justification. *S. v. Forrest*, 186.

§ 28.6. Instructions on Defense of Intoxication

The trial court did not err in a first degree murder prosecution by refusing to instruct on voluntary intoxication and to submit the possible verdict of second degree murder on the basis of voluntary intoxication. *S. v. Strickland*, 31.

HUSBAND AND WIFE

§ 10. Compliance with Statutory Formalities of Separation Agreement

The acts of the parties in signing a separation agreement in the presence of a notary public satisfied the statutory requirements of an acknowledgment, and the notary could affix a certificate of acknowledgment to the separation agreement two years later so that the document "speaks the truth." *Lawson v. Lawson*, 274.

§ 12. Separation Agreement; Revocation and Rescission; Remarriage; Resumption of Marital Relationship

G.S. § 31A-1(b)(6) is inapplicable to separation agreements entered into by parties contemplating a separation or divorce from a valid marriage. *Taylor v. Taylor*, 244.

The trial court correctly terminated plaintiff's obligation to pay alimony under a separation agreement where defendant had remarried without divorcing plaintiff. *Ibid.*

JUDGMENTS

§ 55. Right to Interest

Prejudgment interest was properly awarded in a guaranty action from the date of the principal's breach. *Craftique, Inc. v. Stevens and Co., Inc.*, 564.

JURY

§ 5.2. Discrimination and Exclusion in Selection

A statement by plaintiff's counsel was not alone sufficient to support a finding of discriminatory use of peremptory challenges. *Jackson v. Housing Authority of High Point*, 584.

§ 6. Voir Dire Examination; Practice and Procedure Generally

The trial court did not err in denying defendant's motion to sequester the prospective jurors during the voir dire proceedings in a first degree murder case. *S. v. Holden*, 125.

The trial court did not abuse its discretion by refusing to sequester prospective jurors in a first degree murder case because of comments by two prospective jurors concerning the Biblical basis for the death penalty and a comment by a third prospective juror that a life sentence "does not mean that they will be in there for life and they are capable of committing this crime again." *S. v. Murphy*, 738.

§ 6.3. Scope and Propriety of Voir Dire Examination

The prosecutor's statement to prospective jurors that the State could not receive a fair trial "if there is one person on the jury who could not return a verdict of guilty" was proper for the purpose of eliciting information relevant to statutory provisions permitting a challenge for cause to a juror who, as a matter of conscience, would be unable to render a verdict in accordance with the law of North Carolina. *S. v. Holden*, 125.

§ 6.4. Voir Dire Examination; Questions as to Belief in Capital Punishment

The trial court in a capital case did not err in prohibiting defense counsel from inquiring into prospective jurors' religious denominations and the extent of their participation in church activities. *S. v. Lloyd*, 301.

§ 7.11. Challenges for Cause; Scruples against or Belief in Capital Punishment

Death qualification of the jury did not violate the U. S. or N. C. Constitutions. *S. v. Holden*, 125.

The trial court properly denied defendant's motion in a first degree murder case for two separate jury trials to decide the issues of guilt or innocence and punishment. *Ibid.*

The trial court did not err in excusing a juror for cause and substituting an alternate juror after the completion of the guilt phase of a first degree murder case and prior to the sentencing phase where the court learned after the guilt phase was completed that the juror had changed her mind and could not vote for the death penalty under any circumstances. *Ibid.*

The court's exclusion for cause of certain jurors who expressed an unwillingness to impose the death penalty did not produce a jury biased in favor of conviction in violation of defendant's constitutional rights. *S. v. Green*, 594.

MASTER AND SERVANT

§ 10. Duration and Termination of Contract of Employment

The trial court erred by permitting the jury to determine that a release barred plaintiff's claim for breach of an employment contract. *Travis v. Knob Creek, Inc.*, 279.

§ 49. Workers' Compensation; Employees within the Meaning of the Act

An employment relationship existed between plaintiff and defendant at the time of plaintiff's injury. *Youngblood v. North State Ford Truck Sales*, 380.

§ 55.5. Workers' Compensation; Relation of Injury to Employment; Meaning of "Arising out of" Employment

The death of a furniture designer who was struck by a vehicle as he assisted an injured pedestrian who had no connection to the employee's duties or his employer's business while returning home from a business trip did not arise out of his employment. *Roberts v. Burlington Industries*, 350.

§ 65.1. Workers' Compensation; Hernia

The pain that must accompany an injury resulting in a hernia to render the injury compensable under G.S. 97-2(18)(c) need not occur simultaneously with the sustaining of the injury. *Long v. Morganton Dyeing & Finishing Co.*, 82.

§ 77.2. Workers' Compensation; Modification and Review of Award; Time for Application

The filing of an Industrial Commission Form 18 in a workers' compensation case did not constitute a timely application for review under G.S. 97-47. *Apple v. Guilford County*, 98.

§ 89.1. Workers' Compensation; Remedies against Third Person Tort-feasors; Fellow Employee as Third Person

Plaintiff dock worker's evidence showed only ordinary negligence by his co-employees in operating a forklift with no brakes, and plaintiff was limited to recovery under the Workers' Compensation Act. *Abernathy v. Consolidated Freightways Corp.*, 236.

MUNICIPAL CORPORATIONS

§ 4.4. Public Utilities and Services

The County could not use a condition in a special use permit to impose limitations outside the scope of its statutory authority on the City's use of a city-owned sewage treatment plant located in the county. *Davidson County v. City of High Point*, 252.

NEGLIGENCE

§ 38. Instruction on Contributory Negligence

In an action to recover for injuries received by plaintiff when she was robbed and raped while a registered guest at defendants' motel, the trial court did not err in failing specifically to instruct the jury that plaintiff's failure to look out her bathroom window to determine who was outside before opening the motel door was a basis for finding contributory negligence. *Murrow v. Daniels*, 494.

NEGLIGENCE — Continued

§ 56. Competency and Relevancy of Evidence in Actions by Invitees

Evidence of prior criminal acts by third parties on or near business premises is admissible to show a defendant's knowledge of the need to provide adequate security measures to protect its business invitees. *Murrow v. Daniels*, 494.

§ 57.1. Sufficiency of Evidence in Actions by Invitees; Accidents Involving Doors

The Court of Appeals erred by reversing the Industrial Commission's award of damages to plaintiff where defendant's employee replaced a screen panel in a storm door with a glass panel because children kept pushing out the screen panel. *Bolkhir v. N.C. State Univ.*, 706.

§ 57.10. Sufficiency of Evidence in Actions by Invitees

In an action to recover for injuries received by plaintiff when she was robbed and raped while a registered guest in defendants' motel, plaintiff's evidence was sufficient to raise triable issues of fact as to whether the attack on plaintiff was reasonably foreseeable by defendants and whether defendants were thus negligent in failing to maintain adequate security measures for the protection of their guests. *Murrow v. Daniels*, 494.

PARENT AND CHILD

§ 5.1. Right of Parent to Recover for Injuries to Child

The Industrial Commission erred in an action under the State Tort Claims Act by awarding medical expenses to the parents of an injured child where the father had participated in the action as a guardian ad litem. *Bolkhir v. N.C. State Univ.*, 706.

PENALTIES

§ 1. Generally

Where a superior court judge in a habeas corpus proceeding set a secured bond of $25,000 and ordered the father to appear in the district court with the child of the parties, the bond was an appearance bond intended to guarantee the father's appearance before the court and as a penalty in the event of his failure to appear as ordered rather than a compliance bond, and the proceeds of the forfeited bond should be paid to the county school fund rather than to the mother. *Mussallam v. Mussallam*, 504.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 15.2. Malpractice; Who May Testify as Experts

Plaintiffs waived their physician-patient privileges as to non-party treating physicians whom defendants called as expert witnesses, and this waiver extended not only to information obtained by the treating physicians but also to opinions held by the treating physicians formed as a result of information gained during their treatment of plaintiffs. *Cates v. Wilson*, 1.

PLEADINGS

§ 33.2. Amendment Made after Time for Answering Has Expired

An original complaint gave notice of the amended claim in an action under a construction bond from a water project. *Pyco Supply Co., Inc. v. American Centennial Ins. Co.*, 435.

PRINCIPAL AND SURETY

§ 1. Generally; Nature and Construction of Surety Contract

Where a superior court judge in a habeas corpus proceeding set a secured bond of $25,000 and ordered the father to appear in the district court with the child of the parties, the bond was an appearance bond intended to guarantee the father's appearance before the court and as a penalty in the event of his failure to appear as ordered rather than a compliance bond, and the proceeds of the forfeited bond should be paid to the county school fund rather than to the mother. *Mussallam v. Mussallam*, 504.

A $25,000 secured bond was an appearance bond intended to guarantee the appearance of the father in court rather than a bond required by the court under the authority of G.S. § 50-13.2(c) to insure the return of a child to the court's jurisdiction. *Ibid.*

PROCESS

§ 8. Personal Service on Nonresident Individuals in this State

The trial court properly denied defendant's motion to dismiss where defendant was personally served in North Carolina but claimed insufficient minimum contacts. *Lockert v. Breedlove*, 66.

RAPE AND ALLIED OFFENSES

§ 4.1. Proof of other Acts and Crimes

Testimony by a child rape and sexual offense victim that defendant often engaged in sexual intercourse with her was not prohibited by Rule of Evidence 412, and any error by the trial court in failing to conduct the in camera hearing required by Rule 412 before admitting such testimony was harmless error. *S. v. Spaugh*, 550.

Testimony by defendant's daughter that defendant had engaged in a continuing course of acts of sexual intercourse with her was admissible under Rule of Evidence 404 to show a common plan or scheme. *Ibid.*

§ 4.3. Unchastity of Victim

Where a rape and sexual offense victim testified that defendant asked her if she were a virgin and she answered yes, the trial court properly denied defendant's motion to be allowed to cross-examine the victim concerning her statement that she was a virgin. *S. v. Autry*, 392.

§ 5. Sufficiency of Evidence

The evidence was sufficient to support defendant's conviction of first degree rape by having intercourse with a ten-year-old girl. *S. v. Rhodes*, 102.

The evidence was sufficient to support a jury verdict finding defendant guilty of attempted first degree rape. *S. v. Holden*, 125.

The trial court did not err by denying defendant's motion to dismiss at the end of the evidence in a prosecution for a first degree sex offense against a four-year-old victim. *S. v. Kivett*, 404.

The State's evidence was sufficient to support defendant's conviction of a first degree sexual offense by holding a knife against the victim's throat and forcing her to perform fellatio on him. *S. v. Jordan*, 714.

§ 6. Instructions

Assuming the trial court in a first degree sexual offense case erred by defining a deadly weapon as one "capable" of causing death or great bodily harm rather

RULES OF CIVIL PROCEDURE – Continued

§ 59. New Trials

The trial court did not abuse its discretion in setting aside the verdict of $4,580,000 for the minor plaintiff and ordering a new trial on the issue of damages in an action against a hospital to recover damages resulting from a brain injury suffered by the minor plaintiff during a footling breech birth. *Campbell v. Pitt County Memorial Hosp.*, 260.

§ 60. Relief from Judgment or Order

Neither G.S. 1A-1, Rule 60(b)(6) nor any other provision of law authorizes a court to nullify or void one or more of the legal effects of a valid judgment while leaving the judgment itself intact. *Howell v. Howell*, 87.

SEARCHES AND SEIZURES

§ 4. Particular Methods of Search; Tests

The defendant in a prosecution for murder, rape and kidnapping did not waive his right to contest the admissibility of tests of blood samples taken from him by not making his motion before trial. *S. v. Fisher*, 19.

The trial court did not err in admitting test results of blood samples taken from defendant. *Ibid.*

§ 10. Warrantless Search on Probable Cause

Assuming that an S.B.I. agent's warrantless search of a gym bag belonging to defendant which was seized from the office of defendant's employer violated defendant's constitutional rights and that evidence found in the bag was improperly admitted at defendant's trial for kidnapping, rape and sexual offenses, the erroneous admission of such evidence was harmless beyond a reasonable doubt. *S. v. Autry*, 392.

§ 14. Voluntary, Free, and Intelligent Consent to Search

The trial court properly denied defendant's motion to suppress evidence seized from defendant's home and car after the issuance of a search warrant where defendant had consented to the search. *S. v. Holden*, 125.

TELECOMMUNICATIONS

§ 1.2. Determination of Rate Charged by Public Utility

An order of the Utilities Commission establishing different interLATA Private Line Service rates for AT&T's nonreseller customers and its reseller customers was discriminatory on its face. *State ex rel. Utilities Comm. v. AT&T Communications*, 586.

TRESPASS

§ 2. Trespass to the Person

The trial court improperly granted a directed verdict for defendant in an action for intentional infliction of emotional distress arising out of a confrontation with a store manager over allegedly stolen merchandise where the extreme and outrageous conduct of the store manager was manifest. *West v. King's Dept. Store, Inc.*, 698.

WEAPONS AND FIREARMS

§ 3. Discharging Weapon

A firearm is discharged "into" occupied property within the meaning of G.S. 14-34.1 although the firearm itself is inside the property so long as the person discharging it is not inside the property. *S. v. Mancuso*, 464.

Defendant discharged a gun "into" an occupied vehicle when he was standing outside the vehicle when he fired shots from a pistol even though the pistol itself was inside the vehicle. *S. v. Bray*, 663.

WILLS

§ 52. Residuary Clauses

Where testator's will provided for the distribution of his residuary estate only if his wife survived him, and the wife in fact predeceased testator, the residuary clause was ineffective because the condition precedent was not met, and the residue of testator's estate did not pass under the will to the residuary beneficiaries by implication but passed to the heirs at law in accordance with the laws of intestacy. *McKinney v. Mosteller*, 730.

WITNESSES

§ 1.2. Children as Witnesses

The trial court did not err in ruling that the ten-year-old victim and her nine-year-old brother were qualified to testify in a rape and indecent liberties case. *S. v. Rhodes*, 102.

The trial court did not abuse its discretion by finding that a four-year-old sex offense victim was competent to testify. *S. v. Kivett*, 404.

Where the testimony of the thirteen-year-old prosecutrix observed by the trial court fully supported a conclusion that the prosecutrix was not disqualified as a witness for failure to understand her duty to tell the truth as a witness, the trial court's failure to conduct a voir dire and make specific findings and conclusions concerning the competency of the witness was harmless error. *S. v. Spaugh*, 550.

The trial court did not abuse its discretion in a prosecution for crime against nature, taking indecent liberties with a child, and first degree sexual offense by ruling that the victim was competent to testify. *S. v. Rael*, 528.

WORD AND PHRASE INDEX

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